SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 28, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Manzanet-Daniels, Gesmer, Singh, JJ.

9206 Ethel H. Corcoran, et al., Index 104549/10
Plaintiffs-Appellants,

-against-

Narrows Bayview Company, LLC,
Defendant-Respondent.

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Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellants.

Horing Welikson & Rose, P.C., Williston Park (Niles C. Welikson of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Anthony Cannataro, J.), entered March 12, 2018, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment declaring the legal regulated rent for the apartment to be $2,538 and that all overcharges have been fully refunded, and dismissing plaintiffs' claims for rent overcharge and treble damages, unanimously affirmed, with costs.

Plaintiffs' rent-stabilized apartment could not be deregulated pursuant to luxury decontrol laws during the period

the building was receiving J-51 tax benefits (*Roberts v Tishman Speyer Props. L.P.*, 13 NY3d 270 [2009]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189 [1st Dept 2011]). Given the lack of evidence that defendant engaged in fraud in deregulating the apartment, plaintiffs' claims for rent overcharge and to calculate the legal regulated rent are subject to a four-year look back period (*see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, ___ NY3d ___, 2020 NY Slip Op 02127 [2020]; CPLR 213-a).

The parties agree that the applicable base date is April 2006, four years prior to the April 2010 date of the complaint, and we reject plaintiffs' suggestion that the lack of DHCR filings contemporaneous with the base date requires one to look beyond the four-year period to an earlier legal regulated rent reported in a DHCR filing. This Court has held that "rental history," as that term is used in CPLR 213-a, is not restrained to DHCR records and may include the records of the landlord and the tenant (*Regina Metro. Co., LLC*, 164 AD3d 420, 427 [1st Dept 2018], *affd* ___ NY3d ___, 2020 NY Slip Op 02127). Accordingly, the correct base rent is $2,000, which is the rent actually paid by the prior tenants in April 2006.

When the prior tenants vacated on or about May 31, 2006 and plaintiff executed a two-year lease effective July 1, 2006,

defendant was entitled to a 20% vacancy increase equal to $400 (20% of $2,000), bringing the legal regulated rent to $2,400 (*see* 9 NYCRR 2522.8). Additionally, defendant was entitled to a 5.75% rent guidelines increase of $138.00 (5.75% of $2,400) when plaintiffs executed a two-year renewal lease effective from July 1, 2008 through June 30, 2010. This resulted in a legal regulated rent of $2,538.

The court properly dismissed plaintiffs' claim for treble damages premised on the allegation that defendant willfully deregulated the apartment or violated rent laws by not filing annual regulated rent disclosures with DHCR. A finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*, where defendant followed DHCR's guidance when deregulating the unit (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 398 [2014]; *Regina Metro. Co., LLC*, 164 AD3d at 423), and plaintiffs failed to raise an issue of fact in this

regard. Furthermore, failure to timely file annual disclosures with the DHCR cannot support treble damages (*see* Administrative Code of City of NY § 26-516[a]).

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

ENTERED: MAY 28, 2020

CLERK

Acosta, P.J., Renwick, Richter, González, JJ.

11474 435 Central Park West Tenant Association, et al., Plaintiffs-Respondents, Index 452296/16

-against-

Park Front Apartments, LLC, Defendant-Appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for appellant.

The Legal Aid Society, New York (Jason Wu of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 1, 2019, which, insofar as appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the cause of action alleging rent overcharge, unanimously affirmed, without costs.

Plaintiffs are 435 Central Park West Tenant Association, an unincorporated association comprising low and moderate income tenants of the subject building located at 435 Central Park West, New York, NY, and individual tenants of the building. Plaintiffs commenced this action against defendant Park Front Apartments, LLC, the current owner of the building, seeking a declaratory judgment that plaintiffs' tenancies are subject to the Rent Stabilization Law (the RSL) and damages stemming from

overcharging. On a prior appeal, this Court declared that the building in question was subject to the RSL as of April 12, 2011, when the U.S. Department of Housing and Urban Development's (HUD) oversight of the property ceased (*435 Central Park West Tenant Association et al. v Park Front Apartments, LLC*, 164 AD3d 411 [1st Dept 2018]). The action then continued on the tenant's cause of action for rent overcharge under the RSL.

On June 14, 2019, while this action was pending, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA). This legislation made comprehensive changes to the rent laws. As relevant here, part F of the HSTPA, which amended RSL of 1969 (Administrative Code of City of NY) § 26-516 and CPLR 213-a, govern claims of rent overcharge and the statute of limitations for bringing such claims. However, the Court of Appeals has determined that the HSTPA, which requires that the entire rent history be examined, cannot be retroactively applied to overcharges alleged to have occurred before the HSTPA's enactment in 2019 (see Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal (__ NY3d __, 2020 NY Slip Op 02127, *9 ["We conclude that the overcharge calculation amendments (of the HSTPA) cannot be applied retroactively to overcharges that occurred prior to their enactment."]). Thus, the changes made therein are not applicable

here, and the pre-HSTPA law applies, which *Regina* described as follows:

> "The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred – not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations (*Grimm*, 15 N.Y.3d at 367). In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period. Tenants were therefore entitled to damages reflecting only the increases collected during that period that exceeded legal limits" (*Regina Metro. Co., LLC*,2020 NY Slip Op 02127, *5).

Applying pre-HSTPA law, plaintiffs' overcharge claims fail unless they can prove fraud because, as indicated, the RSL imposed a four-year statute of limitations and lookback period on overcharge claims (*id.*). Plaintiffs, however, claim that the HUD rent in effect on the last day of federal oversight, April 11, 2011, was an illegal rent and thus could not be used as the initial legal regulated rent (base rent) to determine whether defendant engaged in a fraudulent rent overcharge scheme to raise

the pre-stabilization rent of each apartment. We find that plaintiffs have submitted sufficient evidence to raise an issue of fact of whether defendant tampered with a recertification process provided for under the Use Agreement, and pressured and misled tenants, for the purpose of improperly raising rents at Use Agreement "Market" rates far higher than the Use Agreement "Contract" rates.

We reject defendant landlord's argument that the fraudulent exception to the four-year lookback period applies only to a fraudulent-scheme-to-deregulate case. In the event it is proven that defendant engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the lawful rent on the base date for each apartment must be determined by using the default formula devised by DHCR (*Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (2020 NY Slip Op 02127, *5;*see also Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 [2010]*; Thornton v Baron*, 5 NY3d 175 [2005]*; Matter of*), and plaintiffs'

recovery would be limited to those overcharges occurring during the four-year period immediately preceding plaintiffs' rent challenge.

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

ENTERED: MAY 28, 2020

CLERK

Acosta, P.J., Richter, Mazzarelli, Webber, González, JJ.

11671 In re The People of the State of New York, ex rel. Alisha Bacchus, on behalf of David Pamblanco, Petitioner-Appellant,

Index 451075/20
SCID 30046/20
Dkt. CR-36562-19NY

-against-

Cynthia Brann, Commissioner, New York City Department of Correction, Respondent-Respondent.

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

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

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Judgment (denominated an order), Supreme Court, New York County (Marisol Martinez Alonso,J.), entered on or about November 15, 2019, denying the petition for a writ of habeas corpus and dismissing the proceeding, unanimously affirmed, without costs.

We find that the writ of habeas corpus was properly denied (*see* CPLR 7010).

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

ENTERED: May 28, 2020

CLERK

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

10995 In re Patrick J. Lynch, etc., et al., Index 152235/18
Plaintiffs-Petitioners-
Respondents-Appellants,

-against-

The New York City Civilian Complaint
Review Board, et al.,
Defendants-Respondents-
Appellants-Respondents.

- - - - -

James P. O'Neill, etc.,
Nominal Defendant.

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James E. Johnson, Corporation Counsel, New York (Kevin Osowski of counsel), for appellants-respondents.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Matthew C. Daly of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Melissa A. Crane, J.), entered February 28, 2019, which, insofar as appealed from as limited by the briefs, granted the hybrid CPLR article 78 petition/complaint to the extent of declaring invalid Rules of City of New York Civilian Complaint Review Board (38-A RCNY) §§ 1-11(a) and (b), 1-33(a), and 1-42(h), and denied the petition/complaint as to Rules 1-15(a), 1-24(d) and (l), 1-31(b), 1-44, and 1-53(a) and the resolution to begin investigating alleged sexual misconduct, modified, on the law, to deny the petition as to invalidate Rules 1-11(a) and (b) and vacate the declaration that those rules are invalid, and to grant the

petition as to the sexual misconduct resolution, and it is declared that the resolution is invalid, and otherwise affirmed, without costs.

Defendant-respondent The New York City Civilian Complaint Review Board (the CCRB) investigates allegations of police misconduct toward members of the public (NY City Charter § 440[a]). It is empowered to receive, investigate, hear, make findings, and recommend action upon complaints that allege misconduct involving excessive use of force, abuse of authority, discourtesy or use of offensive language (FADO) (*id.* § 440[c][1]). At issue in this appeal are certain amended rules adopted by the CCRB in 2018 (*see* NY City Charter § 440[c][2]; *see also id.* [City Administrative Procedure Act] [CAPA] § 1043) and a resolution, also adopted in 2018, to begin investigating sexual misconduct, which previously had been referred to the New York City Police Department (NYPD) Internal Affairs Bureau (IAB). Petitioners contend that the rules and the sexual misconduct resolution are invalid because, inter alia, they exceed the CCRB's jurisdiction and are arbitrary and capricious.

38-A RCNY 1-11(a), as amended, permits any individual having personal knowledge of alleged misconduct by a member of NYPD to file a complaint. "Personal knowledge" is defined as knowledge "gained through firsthand observation or experience" (38-A RCNY

1-01). This rule is within the CCRB's statutory authority and is rationally rooted in the New York City Charter's directive that the CCRB receive complaints from "members of the public" (NY City Charter § 440[a]).

38-A RCNY 1-11(b), as amended, gives the CCRB discretion to investigate complaints filed by "Reporting Non-Witnesses," i.e., persons "without personal knowledge" of the alleged misconduct (38-A RCNY 1-01). This rule is rationally related to the purpose of the establishment of the CCRB, i.e., that the investigation of complaints of police misconduct "is in the interest of the people of the city of New York and the New York city police department" (NY City Charter § 440[a]).

There is no basis for Supreme Court's speculation that 38-A RCNY 1-11(a) and (b), as amended, would result in "a mass influx of complaints based on unreliable information." Rule 1-11(b) provides a noninclusive list of the factors to be considered in determining whether to investigate a complaint by a nonwitness, among which are "the nature and/or severity of the alleged misconduct, . . . the practicability of conducting a full investigation . . . and the numbers of complaints received by the Board regarding the incident." Thus, the CCRB would serve as its own gatekeeper for the investigation of nonwitness complaints.

We are not persuaded by petitioner's alternative argument

that Rules 1-11(a) and (b) are invalid because only those who are personally aggrieved by the misconduct they allege, i.e., victims of the misconduct, may file a complaint. The fact that the Charter contemplates that complaints will be filed by "members of the public," without referencing any specific members of the public, suggests that pursuant to the Charter, complaints may be filed by victims and nonvictims alike. Petitioner's assertion that complaints may be filed by "complainants," a term which appears elsewhere in the Charter, does not provide support to the above argument as a complainant, self-evidently, is merely a person who files a complaint (*see* Black's Law Dictionary 323 [9th ed 2009]), while a "victim" is a person "harmed by a crime, tort, or other wrong" (*id.* at 1703). Although these terms are frequently used interchangeably, particularly in the criminal context, they are distinct, and sometimes the distinction is significant (*see generally People v DiNapoli*, 369 P3d 680, 683, 685 [Colo App 2015], *cert denied* 2016 WL 768341, 2016 Colo LEXIS 221 [2016]). Moreover, the broad nature of much of the CCRB's FADO jurisdiction, which, as indicated, includes complaints of discourtesy and use of offensive language (NY City Charter § 440[c][1]), naturally suggests that complaints may be filed by members of the public at whom the misconduct is not directed. Indeed, it is easy to imagine a scenario in which a witness to

discourtesy or offensive language might wish to file a complaint while the object of the discourtesy or offensive language might not.

38-A RCNY 1-15(a), as amended, authorizes the CCRB Chair to investigate complaints of misconduct filed after the expiration of Civil Service Law (CSL) § 75(4)'s 18-month statute of limitations period, which relates to the commencement of removal and disciplinary proceedings. Specifically, CSL 75(4) provides, in pertinent part, that "no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of . . . ." Supreme Court properly found that the amended rule does not run afoul of the statute of limitations and is not arbitrary or capricious. Initially, amended Rule 1-15(a) merely authorizes the CCRB to *investigate* a complaint. It does not authorize the commencement of any removal or disciplinary proceedings after the 18-month statute of limitations has expired, which is precisely what is barred by CSL 75(4). Further, after an investigation, the CCRB can make recommendations short of removal and disciplinary proceedings, such as instructions or training for the offending officer, which would not implicate CSL 75(4)'s statute of limitations. Additionally, if the CCRB determines that the misconduct complained of rose to the level of criminal

conduct, which is outside of the CCRB's jurisdiction, the CCRB can refer the matter to the appropriate agency for action, which also does not violate CSL 75(4). Moreover, these actions comport with the CCRB's mandate to investigate and "make findings and recommend action." Contrary to the dissent's contention, the legislature, in enacting CSL 75(4), could have barred an agency from investigating all complaints and making any recommendation whatsoever after the expiration of the 18-month statute of limitations. However, it did not do so and instead, chose only to bar the commencement of removal or disciplinary proceedings after the expiration of the statute of limitations.

The CCRB amended 38-A RCNY 1-24(d), relating to "Conduct of Interviews," to direct that police officers be informed at the beginning of the interview that intentionally false statements may be grounds for dismissal under the NYPD Patrol Guide. Additionally, revised Rule 1-24(l) provides for civilian interviewees to be notified at the beginning of the interview that they will be asked to sign a verification statement at the end of the interview and, that at the end of the interview, the interviewee will be asked to sign a verification statement attested to by a commissioner of deeds. Supreme Court properly found that both provisions were rational as they satisfy the Charter's requirement for sworn statements from complainants and

witnesses. Although the rule's requirement that police officers give statements under express penalties of perjury is more rigorous than its provision for civilians to sign verifications, police officers and civilians are not similarly situated. The police officers face the possibility of dismissal if they make false statements and the rule merely reminds the officers of the potential consequences they will face. Further, Supreme Court properly credited the CCRB's contention that requiring civilian witnesses to sign the verification form at the beginning of the interview rather than at the end could discourage some civilians from testifying.

38-A RCNY 1-31(b) formerly required the CCRB to sit in panels with at least one City Council, Mayoral and Police Commissioner designee. The CCRB amended the rule to permit panels to deviate from this requirement and to consist of members from only two of the categories, where strict compliance would delay the CCRB's operations. Supreme Court properly found the amended rule to be rational because the Charter only requires that the panels be formed with members from two of the categories and that if there is an emergency situation, the CCRB needs to proceed rapidly. Petitioner's contention that the rule will tend to prejudice police officers because Police Commissioner designees are fewer in number and therefore less likely to be

available for a given panel is speculative.

38-A RCNY 1-33(a), which was amended to permit consideration of prior unsubstantiated complaints, provided they were not the "sole" basis for making findings, was properly invalidated by the Supreme Court. Rule 1-33(a), as amended, is invalid because the Charter itself forbids any consideration of prior unsubstantiated complaints. Indeed, the Charter specifies that "No finding or recommendation shall be based solely upon an unsworn complaint or statement, *nor shall prior unsubstantiated, unfounded or withdrawn complaints be the basis for any such finding or recommendation*" (NY City Charter § 440[c][1][emphasis added]). The omission of the word "sole" in the clause at issue should be taken to have been deliberate and a contrast to the preceding clause, thereby signifying a directive that prior unsubstantiated complaints play no role in subsequent findings.

38-A RCNY 1-42(h) was amended to provide that, after referral of a case for prosecution by the CCRB's Administrative Prosecution Unit (APU), the CCRB's Chief Prosecutor or Executive Director or designee may ask the panel to add allegations, or to reconsider unsubstantiated allegations for substantiation, upon written notice to all parties. In so doing, the CCRB noted that the memorandum of understanding (MOU) between itself and the NYPD, which provided for prosecution of cases by the APU,

analogized the APU to the NYPD's Department Advocate's Office (DAO), which prosecuted internal NYPD disciplinary proceedings. Supreme Court properly invalidated amended Rule 1-42(h) because the Charter does not give the CCRB this power. The Charter empowers the CCRB only to make findings and recommendations for action by the Police Commissioner (*see* NY City Charter §§ 440[c][1], [d][3]). Among other things, the CCRB can recommend to the Police Commissioner that charges and specifications be brought and the Police Commissioner can accept or reject this recommendation. The MOU provides a mechanism for delegating to the APU prosecution of CCRB-recommended charges and specifications accepted by the Commissioner. Amended charges and specifications, being in effect, new charges, would have to be submitted to the Commissioner as recommendations. This is a limitation imposed by the Charter. Since neither the CCRB nor the NYPD has the power to override the Charter, the two agencies' MOU cannot do so either.

38-A RCNY 1-44 was amended to provide for non-FADO misconduct to "be noted in case dispositions by categories describing the possible misconduct and the evidence of such misconduct." Supreme Court properly found the amended rule to be rational based on the CCRB's explanation that the revision codified existing practice and was designed to make a record of

the existence of possible non-FADO misconduct, which would likely be referred to another agency, without making any findings or recommendations with respect thereto. Contrary to the dissent's assertion that the revision exceeds the CCRB's FADO jurisdiction because it incorporates non-FADO findings into the case disposition, the amended rule specifies that potential non-FADO misconduct is to be "noted" as "possible misconduct" with a listing of evidence of such misconduct and thus entails neither a finding nor a determination made by the CCRB.

38-A RCNY 1-53(a) authorized the CCRB's Executive Director to delegate duties to CCRB members or "senior staff." The CCRB amended the rule to expand the Executive Director's authority to delegate to all "Agency Staff" and not merely "senior staff." Supreme Court properly found the amended rule to be rational and not overbroad because it conforms with the requirements of the Charter. Specifically, the Charter gives the CCRB the power "to appoint such employees as are necessary to exercise its powers and fulfill its duties" and it does not prohibit the Executive Director from further delegating duties (NY City Charter § 440[c][5]). Moreover, to the extent that problems may arise with the Executive Director's delegation of duties, including a lack of transparency, Rule 1-53(a)(2) makes clear that the CCRB may limit the Executive Director's authority at any time by further

resolution.

In addition to CCRB's adoption of the revised rules, the CCRB passed a resolution to begin investigating allegations of sexual misconduct. The resolution to begin investigating allegations of sexual misconduct announced a change from the CCRB's historic practice of referring such allegations to the NYPD, on the ground that "sexual misconduct by a police officer is, at its core, an abuse of authority" (which is included in the CCRB's FADO jurisdiction). The CCRB resolved that it would immediately begin investigating allegations of what it termed "Phase 1" sexual misconduct, i.e., generally, sexual harassment without physical contact. It would also begin training and preparing to investigate "Phase 2" sexual misconduct, i.e., generally, sexual conduct involving physical contact, and would begin investigating Phase 2 sexual misconduct allegations upon the Executive Director's report that the CCRB was "ready" for Phase 2.

By declaring that the CCRB would assert jurisdiction over an entire category of misconduct that it had historically referred as a matter of policy, the resolution announced a sweeping policy change that materially affected the rights of all alleged victims of sexual misconduct and allegedly offending police officers "equally and without exception," and thus amounted to the

adoption of a new "rule" (*Matter of Singh v Taxi & Limousine Commn. of City of N.Y.*, 282 AD2d 368, 368 [1st Dept 2001], [citing, inter alia, NY City Charter § 1041(5)(a)(iii)], *lv denied* 96 NY2d 720 [2001]). However, because the CCRB undisputedly did not follow the public vetting process required by CAPA for adopting a new rule, the sexual misconduct resolution is a nullity (NY City Charter § 1043; *see Callahan v Carey*, 2012 NY Slip Op 30400[U] [Sup Ct, NY County 2012], *affd for reasons stated below* 103 AD3d 464 [1st Dept 2013], *affd sub nom Matter of Council of the City of N.Y. v Department of Homeless Servs. of the City of N.Y.*, 22 NY3d 150 [2013]).

All concur except Friedman, J.P. who dissents in part in a memorandum as follows:

FRIEDMAN, J.P. (dissenting in part)

For the reasons discussed below, while I otherwise concur in the majority's disposition of this appeal, I respectfully dissent to the extent the majority affirms Supreme Court's denial of the petition insofar as it seeks invalidation of revised § 1-15(a) of the Rules of the Civilian Complaint Review Board (CCRB) and the final sentence of revised § 1-44 thereof. In my view, these amendments to the CCRB Rules should be invalidated on the ground that each of them exceeds the power granted to the CCRB by section 440 of the Charter of the City of New York (NY City Charter § 440).

I turn first to revised § 1-15(a) of the CCRB Rules, which, as noted, was sustained by Supreme Court when challenged in this article 78 proceeding by plaintiffs-petitioners Patrolmen's Benevolent Association (PBA) and its president. Revised § 1-15(a) provides that the CCRB may, in its discretion, investigate a complaint filed "after the 18-month statute of limitations has expired pursuant to Civil Service Law § 75(4)."[1] The referenced statute of limitations of Civil Service Law § 75(4) bars the

[1]Revised § 1-15(a) provides in full: "When a complaint is filed with the Board after the 18-month statute of limitations has expired pursuant to Civil Service Law § 75(4), the Chair in consultation with the Executive Director will determine whether to investigate the complaint."

commencement of a removal or disciplinary proceeding against a covered civil servant (including a member of the New York City Police Department)

> "more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges . . . , provided, however, that such limitation[] shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime."

In upholding revised § 1-15(a), the majority appears to rely primarily, as did Supreme Court, upon the Civil Service Law's "crime" exception to the 18-month statute of limitations for disciplinary proceedings. However, the authority to investigate late complaints purportedly conferred on the CCRB by revised § 1-15(a) is not limited to complaints of alleged misconduct that would also constitute a criminal offense. Moreover, the CCRB, in defending revised § 1-15(a) upon this appeal, places no reliance on the "crime" exception to the disciplinary statute of limitation. In fact, the exception is not even mentioned in the section of the CCRB's appellate brief addressing this issue, and the CCRB has never expressed, either on this appeal or in the record, any intention to limit its investigation of time-barred complaints to those alleging conduct that might constitute a criminal offense. On the contrary, as noted by the majority, the CCRB states that, should it make a finding of noncriminal

misconduct that occurred more than 18 months before the complaint was filed, it will recommend the imposition of "informal discipline, such as an instruction from the officer's supervisor or additional training."

The "crime" exception to the Civil Service Law's 18-month statute of limitations, even if it could save a hypothetical rule authorizing the CCRB to investigate a late complaint of misconduct that possibly constitutes a crime, cannot save revised § 1-15, which contains no such limitation.[2] NY City Charter § 440 mandates that the CCRB's findings and recommendations be "submitted to the police commissioner" — necessarily implying that the CCRB's powers are limited to complaints of misconduct on which the police commissioner can act by imposing discipline. Under Civil Service Law § 75(4), the commissioner has no power to impose discipline on an officer based on noncriminal misconduct that occurred more than 18 months before the charge was filed. Accordingly, because revised § 1-15(a) purports to authorize the CCRB to investigate a complaint of alleged misconduct of any kind (not just potentially criminal misconduct) that occurred more than 18 months before the complaint was filed, the provision is impermissibly overbroad and should be invalidated in its entirety

[2]And, to reiterate, the CCRB makes plain that it has no intention of abiding by any such limitation in practice.

(*see Boreali v Axelrod*, 71 NY2d 1, 14 [1987]).

In an attempt to justify the effective elimination of the disciplinary statute of limitations effected by revised § 1-15, the majority draws a distinction between "*investigat*[ing] a complaint," on the one hand, and, on the other hand, "the commencement of [a] removal or disciplinary proceeding[]." Only the latter, according to the majority, is subject to the 18-month statute of limitations. This distinction is without foundation. Far from drawing a distinction between investigations and proceedings, Civil Service Law § 75 makes clear that an investigation is part of a disciplinary proceeding. Under Civil Service Law § 75(4), the limitation period runs from "the occurrence of the alleged incompetency or misconduct complained of," not from the completion of the investigation. Further, under Civil Service Law § 75(2), an employee who "appears to be a potential subject of disciplinary action" is entitled to representation "at the time of questioning," i.e., even before being charged. Plainly, the legislature regarded an investigation as part and parcel of a disciplinary proceeding, and the distinction drawn by the majority has no statutory basis.

A few more points deserve to be made concerning the CCRB's attempt to circumvent the disciplinary statute of limitations enacted by the legislature. First, the "informal" disciplinary

measures (such as "behavior correction or training") that the CCRB proposes to recommend for noncriminal misconduct that occurred more than 18 months before the filing of the complaint would still constitute discipline and, as such, are barred by Civil Service Law § 75(4). Further, as the Police Department noted in objecting to revised § 1-15(a), the mere presence of a late complaint on his or her record would "unduly stigmatize" a police officer, as it could impact future promotions and transfers. In enacting Civil Service Law § 75(4), the legislature, after balancing the competing interests, determined that such adverse consequences are appropriate only where an officer has been confronted with the charges within the statutorily defined limitations period. The majority essentially rewrites Civil Service Law § 75(4) when it asserts that it would not violate the statute of limitations for the CCRB to recommend that an officer undergo what it calls "instructions or training" — and suffer the negative consequences that will inevitably ensue therefrom — based on conduct that occurred more than 18 months before the filing of the complaint.

I further note that, in authorizing the CCRB to investigate a late complaint of any kind of alleged misconduct, revised § 1-15(a) deprives police officers of the certainty and repose with which the Legislature intended to provide them by enacting the

disciplinary statute of limitations. There is no basis for singling out New York City police officers, among all the government employees covered by the Civil Service Law, to deprive them of this benefit.

Finally, I believe that we should modify the order appealed from to invalidate the final sentence of revised § 1-44 of the CCRB Rules. This new provision grants the CCRB an entirely new power to take "note[]" in its case dispositions of "possible misconduct falling outside its jurisdiction" and of "the evidence of such misconduct." In this regard, it should be borne in mind that the CCRB's jurisdiction under the City Charter is limited to misconduct falling within the categories of "excessive use of force, abuse of authority, discourtesy, or use of offensive language" (NY City Charter § 440 [c][1]), colloquially known as "FADO" misconduct. The previous version of § 1-44 tracked an April 2012 memorandum of understanding between the CCRB and the Police Department by requiring the CCRB, upon "becom[ing] aware of possible misconduct falling outside its jurisdiction, such as the making of a false statement by an officer, . . . not itself [to] prosecute such possible misconduct but . . . instead [to] immediately refer such possible misconduct to the Police Department for investigation and possible prosecution by the Police Department." Revised § 1-44, while retaining the language

just quoted, turns the meaning of the rule on its head by adding the following new concluding sentence: "Other misconduct will be noted in case dispositions by categories describing the possible misconduct and the evidence of such misconduct."[3]

In my view, the amendment of § 1-44 to empower the CCRB to take "note[]" in its case dispositions of possible non-FADO misconduct, and of the evidence of such misconduct, essentially directs the CCRB to make findings concerning misconduct outside its jurisdiction under the City Charter. The majority resists this conclusion by pointing to the new sentence's reference to

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[3]In its entirety, revised § 1-44 provides as follows, with changes from the previous version indicated by underlining of new material and bracketing of deleted material:

"§ 1-44 Other Misconduct.

"If during the course of a Prosecution the [CCRB] Civilian Complaint Review Board becomes aware of possible misconduct falling outside its jurisdiction, such as the making of a false statement by an officer, the Board shall not itself prosecute such possible misconduct but shall instead immediately refer such possible misconduct to the Police Department for investigation and possible prosecution by the Police Department. The [CCRB shall] Civilian Complaint Review Board will provide to the Police Department such assistance as may be requested, in the investigation or [p]Prosecution by the Police Department of such possible misconduct and shall, if necessary, coordinate its Prosecution with that of the Police Department. Other misconduct will be noted in case dispositions by categories describing the possible misconduct and the evidence of such misconduct."

"*possible* misconduct" (emphasis added). No doubt the word "possible" was inserted into the amendment as a fig leaf to achieve just this result, but I see no practical difference, in terms of impact upon an accused police officer, between a finding by the CCRB of "misconduct" and a finding by the CCRB of "possible misconduct." In either case, the finding becomes part of the officer's permanent record and will affect the future course of his or her career, whatever the commissioner's ultimate disposition of the matter might be. Further, there is no need for including a finding of "possible [non-FADO] misconduct" in a case disposition by the CCRB, since the CCRB can refer to the Police Department instances of possible non-FADO misconduct of which it becomes aware (and, indeed, is directed to do so "immediately") without making any such formal finding in the final case disposition. In sum, revised § 1-44, to the extent it purports to empower the CCRB to make findings concerning police misconduct outside its FADO jurisdiction (whether "possible" or actual), should be invalidated.

For the foregoing reasons, I would modify the order appealed from to invalidate revised § 1-15(a) of the CCRB rules and to

invalidate the final sentence of revised § 1-44 of the CCRB Rules. To the extent the majority does otherwise, I respectfully dissent. In all other respects, I concur with the majority's disposition of the appeal and cross appeal.

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Mazzarelli, Moulton, González, JJ.

11137 Carson Williams, Index 311533/11
Plaintiff-Appellant, 42063/12
83993/12

-against-

New York City Housing Authority, et al.,
Defendants-Respondents,

Castle Hill Houses Community Center
Inc., et al.,
Defendants.

- - - - -

[And A Third-Party Action]

- - - - -

LIRO Program, et al.,
Second Third-Party Plaintiffs-Respondents,

-against-

Corbex, Inc.,
Second Third-Party Defendant-Respondent-Appellant.

_____

Wingate, Russotti, Shapiro & Halperin, LLP, New York (William P. Hepner of counsel), for appellant-respondent.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for New York City Housing Authority, respondent.

Law Offices of Cheng and Associates, PLLC, Long Island City (Pui Chi Cheng of counsel), for LIRO Program and Construction Management, PE, PC, and Corbex, Inc., respondents.

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Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about December 4, 2018, which, insofar as appealed from as limited by the briefs, granted the motions of defendants New York City Housing Authority (NYCHA) Liro Program and Construction Management, PE, P.C. (Liro), and third-party

defendant Corbex, Inc. (Corbex) for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of denying NYCHA's motion and reinstating the complaint as against it, and otherwise affirmed, without costs.

This appeal involves a slip and fall in a hallway on the top floor of a building in the Castle Hill Houses in the Bronx, which was operated and managed by defendant NYCHA. On March 5, 2011, a Saturday, plaintiff Carson Williams visited the premises between noon and 1:00 p.m. to see a friend who lived there, Jennie Ruiz. Plaintiff slipped after stepping off the elevator. After he fell, plaintiff looked up, and saw that there was a crack in the ceiling from which water was slowly dripping, creating the accumulation that caused his fall. Photographs taken approximately two weeks after the accident showed that in one area on the ceiling, in the vicinity of where plaintiff fell, the paint was cracked and peeling, and discolored in one spot.

Plaintiff commenced this action against NYCHA and eventually against Liro and Corbex. Liro was the construction manager in charge of a major project involving the replacement of all of the roofs in the Castle Hill Houses, which commenced approximately one and one-half years before the accident and reached substantial completion a few weeks before the accident. Corbex was the general contractor for the roof replacement project. All

three defendants answered and eventually moved for summary judgment.

In moving for summary judgment, NYCHA relied on a two-fold defense. First, it cited the fact that the roof project was finished right before the accident. Indeed, on February 16, 2011, approximately three weeks before plaintiff fell, the roof manufacturer issued a 20-year warranty for the roof atop the building where plaintiff fell. The warranty was issued after NYCHA performed a "cut test," witnessed by the roof manufacturer, to ensure the roof was, inter alia, watertight. NYCHA maintains that plaintiff presented no evidence that the roof replacement was done in a shoddy manner such that it would have leaked so soon after it passed the cut test, and that any peeling paint on the ceiling evidenced leaks that occurred before the roof replacement.

NYCHA's second line of defense was that it had no notice of the condition that caused the accident. In support it relied on the deposition testimony of George May, who was one of the caretakers at the building at the time of the accident, and Rodney Davis, who at the time was employed by NYCHA as the superintendent for the Castle Hill Houses. An employee ledger submitted into the record by NYCHA shows that May was assigned to work on the day of the accident. May testified at his deposition

that he did not have an independent recollection of working on the day of the accident, or that an accident had occurred. However, he did testify as to what, pursuant to his usual Saturday work routine, he would have done on that day. That routine was to inspect the hallways twice, with the second inspection occurring from 11:30-11:45 a.m. May would have visited all of the floors, starting at the top (where plaintiff fell) and working his way down, cleaning hallways as necessary. If he had seen water leaking through the ceiling, he would have placed a bucket and "wet floor" sign, and notified his supervisor. However, May did not recall doing that at any time in 2010 or 2011.

Davis testified that if a resident called to complain about a leaking ceiling, a work order would be generated and a worker would be assigned to investigate. He further stated that the buildings were fully inspected on a monthly basis, and that the supervisor would fill out a sheet documenting the inspection results. NYCHA also submitted affidavits from an assistant superintendent at the Castle Hill Houses, as well as from an outside claims investigator, who averred that they searched the records for all complaints made of leaking ceilings on the roof and top two floors of the building in question during the one-year period preceding the accident, and failed to turn up

anything relevant.

Liro also moved for summary judgment, arguing that there was no evidence that the puddle on which plaintiff slipped was caused by a roof leak, and that the roof installed under its management passed waterproof testing prior to the accident. Liro submitted the deposition transcript of its senior project manager, who described in detail the roof replacement project, which encompassed demolishing the existing roof down to the concrete deck, pouring new concrete, laying down a vapor barrier, pouring a flood coat, installing flashing, and finally placing down a layer of gravel.[1] The project manager discussed the cut test and described the process whereby the guarantee was issued. He acknowledged that there was some work remaining after the cut test was performed, including the replacement of drains, but that such would not have impacted the previous determination that the roof was watertight.

In support of its own motion for summary judgment, Corbex submitted the transcript of the deposition of its construction supervisor, who also testified about the manner in which the roof

[1] Plaintiff argues that the roof was not finished before the accident because the gravel had not yet been laid when the accident happened. However, the record is not entirely clear as to when the gravel was placed. In any event, Liro's witness explained that the gravel is unrelated to making the roof watertight.

replacement work was performed. He did not recall any work being performed after March 2, 2011 (three days before the accident), when drain covers were being installed. He further stated that he walked the 20th floor hallway each day to reach the roof, and never observed a leak in the ceiling. Furthermore, to his knowledge, Corbex never received any complaints about leaks inside the building after the project was completed.

In opposition to the motions, plaintiff submitted, inter alia, his own deposition transcript, as well as the statement of Ruiz, his friend who he was going to visit on the day of the accident. Ruiz's statement was sworn to in June 2011, a few months after the accident and several months before the action was commenced, not to mention years before the parties moved for summary judgment. Thus, it did not contain the action's caption. In addition, although notarized, the statement did not state that it was sworn to under penalty of perjury, and it was missing Ruiz's date of birth in a space left for that information. Ruiz averred that in the 19 years she resided in the building there were intermittent ceiling leaks, which were never repaired. She stated that she witnessed plaintiff's fall, and noticed that water which had dripped from the ceiling had accumulated in the area where he fell, a fact which she pointed out to plaintiff while he was still laying on the floor.

Plaintiff argued that the statement, along with the photographs of the peeling paint on the ceiling, constituted sufficient evidence that the water on the floor had come from a leak in the ceiling. Plaintiff further maintained that Liro and Corbex had failed to make out their prima facie showing of entitlement to summary judgment, because they failed to submit any facts establishing that the water did not come from a roof leak and that they did not have sufficient opportunity to notice the leak.

The motion court granted summary judgment to all the moving defendants. It found that NYCHA met its prima facie burden of showing lack of notice through May and Davis, who testified as to the protocol for cleaning and inspecting the premises; coupled with the monthly inspection reports, log books of complaints, and the affidavits confirming a lack of records of complaints. Regarding Liro and Corbex, the court observed that the roof was independently certified as watertight before the accident, and that no complaints were made by anyone that there were leaks in the roof. While acknowledging plaintiff's submission of photographs of paint peeling off the ceiling, the motion court found that the assertion that the peeling paint evidenced a leak was an assumption unsupported by the remainder of the record. Further, the court discounted Ruiz's affidavit, since it pre-

dated the lawsuit, did not contain the action's caption, was not sworn under penalty of perjury, and was missing Ruiz's date of birth in the space left for that information. Thus, the court concluded, plaintiff failed to create a triable issue of fact, and defendants were entitled to dismissal of the action.

On appeal, NYCHA argues that it met its burden by submitting testimony that there was a set protocol for inspecting and cleaning the building in question, and that May, the caretaker, followed that protocol as a matter of habit, coupled with documentary evidence that May was on duty, and the written logs and other records containing no evidence of the defect. Indeed, a defendant landlord in a premises liability action may meet its prima facie burden on a summary judgment motion by establishing that it had a regular inspection and maintenance routine that it adhered to at the time the accident occurred (see *Raghu v New York City Hous. Auth.*, 72 AD3d 480 [1st Dept 2010]). In *Raghu*, a janitor was permitted to rely on his past routine in testifying that he "remembered" that he checked the area where the plaintiff fell on the day of her accident, and did not observe the substance she claimed cause the fall. Similarly, in *Pfeuffer v New York City Hous. Auth.* (93 AD3d 470 [1st Dept 2012]), the Court found that the defendant met its burden by submitting a caretaker's affidavit stating his regular practice with respect

to cleaning the staircases, as well as by submitting the superintendent's testimony confirming the caretaker's schedule.

Plaintiff argues that NYCHA did not meet its burden because its superintendent did not have an actual memory of the date in question. However, plaintiff cites to no authority holding that actual memory of inspecting the area where an accident occurred is required, as opposed to evidence of what a maintenance worker would have done, and evidence that a maintenance worker was working on the day in question.

Nevertheless, NYCHA's defense is premised on the notion that the water condition which caused plaintiff's fall was a transient one, and that the failure to notice it was excusable so long as NYCHA maintained its reasonable maintenance schedule. This ignores that plaintiff's theory is not that an active leak should have been noticed at a particular time, but rather that conditions that were *suggestive* of a permanent leak condition should have been noticed and addressed. Plaintiff created an issue of fact on this point by submitting the Ruiz affidavit and the photographs of the ceiling. Preliminarily, we do not reject the Ruiz notarized statement out of hand based on the perceived infirmities relied on by the motion court, such of the lack of a caption and the absence of a declaration that it was sworn to under penalty of perjury. These are technical errors that did

not prejudice a substantial right of the defendants (CPLR 2001; *see e.g. Moore v DL Peterson Trust*, 172 AD3d 1058 [2d Dept 2019]). We similarly reject NYCHA's position that the affidavit is "stale." This action involves a static set of facts that have not changed since the day of the accident. The fact that the affidavit was prepared contemporaneously makes it more probative than had it been made at the time of the summary judgment motions, not less.

Substantively, the Ruiz affidavit established that leaks had existed in the ceiling for a long period of time before the accident, and that water from the ceiling had caused the accident. The photographs of the ceiling show discoloration and peeling paint that could be suggestive of a longstanding, "visible and apparent" condition – dripping water - that NYCHA's practices and procedures unreasonably failed to observe (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). May's testimony that had he seen a leak he would have placed a bucket underneath it and notified his supervisor fails to account for why he or anybody at NYCHA did not notice the obvious condition of the ceiling, nor does the evidence that there were no complaints regarding leaks on the 20th floor explain why NYCHA's maintenance staff did not notice it.

Finally, the fact that NYCHA completed the roof replacement

before the accident does not absolve it of liability as a landowner. NYCHA failed to establish, through an expert affidavit or otherwise, that any condition that may have caused the leaks discussed in the Ruiz affidavit was actually addressed by the project. However, because Liro and Corbex are not landowners but rather mere contractors hired by NYCHA to replace the roofs, they owed no direct duty to plaintiff, but could only be liable to the extent that they launched an instrument of harm, that plaintiff detrimentally relied on their performance of their respective contracts with NYCHA, or that they entirely replaced NYCHA's obligation to maintain the premises in a safe condition (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). There is no evidence to suggest that either of those three conditions existed here. Accordingly, summary judgment was properly awarded to Liro and Corbex.

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

ENTERED: MAY 28, 2020

CLERK

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

11558 The People of the State of New York, Ind. 3384/16
Respondent,

-against-

Jaleel Gardner,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (April Newbauer, J.), rendered November 15, 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: MAY 28, 2020

CLERK

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

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

11559 Bela Bako, et al., Index 150214/11
Plaintiffs-Respondents,

-against-

Kausar Zaman, et al.,
Defendants-Appellants,

John Doe,
Defendant.

_____

Sweetbaum & Sweetbaum, Lake Success (Joel A. Sweetbaum of counsel), for appellants.

Horn & Lee, P.C., New York (John Lee of counsel), for respondents.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered August 12, 2019, which denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to establish their prima facie entitlement to judgment as a matter of law in this action where plaintiff Bela Bako was injured when, while descending an interior stairwell in the house he and his wife plaintiff Annika Bako were renting, he lost his balance and fell. Although there was a little wall next to the stairwell, plaintiff was unable to grab onto the top of the wall, which was capped by a flat piece of wood. Defendants failed to submit an expert affidavit opining

that the subject stairs complied with the applicable building code on the day of the accident even though the complaint and bill of particulars allege that Bela's injuries were proximately caused by the fact that it had inadequate and/or missing handrails (*see Burke v Yankee Stadium, LLC*, 146 AD3d 720, 721 [1st Dept 2017]).

Furthermore, Bela and Annika both testified that Bela could not stop his fall because the wood piece capping the wall next to the stairwell was too wide for him to grasp. Thus, triable issues exist as to whether the absence of a compliant handrail was a proximate cause of Bela's alleged injuries (*see Sanchez v Irun*, 83 AD3d 611, 612 [1st Dept 2011]; *Asaro v Montalvo*, 26 AD3d 306, 307 [2d Dept 2006]).

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

ENTERED: MAY 28, 2020

CLERK

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

11560 In re William W., Dkt. V-13020-18
Petitioner-Appellant,

-against-

Yaunning W.,
Respondent-Respondent.

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Larry S. Bachner, New York, for appellant.

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Order, Family Court, New York County (Jane Pearl, J.), entered on or about September 20, 2018, which, inter alia, dismissed the petition seeking modification of an order of visitation, with prejudice, unanimously affirmed, without costs.

Application by petitioner's assigned counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). A review of the record demonstrates that there are no nonfrivolous issues that could be raised on this appeal. The petition for a modification of the order of visitation based on a change of circumstances was correctly dismissed because petitioner neither alleged a material

change of circumstances nor presented evidence of such a change at the hearing afforded him (*see Matter of Ronald S. v Deirdre R.*, 62 AD3d 593 [1st Dept 2009]).

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

ENTERED: MAY 28, 2020

CLERK

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

11561- Index 850034/15
11561A Wells Fargo Bank, N.A., etc., 850294/17
Plaintiff-Appellant,

-against-

Donna Ferrato,
Defendant-Respondent,

The Simon & Mills Building
Condominium Board, et al.,
Defendants.

- - - - -

Wells Fargo Bank, N.A., etc.,
Plaintiff-Respondent,

-against-

Donna Ferrato,
Defendant-Appellant,

Capital One Bank (USA) N.A., et al.,
Defendants.

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Greenberg Traurig, LLP, New York (Brian Pantaleo of counsel), for appellant/respondent.

Wrobel Markham LLP, New York (M. Katherine Sherman of counsel), for respondent/appellant.

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Order, Supreme Court, New York County (Judith N. McMahon, J.), entered March 6, 2018, which, to the extent appealed from, denied plaintiff Wells Fargo Bank's motion to revoke acceleration of a mortgage loan made to defendant, unanimously affirmed, with costs. Order, same court and Justice, entered August 7, 2018, which denied defendant's motion to dismiss plaintiff's

foreclosure action on the basis of CPLR 3211(a)(4) and CPLR 3211 (a)(5), unanimously reversed, with costs, on the law, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Wells Fargo Bank failed to affirmatively revoke the acceleration of defendant's mortgage debt, as mere voluntary discontinuance of a foreclosure action is insufficient, in itself, to constitute an affirmative act of revocation (*see Wells Fargo Bank, N.A. v Liburd*, 176 AD3d 464, 464 [1st Dept 2019]; *see also HSBC Bank USA v Kirschenbaum*, 159 AD3d 506, 507 [1st Dept 2018]). Wells Fargo admitted that its primary reason for revoking acceleration of the mortgage debt was to avoid the statute of limitations bar, and it proceeded to collect on the accelerated loan amount in a fifth foreclosure action filed shortly after it made its motion to revoke acceleration (*see Vargas v Deutsche Bank Natl. Trust Co.*, 168 AD3d 630 [1st Dept 2019], *lv granted* 34 NY3d 910 [2020]).

Moreover, Wells Fargo's fifth foreclosure action, commenced on or around December 11, 2017, is time-barred, as Wells Fargo had accelerated the mortgage debt when it commenced its second foreclosure action on September 16, 2009 (CPLR 213[4]; *see CDR Créances S.A. v Euro-American Lodging Corp.*, 43 AD3d 45, 51 [1st

Dept 2007]). The fact that the prior foreclosure actions were dismissed does not undo Wells Fargo's act of accelerating the mortgage debt.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 28, 2020

CLERK

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

11562 William Jackson, Index 306203/14
Plaintiff-Appellant,

-against-

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

_____

Sim & DePaola, LLP, Bayside (Sang J. Sim of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Claibourne Henry of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about April 19, 2019, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie entitlement to judgment as a matter of law by submitting evidence that the officers had probable cause to arrest plaintiff on a theory of constructive possession. This evidence demonstrates a complete defense to plaintiff's claims of false arrest, false imprisonment and malicious prosecution (*see Hunter v City of New York*, 169 AD3d 603 [1st Dept 2019]).

In opposition, plaintiff failed to raise an issue of fact with respect to his constructive possession of the contraband. The evidence showed that plaintiff provided police with the

address of the subject premises and admitted to renting a room in the apartment for five months prior to the date of the execution of the search warrant and his arrest. Plaintiff was found in the apartment in a state of undress, and the contraband which was the basis for plaintiff's arrest was recovered in plain view in the living room (*see Walker v City of New York*, 148 AD3d 469, 470 [1st Dept 2017]; *Mendoza v City of New York*, 90 AD3d 453 [1st Dept 2011]).

Plaintiff's assault and battery and excessive force claims were properly dismissed since the police were authorized to use reasonable force, including handcuffing plaintiff during the arrest (*see Fowler v City of New York*, 156 AD3d 512, 513 [1st Dept 2017], *lv dismissed* 31 NY3d 1042 [2018]). Furthermore, plaintiff failed to make a showing that he suffered injuries from the alleged strip-search conducted by unidentified officers at the precinct (*see Davidson v City of New York*, 155 AD3d 544 [1st Dept 2017]).

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: MAY 28, 2020

CLERK

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

11563 Marc A. Stephens, etc., et al., Index 303056/13
Plaintiffs-Appellants,

-against-

Evan Dore, etc., et al.,
Defendants-Respondents.

_____

Marc A. Stephens, appellant pro se.

Evan M. Dore, respondent pro se.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about January 25, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment as to liability and granted defendants' motion for summary judgment dismissing the complaint except for the claim on the promissory note, unanimously affirmed, without costs.

Plaintiff Marc Stephens failed to establish the existence of a binding agreement between himself and defendants with regard to joint ownership of Doreway Transportation Services (DTS). Although the record contained a draft written agreement granting Stephens a minority ownership interest in DTS, Stephens failed to

establish that it was validly executed. For this reason, the court properly dismissed plaintiffs' breach of fiduciary duty claim, conversion claims and tortious interference with contract claim as well as their other claims.

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

ENTERED: MAY 28, 2020

CLERK

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

11564 The People of the State of New York, Ind. 3857/16
Respondent,

-against-

Jefferson Bonifacio,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jonathan Cantarero 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 J. Obus, J.), rendered February 22, 2018,

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

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

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

ENTERED: MAY 28, 2020

CLERK

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

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

11565 Susan A. Habberstad, et al., Index 655993/17
Plaintiffs-Appellants,

-against-

Revere Securities LLC, et al.,
Defendants,

Peter Nussbaum, et al.,
Defendants-Respondents.

_____

McGiff Halverson Dooley, LLP, Patchogue (Robert R. Dooley of counsel), for appellants.

Locke Lord LLP, New York (Ira G. Greenberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about April 25, 2019, which, insofar as appealed from as limited by the briefs, granted the motion of defendants Peter Nussbaum and Mazars USA LLP to dismiss the amended complaint's seventh and ninth causes of action, unanimously affirmed, with costs.

Plaintiffs' claim for breach of fiduciary duty founders on the governing trust agreement's exculpatory clause, which expressly relieved the trustees, including Nussbaum, of liability for acts and omissions other than willful misconduct (*see Matter of Jastrzebski*, 97 AD3d 819, 821 [2d Dept 2012]). Plaintiffs' attempt to circumvent the exculpatory clause by pointing to the

alleged malfeasance of Nussbaum's fellow trustee and co-fiduciary is independently unavailing, as the co-fiduciary would have been protected by the exculpatory clause to the same extent as Nussbaum.

Plaintiffs' fiduciary duty claim is also untimely under the governing three-year limitations period. The essence of plaintiffs' allegations against Nussbaum is not that he was an active participant in an alleged fraudulent scheme, but that he endorsed it rather than opposed it. Any fraud allegations are at most incidental to the fiduciary duty claim (*see Cusimano v Schnurr*, 137 AD3d 527, 529 [1st Dept 2016]; *Kaufman v Cohen*, 307 AD2d 113, 118-119 [1st Dept 2003]). As plaintiffs concede, the fiduciary tolling doctrine is also inapplicable here, where plaintiffs seek money damages, rather than accounting or equitable relief (*see Matter of Yin Shin Leung Charitable Found. v Seng*, 177 AD3d 463, 464 [1st Dept 2019]; *Cusimano*, 137 AD3d at 530-531).

Plaintiffs fail to state a claim for aiding and abetting fraud. The motion court dismissed all fraud claims, and plaintiffs have abandoned their appeal from that aspect of the order on review. Since there is no underlying fraud claim, the

aiding and abetting claim must also be dismissed (*see Empire Outlet Bldrs. LLC v Construction Resources Corp. of N.Y.*, 170 AD3d 582, 583 [1st Dept 2019]; *McBride v KPMG Intl.*, 135 AD3d 576, 578 [1st Dept 2016]).

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

ENTERED: MAY 28, 2020

CLERK

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

11566 In re Cheryl H., Dkt. O-27428-15/15C
Petitioner-Respondent,

-against-

Clement H.,
Respondent-Appellant.

_____

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for appellant.

_____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about December 15, 2017, which, after a hearing, found that respondent husband violated a temporary order of protection and committed the family offense of harassment in the second degree (Penal Law § 240.26[1]), granted petitioner wife a two-year order of protection against respondent and directed him to pay petitioner's attorney's fees in the amount of $2,275, unanimously affirmed, without costs.

Petitioner established by a fair preponderance of the evidence that respondent willfully violated the temporary order of protection, by engaging in conduct which constituted harassment in the second degree (*see* Family Ct Act § 846-a; *Matter of Tina T. v Steven U.*, 243 AD2d 863, 864 [3d Dept 1997], *lv denied* 91 NY2d 805 [1998]). Specifically, petitioner testified that in November 2015, respondent slapped her across

the face after she refused to discuss reconciliation. There exists no basis to disturb Family Court's credibility determinations (*see Matter of Everett C. V Oneida P.*, 61 AD3d 489 [1st Dept 2009]).

Based on respondent's willful violation of the temporary order of protection, the court providently exercised its discretion in awarding attorney's fees (*see* Family Ct Act § 846-a; *Matter of Birch v Sayegh*, 9 AD3d 514, 516-517 [3d Dept 2004]), especially in view of the court's finding that respondent was evasive and incredible as to his finances.

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

ENTERED: MAY 28, 2020

CLERK

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

11567 The People of the State of New York, Ind. 1841/12
Respondent,

-against-

Robert Urena,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered January 13, 2014, convicting defendant, after a jury trial, of murder in the second degree and gang assault in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

As the People concede, the trial court erroneously received a detective's opinion testimony that the object defendant appeared to be holding in surveillance videos was a knife. However, there is no reasonable probability that the error contributed to the verdict (*see People v Crimmins*, 36 NY2d 230 [1975]). The jurors, who were properly instructed about their role as triers of fact, were able to see and evaluate the videotapes for themselves. Furthermore, a cooperating

accomplice's testimony, which was extensively corroborated, overwhelmingly demonstrated that it was defendant who stabbed the victim.

The court providently exercised its discretion in dismissing a juror as grossly unqualified (*see generally* CPL 270.35[1]; *People v Buford*, 69 NY2d 290, 299 [1987]). The totality of the record indicates either that the juror was asleep during parts of the trial, or that he was at least, in his own words, going "on and off" and missing some of the testimony (*see People v Russell*, 112 AD2d 451 [2d Dept 1985]).

The court providently exercised its discretion in denying defendant's request to introduce into evidence the prior inconsistent videotaped statement of the cooperating witness. The contents of the video statement were clearly brought out during recross-examination, and the witness admitted having made them, rendering introduction of the video unnecessary (*see People v Person*, 26 AD3d 292, 294 [1st Dept 2006], *affd* 8 NY3d 973 [2007]). Defendant's arguments on this issue are generally similar to arguments this Court rejected in *Person*, and we find no basis to revisit that decision.

To the extent that defendant objected to leading questions by the prosecutor, and to allegedly improper evidence of defendant's gang activity, we find nothing that was so egregious

or prejudicial as to warrant reversal. By failing to object, by making generalized objections or objections that did not articulate the grounds asserted on appeal, or by failing to request further relief after the court took curative actions, defendant failed to preserve his remaining claims of prosecutorial error, and we decline to review them in the interest of justice. As an alternative holding, we find that the alleged misconduct, even viewed cumulatively, was not so prejudicial as to require a new trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). To the extent there were improprieties, they were sufficiently addressed by the court's curative actions.

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

ENTERED: MAY 28, 2020

CLERK

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

11568 In re A.P., and Others, Dkt. NA-27316-17/13
NA-27670/13

Children Under Eighteen Years
of Age, etc., et al.,

M.P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Deborah E. Wassel of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Gilbert A. Taylor, J.), entered on or about January 16, 2019, to the extent it brings up for review a fact-finding order of the same court (Karen I. Lupuloff, J.), entered on or about May 24, 2016, which, after a hearing, determined that respondent sexually abused the child B.P. and derivatively abused the children A.P. and M.P., unanimously affirmed, without costs.

Although respondent failed to file a timely notice of appeal from a prior order of disposition with respect to B.P., it is undisputed that he timely appealed from the order of disposition regarding A.P. and M.P., which brings up for review the fact-

finding determination as to all three children. Since the issues of whether respondent derivatively abused A.P. and M.P. and whether he sexually abused B.P. are "inextricably intertwined," we will review the fact-finding determination as to B.P. (*see Citnalta Constr. Corp. v Caristo Assoc. Elec. Contrs.*, 244 AD2d 252, 254 [1st Dept 1997]).

The court correctly determined that petitioner agency's progress notes on a prior unfounded case against respondent with respect to another child, B.P.'s 18-year-old half-sister, were not admissible (*see* Social Services Law § 422[5][b]). In any event, respondent's counsel extensively cross-examined this witness about her allegations that respondent had sexually abused her when she was a child.

A preponderance of the evidence supports the court's determination that respondent sexually abused B.P. (*see* Family Court Act §§ 1012[e][iii]; 1046[b][i]). Family Court Act § 1046(a)(vi) provides that a child's out-of-court statement is admissible in an Article 10 proceeding to establish abuse or neglect, provided that it is corroborated by "any other evidence tending to support the reliability" of the child's out-of-court statement. Family Court has broad discretion to determine whether "proffered corroborative testimony actually 'tend[s] to support the reliability of the previous statements,'" *(Matter of*

Christina F., 74 NY2d 532, 535-36 [1989]), Here, Family Court properly determined that the testimony of appellant and his girlfriend corroborated the child's out-of-court statements because they established that she had regular overnight visits with appellant. In addition, Family Court found that the testimony of the child's older half-sister about respondent's sexual abuse of her in a similar manner several years earlier was credible and further corroborated B.P.'s out-of-court statements (*see Matter of Sha-Naya M.S.C. [Derrick C.]*, 130 AD3d 719, 721 [2d Dept 2015]). Moreover, while the half-sister's testimony did not require corroboration, Family Court found that it was corroborated by the testimony of respondent's witness, his own uncle. We see no reason to disturb the court's credibility determinations (*see Matter of Christina G. [Vladimir G.]*, 100 AD3d 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]).

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

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

ENTERED: MAY 28, 2020

CLERK

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

11569-
11569A In re Dana Harge,
Petitioner,

-against-

City of New York,
Respondent.

Index 150868/19

_____

The Law Office of Fred Lichtmacher P.C., New York (Fred Lichtmacher of counsel), for petitioner.

James E. Johnson, Corporation Counsel, New York (Lorenzo DiSilvio of counsel), for respondent.

_____

Determinations of respondent, dated September 25, 2018, which, after a hearing, found petitioner guilty of multiple New York City Police Department patrol guide violations arising from five separate incidents, and ordered a one-year dismissal probation, forfeiture of 31 suspension days already served, and forfeiture of 20 vacation days, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carol R. Edmead, J.], entered on or about April 8, 2019) dismissed, without costs.

All charges sustained are supported by substantial evidence in the record (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). We find no reason to overturn

the assistant deputy commissioner's credibility determinations, which are "largely unreviewable" (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). As for the charges arising from an alleged domestic violence incident, "[i]t is well-settled that hearsay is admissible in administrative proceedings, that it may be the basis for an administrative determination and — if sufficiently relevant and probative — may constitute substantial evidence alone" (*Matter of Rosa v New York City Hous. Auth., Straus Houses*, 160 AD3d 499, 500 [1st Dept 2018]).

We do not find the penalty to be so disproportionate as to shocks one's sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; Administrative Code of City of NY § 14-115[a], [d]).

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

ENTERED: MAY 28, 2020

CLERK

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

11571N Ashiya Dudhia, Index 305847/17
Plaintiff-Appellant,

-against-

Niraj Agarwal,
Defendant-Respondent.

_____

Warshaw Burstein, LLP, New York (Neena Tankha of counsel), for appellant.

Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP, New York (Robert Stephan Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered November 14, 2019, which, inter alia, denied plaintiff wife's motion to disqualify defendant husband's counsel, unanimously affirmed, without costs.

In November 2014, plaintiff consulted with Neena Tankha, Esq., an associate at Cohen Clair Lans Greifer Thorpe & Rottenstreich LLP (Cohen Clair). Plaintiff also claims that an unidentified partner was present at that meeting. Ms. Tankha could only corroborate that at the time it was Cohen Clair's practice to have a partner present at such meetings, but had no specific recollection of the meeting. Plaintiff retained Cohen Clair after that consultation, pursuant to a retainer letter signed solely by Ms. Tankha, but transferred her file to another firm in March 2015, when Ms. Tankha moved to that firm. There is

no record of any attorney other than Ms. Tankha rendering services to plaintiff while she was represented by Cohen Clair. Ms. Tankha herself only billed plaintiff for a few hours of work. In December 2018, defendant retained Cohen Clair.

Supreme Court correctly determined that no conflict of interest existed that mandated disqualification of Cohen Clair pursuant to rule 1.9(a) of the Rules of Professional Conduct (22 NYCRR 1200.0; see *Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 98 [1st Dept 2008]). However, the parties do not dispute that the facts show the existence of an imputed conflict of interest that gave rise to a rebuttable presumption of disqualification under rule 1.10(b) (*see Moray v UFS Indus., Inc.*, 156 AD3d 781, 783 [2d Dept 2017]).

The court providently exercised its discretion in denying plaintiff's disqualification motion since defendant rebutted the presumption by establishing, through the affirmation of a partner at the firm who interviewed the firm's attorneys and the affidavit of Cohen Clair's electronic data specialist, that Cohen Clair did not have any confidential information relating to plaintiff's matter after Ms. Tankha left that firm. Although plaintiff produced an undated highly redacted copy of notes purportedly taken during her initial meeting, the motion court reviewed them in an un-redacted form and concluded that they

contained no material, confidential information. Furthermore, any residual appearance of impropriety under the circumstances presented was adequately addressed by Cohen Clair's internal screening measures, under which only three attorneys are permitted to work on the matter and to access the case file, and non-attorney staff have been directed to communicate only with those three attorneys concerning the case (*see Dietrich v Dietrich*, 136 AD3d 461 [1st Dept 2016]; *see also Kassis v Teacher's Ins. & Annuity Assn.*, 93 NY2d 611, 617-618 [1999]; *Nimkoff v Nimkoff*, 18 AD3d 344, 346 [1st Dept 2005]).

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

ENTERED: MAY 28, 2020

CLERK

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

11572N James Davis II, et al., Index 656346/18
Plaintiffs-Respondents,

-against-

Influx Capital Group, LLC, et al.,
Defendants-Appellants.

Richmond Capital Group, LLC, et al.,
Defendants.

_____

Jacobowitz Newman Tversky LLP, Cedarhurst (Evan M. Newman of counsel), for appellants.

Colonna Cohen law, PLLC, Brooklyn (Ashlee V. Colonna Cohen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 14, 2019, which granted plaintiffs' motion for a preliminary injunction, unanimously reversed, on the law, with costs, and the motion denied.

Both CPLR 6301 and 6312(a) require a link between a cause of action and a preliminary injunction. There is no such link in the case at bar; hence, plaintiffs' motion should have been denied (*see e.g. BSI, LLC v Toscano*, 70 AD3d 741 [2d Dept 2010]).

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11573 The People of the State of New York, Ind. 143/14
Respondent,

-against-

Richard Ifill,
Defendant-Appellant.

_____

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

Richard Ifill, appellant pro se.

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

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Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J. at hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered July 27, 2017, convicting defendant of kidnapping in the second degree, robbery in the first degree, and two counts of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The hearing court properly denied defendant's motion to suppress a lineup identification. The record supports the court's finding that, under all the relevant circumstances, the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Even if defendant was the only lineup participant who appeared to be

completely bald, his baldness was not mentioned in the description given by the victim (*see People v Jackson*, 98 NY2d 555, 559 [2002]). While that factor is not dispositive (*see People v Perkins*, 28 NY3d 432 [2016]), here the victim described his assailant as wearing a hat, making it less likely that he noticed any baldness.

A detective's testimony that the victim stated that he would be able to identify the older of the two assailants (whom he later identified as defendant) was not necessary to help the jury understand the complaining witness's testimony (see People v Stanard,32 NY2d 143 144-145 [1973]). However, the error was harmless, because there is no reasonable probability that this testimony affected the verdict (*see People v Crimmins*, 36 NY2d 230 [1975]), particularly where defendant was linked to the crime by significant DNA evidence.

The court properly concluded that defendant forfeited his right to be present at his sentencing, which had already been rescheduled numerous times (*see People v Corley*, 67 NY2d 105, 109-110 [1986]). The court based this finding on a reliable report that defendant had refused to be produced in court for sentencing, as well as defendant's ongoing conduct.

We have considered and rejected defendant's pro se claims.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11574 Jose Fernandez, Index 27052/15E
Plaintiff-Respondent,

-against-

Kevin McCarthy, Esq., et al.,
Defendants-Appellants,

Cohen & Siegel, LLP,
Defendant.

_____

McMahon & McCarthy, Bronx (Matthew J. McMahon of counsel), for appellants.

The Perecman Firm, P.L.L.C., New York (Peter D. Rigelhaupt of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 24, 2019, which granted plaintiff's cross motion to extend the time to serve his complaint in the interests of justice and, in effect, denied defendants' motion to dismiss the complaint based on improper service, unanimously affirmed, without costs.

Under the circumstances, we find that, although plaintiff delayed in seeking an extension of his time to re-serve the complaint, the motion court appropriately exercised its discretion when it extended plaintiff's time in the interest of justice (CPLR 306-b), as plaintiff established the existence of several relevant factors weighing in favor of an extension (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-105 [2001];

Chase Home Fin. LLC v Adago, 171 AD3d 533 [1st Dept 2019]). Plaintiff's legal malpractice claim, which would otherwise be lost due to the running of the statute of limitations, seems to be potentially meritorious, and defendants have not established that they would suffer substantial prejudice from the extension, where they had actual notice of this action and the allegations against them from early on (*see Wimbledon Fin. Master Fund, Ltd. v Laslop*, 169 AD3d 550 [1st Dept 2019]; *Pennington v Da Nico Rest.*, 123 AD3d 627 [1st Dept 2014]).

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11575-
11575A

Dkt. B-59-61/15

In re Shilloh M.J.,
and Others,

Dependent Children Under the Age
of Eighteen Years, etc.,

Jamesina M.J.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent,

Administration for Children's Services,
Respondent.

_____

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Larry S. Bachner, New York, attorney for the children Shilloh M. J. and Khalil T.J.

Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child Cobey R.R.

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Orders, Family Court, Bronx County (Elenor C. Reid, J.), entered on or about January 17, 2019, which, inter alia, upon findings that respondent mother permanently neglected the subject children, terminated respondent's parental rights to the children and committed custody and guardianship of the children to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously modified, on the facts,

to vacate the order that terminated respondent's parental rights to the child Cobey and freed him for adoption, and the matter remanded to Family Court for a new dispositional hearing regarding the best interests of Cobey, and otherwise affirmed, without costs.

The agency demonstrated by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship, and notwithstanding these efforts, the mother permanently neglected the children by failing to plan for their future (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). The evidence shows that the agency developed a plan tailored to respondent's needs by, among other things, referring her for a mental health evaluation and drug treatment program, scheduling regular supervised visitation with the children, and meeting with her to review the service plan and discuss the importance of compliance (*see e.g. Matter of Nahzzear Y.G. [Tanisha N.]*, 172 AD3d 526 [1st Dept 2019], *lv denied* 33 NY3d 1113 [2019]). Despite these diligent efforts, respondent was uncooperative, as she refused to follow up on the multiple referrals for required services and to permit agency visits to her home. She also did not provide documentation verifying her participation in mental health services pursued on her own, or sign consent forms so that the agency could confirm

with the provider directly (*see Matter of Angelica D. [Deborah D.]*, 157 AD3d 587, 588 [1st Dept 2018]).

The finding that termination of respondent's parental rights is in the children's best interests is supported by a preponderance of the evidence (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the children have been in the same pre-adoptive stable foster home since 2013, where they are well cared for and their needs are met. As there is no evidence that any additional delay would alter the situation, a suspended judgment is not warranted (*see Matter of Alexandria D. [Brenda D.]*, 136 AD3d 604 [1st Dept 2016]).

Although the record supports the court's determination that adoption by the foster parents is in the children's best interests, we remand the matter for a new dispositional hearing with respect to Cobey. His attorney has advised that he is no longer in the same pre-adoptive home, is now 16 years old, and does not consent to being adopted (*see Matter of Eugene L.*, 22 AD3d 348, 348-349 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006]).

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11576-
11576A Index 651540/16

Bethpage Federal Credit Union, as successor by merger to Montauk Credit Union,
Plaintiff-Respondent,

-against-

Paula Bouzaglou, et al.,
Defendants-Appellants.

_____

Cobert Haber & Haber LLP, Garden City (Eugene Haber of counsel), for appellants.

Jaspan Schlesinger LLP, Garden City (Victoria R. Gionesi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered October 25, 2018, in favor of plaintiff and against defendants, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about August 27, 2018, which granted plaintiff's motion to amend the caption and for summary judgment on its breach of contract claims and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff seeks to recover the unpaid balances of eight loans made to defendant Paula Bouzaglou individually and guaranteed by the eight LLC defendants.

The motion court properly amended the caption to reflect plaintiff's successorship by merger to the entity that issued the subject loans (*see* CPLR 1018; Banking Law § 602[4]).

Plaintiff established its prima facie case by submitting proof of the existence of the loans and nonpayment thereof (*see First Interstate Credit Alliance v Sokol*, 179 AD2d 583, 584 [1st Dept 1992]). The affidavit based upon documentary evidence is sufficient to comply with the requirement of personal knowledge (*see id.*; *Barclay's Bank of N.Y. v Smitty's Ranch*, 122 AD2d 323, 324 [3d Dept 1986]).

Defendants failed to raise any issues of fact in opposition.

The motion court providently exercised its discretion in rejecting defendants' argument based on CPLR 3212(f). Although defendants purport to require discovery from a third party, that entity is defendants' own agent, and defendants neither explained

why they were unable to obtain such information sooner nor outlined any efforts made to obtain it.

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

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11577 Omar Herrera, Index 302090/15
Plaintiff-Appellant,

-against-

Carlos Vargas,
Defendant-Respondent.
- - - - -
[And a Third-Party Action]

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Joseph Capella, J.), entered on or about September 29, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

In this action arising from plaintiff's slip-and-fall on snow and ice, the court's determination that defendant was entitled to summary judgment dismissing the complaint on the ground that he is an out-of-possession landlord is no longer sound in light of the Court of Appeals's decision in *Xiang Fu He v Troon Mgt., Inc.* (34 NY3d 167 [2019]). Moreover, even if, as defendant urges, plaintiff was required to plead defendant's violation of Administrative Code of City of New York § 7-210 - which he undisputedly failed to do - plaintiff's reliance thereon

for the first time in opposition to defendant's motion for summary judgment was permissible, given that doing so did not raise any new theory of liability or prejudice (*cf. e.g., DB v Montefiore Med. Ctr.*, 162 AD3d 478, 478 [1st Dept 2018]; *Wadsworth Condos, LLC v Dollinger Gonski & Grossman*, 114 AD3d 487, 487 [1st Dept 2014]; *Alarcon v UCAN White Plains Hous. Dev. Fund Corp.*, 100 AD3d 431, 432 [1st Dept 2012]).

Defendant made a prima facie case for summary judgment on his alternative ground that a storm was in progress at the time of plaintiff's accident, through plaintiff's deposition testimony that it was snowing when he fell (*see Mosley v General Chauncey M. Hooper Towers Hous. Dev. Fund Co., Inc.*, 48 AD3d 379, 380 [1st Dept 2008]). However, plaintiff raised triable issues of fact in opposition. The sworn report of his meteorological expert concluded, among other things, that, at the time of plaintiff's accident, no snow was falling, and three inches of preexisting snow and ice was on the ground. Coupled with plaintiff's testimony regarding the condition of the sidewalk at the time of his accident, an issue "of fact exist[s] as to whether plaintiff's fall was caused by an ice condition associated with [a] prior storm, and whether defendant[] had a reasonable time to remedy it before the accident" (*Bagnoli v 3GR/228 LLC*, 147 AD3d 504, 505 [1st Dept 2017]; *see Womble v NYU Hosps. Ctr.*, 123 AD3d

469, 470 [1st Dept 2014]; *Walters v Costco Wholesale Corp.*, 51 AD3d 785, 786 [2d Dept 2008], cited in *Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 568 [1st Dept 2011]; *Rivas v New York City Hous. Auth.*, 261 AD2d 148, 148 [1st Dept 1999]).

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11578 In re Sincere L., Dkt. NN-20092/17

A Child under Eighteen Years of Age, etc.,

Romone L.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

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

Dawne A. Mitchell, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Fiordaliza A. Rodriguez, J.), entered on or about December 5, 2018, which, after a hearing, found that respondent father neglected the subject child, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Court Act § 1046[b]; § 1012[f]). The record shows that during an altercation the father punched the mother in the face while the child was present (*see e.g. Matter of Jermaine K.R.*, 176 AD3d 648 [1st Dept 2019]; *Matter of O'Ryan Elizah H. [Kairo E.]*, 171 AD3d 429 [1st Dept 2019]). There exists no basis to disturb the court's credibility determinations

(*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

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: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11579 The People of the State of New York, Ind. 704/15
Respondent,

-against-

Christopher Gomez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered November 9, 2017, convicting defendant, after a jury trial, of promoting prostitution in the third degree, and sentencing him, as a second violent felony offender with a prior violent felony conviction, to a term of 3½ to 7 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence (*see People v Gordon*, 23 NY3d 643, 649 [2014]). The evidence amply supports the conclusion that defendant advanced or profited from prostitution by either managing or supervising a business or enterprise that involved prostitution activity by at least two people (*see* Penal Law § 230.25[1]; *People v Freaney*, 108 AD2d 228, 231 [2d Dept 1985]). Defendant's argument that the evidence only established his management of the particular person who

testified is unpersuasive. The testimony, as well as electronic evidence retrieved from defendant's phones, established that he managed or supervised a prostitution business by soliciting clients, setting and communicating rates, providing transportation, arranging for hotel rooms, preparing advertisements, and addressing nonpayment. Defendant's own communications also reflect that multiple people were engaged in prostitution as part of the business or enterprise he was managing, including during the period covered by the indictment.

The court properly admitted evidence of defendant's communications during the approximately two weeks preceding the period covered in the indictment. These communications were relevant to the charged crime, and they established the existence of a prostitution business which defendant continued to manage or supervise into the period covered by the indictment (*see People v Frumusa*, 29 NY3d 364, 369-70 [2017]). In any event, even if viewed as uncharged crime evidence, the prior communications were also highly probative to show a common scheme or plan (*see People v Molineux*, 168 NY 264, 293, 305 [1901]; *see also People v Brown*, 74 AD3d 1748, 1749 [4th Dept 2010], *lv denied* 15 NY3d 802 [2010]; *People v Grant*, 104 AD2d 674, 675 [3d Dept 1984]), and their probative value outweighed any prejudicial effect.

Defendant's claim that the sentencing court considered

crimes of which defendant was acquitted requires preservation (*see People v Harrison*, 82 NY2d 693 [1993]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that the record does not support defendant's assertion. Although the court expressed its belief that the evidence also supported a conviction of other charges, it indicated that it was only sentencing defendant based on the charge of which he was convicted. We perceive no other basis for reducing the sentence.

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11580 Juan Rivera, Index 158933/17
Plaintiff-Appellant,

-against-

New York City Department of Sanitation, et al.,
Defendants-Respondents.

_____

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

James E. Johnson, Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

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Order, Supreme Court, New York County (Lyle E. Frank, J.), entered March 7, 2019, which granted defendant New York City Department of Sanitation's motion to dismiss the complaint and denied plaintiff's cross motion pursuant to CPLR 3025 to amend the complaint, unanimously reversed, on the facts, without costs, the motion denied and the cross motion granted.

The summons and complaint were served on Corporation Counsel for the City of New York, which answered on behalf of the City of New York. Defendant's motion to dismiss the complaint should have been denied and plaintiff's cross motion to amend the summons and complaint to correct the misnomer granted. The City was not prejudiced by the mis-description and was on notice that

plaintiff intended to seek a judgment against it (*see* CPLR 305[c]; 2001; *Medina v City of New York*, 167 AD2d 268 [1st Dept 1990]).

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11581 In re Steven E., Dkt. V-42316-11/17C
Petitioner-Appellant,

-against-

Angella E.,
Respondent-Respondent.

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Steven E., appellant pro se.

Cohen & Gresser, LLP, New York (Harvey B. Silikovitz of counsel), for respondent.

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

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Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about February 21, 2019, which granted respondent-mother's motion to dismiss the father's petition to modify a custody/visitation order, unanimously affirmed, without costs.

The court properly dismissed the petition seeking modification of the custody/visitation order without a hearing since the father did not credibly allege a material change of circumstances (*see Skidelsky v Skidelsky*, 279 AD2d 356 [1st Dept 2001]). The court acted within its discretion in finding that the claimed changed circumstances were no different than the circumstances that existed at the time of the original order. Moreover, the father did not demonstrate that providing him with

custody of or visitation with the daughter would be in her best interests (*see St. Clement v Casale*, 29 AD3d 367, 368 [1st Dept 2006]).

The remainder of the father's arguments are unpreserved (*Matter of Christian E.*, 66 AD3d 433 [1st Dept 2009]) and are otherwise unavailing.

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11582 The People of the State of New York, Ind. 2922/09
Respondent,

-against-

Rabindra Singh,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered May 10, 2010, as amended January 21, 2011, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the third and fourth degrees, and sentencing him, as a second felony offender, to concurrent prison terms of two to four years, unanimously affirmed.

The court did not advise defendant that if he was not a United States citizen, he could be deported as a result of his plea, as subsequently required under *People v Peque* (22 NY3d 168 [2013], *cert denied sub nom. Thomas v New York*, 574 US 840 [2014]). While the question of whether a defendant was prejudiced by the lack of such advice from the court is generally to be determined by way of a hearing (*id.* at 200-01; *People v Lantigua*, ___ AD3d ___, 2020 NY Slip Op 02557 [1st Dept 2020]);

People v Martinez, 180 AD3d 190 [1st Dept 2020]), under the unique circumstances of this case, we find no reasonable possibility that defendant could make the requisite showing of prejudice at a hearing.

Indeed, at the time that defendant pleaded guilty in 2009, he had been previously twice convicted, a 2010 federal conviction for conspiracy to transport stolen vehicles, and a 2005 grand larceny conviction, which convictions rendered defendant deportable according to federal law. Thus, regardless of whether defendant pleaded guilty to the charges in 2009, had been found guilty after trial or had been acquitted, his status as a deportable non-citizen would not have been affected (see *People v Haley*, 96 AD3d 1168, 1169 [3d Dept 2012] [defendant's immigration status was not affected by guilty plea because he already was deportable based on his prior convictions]). Accordingly, the alleged failure of the sentencing court to inform him of the immigration consequences of his guilty plea in 2009 did not prejudice defendant in any way.

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11583 The People of the State of New York, Respondent, Index 3603/18 4342/18 153000/19

-against-

U.S. Specialty Insurance Co. Inc./AAA Bail Bonds, Surety-Appellant,

Moses Olanibi, Defendant.

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Law Office of Evans D. Prieston, P.C., Long Island City (Evans D. Prieston of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Robin A. McCabe of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Biben, J.), entered on or about June 24, 2019, which denied the motion of Surety U.S. Specialty Insurance Co. Inc./AAA Bail Bonds for remission of a bail forfeiture in the amount of $250,000, unanimously affirmed, without costs.

The court providently exercised its discretion in denying Surety's motion for remission of forfeited bail. The record shows that defendant failed to "render himself amenable to the orders . . . of the criminal court" in which bail was posted (CPL 540.10[1]) when he assaulted the victim in violation of an order of protection issued by the court, causing "prejudice to the People" (*People v Peerless Ins. Co.*, 21 AD2d 609, 613 [1st Dept

1964]) by potentially deterring the victim from testifying in the underlying case (*see e.g. People v Torres*, 112 Misc 2d 145, 153 [Sup Ct, NY County 1981]). Surety failed to establish "exceptional circumstances" warranting the relief sought (*Peerless Ins. Co.*, 21 AD2d at 613).

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11584 Angeni Gil, et al., Index 162588/15
Plaintiffs-Appellants,

-against-

Margis Realty LLC, et al.,
Defendants-Respondents.

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Ginarte Gallardo Gonzalez & Winograd, LLP, LLP, New York (Timothy Norton of counsel), for appellants.

Gennet, Kallmann, Antin, Sweetman & Nichols, P.C., New York (Alan L. Korzen of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered April 26, 2019, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Angeni Gil was injured when, while descending the right side of the exterior staircase of the subject premises, she slipped and when she tried to grab onto a handrail, there was no right-sided handrail. A triable issue of fact thus exists as to whether the absence of a required handrail on that side of the staircase was a proximate cause of the accident (*see Sanchez v Irun*, 83 AD3d 611 [1st Dept 2011]; *Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311 [1st Dept 2008]). Defendants' argument that the missing handrail on the right side of the staircase did

not proximately cause plaintiff's fall since she chose not to use the available left-side handrail, is directed to the issue of comparative negligence (*see Penge v Board of Educ. of City of N.Y.*, 10 AD3d 251, 252 [1st Dept 2004]).

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

ENTERED: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11585 The People of the State of New York, Ind. 3070/17
Respondent,

-against-

Eugene Taylor,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jennifer Westphal 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. at plea; Patricia Nunez, J. at sentence), rendered July 5, 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: MAY 28, 2020

CLERK

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

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11586N In re John McLeod, Index 101065/17
Petitioner-Appellant,

-against-

Department of Sanitation,
Defendant-Respondent.

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John McLeod, appellant pro se.

James E. Johnson, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 28, 2017, which denied the petition to file a late notice of claim and granted respondent's motion to dismiss the proceeding, unanimously affirmed, without costs.

Petitioner seeks leave to file a late notice of claim alleging that his car was taken by respondent on August 8, 2016, when he received a summons from respondent charging that he had left an abandoned vehicle on a public street for more than six hours. The summons was dismissed after a hearing in January 2017, based on petitioner's showing that he did not intend to abandon the vehicle. On or about April 5, 2017, petitioner filed a notice of claim asserting for the first time that respondent was responsible for the loss of his vehicle. Several months after the City rejected the claim as untimely, petitioner sought

leave to file a late notice of claim.

The court providently exercised its discretion in denying the petition. Petitioner made no showing that respondent "acquired actual knowledge of the essential facts constituting the claim" within 90 days after the claim arose or "within a reasonable time thereafter" (General Municipal Law § 50-e[5]), and failed to provide a reasonable excuse for his extended delay in filing a notice of claim and in seeking leave to file a late notice (*see Matter of Smiley v Metropolitan Transp. Auth.*, 168 AD3d 631 [1st Dept 2019]; *Tavarez v City of New York*, 26 AD3d 297, 298-299 [1st Dept 2006]). Even if respondent had appeared at the aforementioned hearing concerning the summons, it would not have learned from any evidence or argument presented by petitioner that he was claiming that respondent, rather than a person or persons unknown, was responsible for the loss of his car. Petitioner also failed to demonstrate that filing a late notice of claim would not prejudice respondent in its ability to

defend against the claim on the merits (*see Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 467-468 [2016]).

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: MAY 28, 2020

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Singh, Moulton, JJ.

11587N Joseph Fisher, Index 652246/19
Plaintiff-Respondent,

-against-

Patrick Stone formerly known as
Patrick O'Brien,
Defendant,

Andrew Davis,
Nonparty Appellant.

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McLaughlin & Stern, LLP, New York (Jonathan R. Jeremias of counsel), and Greene Espel PLLP, Minneapolis, MN (Lawrence M. Shapiro of the bar of the State of Minnesota, admitted pro hac vice, of counsel), for appellant.

Moses & Singer LLP, New York (David Rabinowitz of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered September 24, 2019, which denied nonparty Andrew Davis's motion to intervene under CPLR 1012 and CPLR 1013, unanimously affirmed, without costs.

Intervention as of right under CPLR 1012(a) was properly denied in this action concerning the valuation and disposition of corporate assets. The proposed intervenor's purported interest in the action is contingent upon an Illinois divorce court's determination as to whether defendant's interest in the assets are marital property. Accordingly, the proposed intervenor cannot demonstrate an ascertainable property interest in this

commercial business dispute (*Matter of Rapoport*, 91 AD3d 509, 509-510 [1st Dept 2012]).

The motion court providently exercised its discretion by denying permissive intervention under CPLR 1013. Any common question of corporate asset valuation between plaintiff and the proposed intervenor will only become relevant upon the Illinois court's determination that defendant's interest in the corporate assets are marital property.

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

ENTERED: MAY 28, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Judith J. Gische, J.P.
Barbara R. Kapnick
Troy K. Webber
Peter H. Moulton, JJ.

11012
Index 155991/18

_____x

Estates NY Real Estate Services LLC,
Plaintiff-Appellant,

-against-

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

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Julio Rodriguez, III, J.), entered June 5, 2019, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the second amended complaint seeking an order declaring that the Human Resources Administration's security deposit voucher program does not fall within the "source of income" provisions of the New York City Human Rights Law, and that the program was prohibited by the Urstadt Law and Social Services Law § 143-c.

Rosenberg & Estis, P.C., New York (Jeffrey Turkel and Nicholas Turkel of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Barbara Graves-Poller and Claude S. Platton of counsel), for respondents.

WEBBER, J.

In this declaratory judgment action, we are asked to determine whether the Human Resources Administration's security deposit vouchers constitute a "lawful source of income" under the City Human Rights Law (HRL) and whether the voucher program violates Social Services Law § 143-c or the Urstadt Law.

Plaintiff, Estates NY Real Estate Services LLC (Estates), acts as manager and leasing agent for multi-family apartment buildings throughout New York City. Defendants are the New York City Commission on Human Rights (Commission), which administers the City HRL, and the City of New York, which operates the New York City Human Resources Administration (HRA), an administrative unit of the New York City Department of Social Services.

The Underlying Dispute

In 2017, Latonya Walters completed an application for an apartment located at 2775 East 12th Street in New York City. At the time of the application, she informed the leasing agent, an employee of plaintiff Estates, that she intended to pay the security deposit by an HRA security voucher. Plaintiff's employee told Walters that plaintiff required a cash security deposit from all prospective tenants. On June 20, 2017, the employee wrote to the New York City Housing Authority (NYCHA) and

stated that Estates was canceling Walters's application because "the landlord cannot accept security vouchers as a payment." In the spring of 2018, Walters contacted another Estates employee, and asked whether Estates had changed its policy. The employee advised her that it had not. Subsequent attempts by the Commission, which had been contacted by Ms. Walters, to resolve the matter failed.

Administrative Complaint

In July 2018, defendants filed a complaint against Estates claiming that, in refusing to accept the HRA security voucher, Estates had violated the HRL, which prohibits a landlord from denying housing to an individual based on her "lawful source of income" (Administrative Code of City of NY §§ 8-107[5][a][1][a], 8-107[5][a][1][b], & 8-107[5][c][1]).

Plaintiff commenced the instant declaratory judgment action alleging that the City had tried to force landlords to accept HRA security vouchers in lieu of a cash security deposit. Estates alleged three causes of action: a judgment declaring the "source of income" provisions of the HRL do not apply to HRA security vouchers; a judgment declaring the City's conduct was prohibited by the Urstadt Law, which prohibits any increase to the number of rent controlled or rent stabilized buildings; and a judgment

declaring the City's conduct was prohibited by Social Services Law § 143-c, which governs security deposits paid by HRA.

Defendants moved to dismiss arguing plaintiff failed to state a cause of action. Supreme Court granted the motion to dismiss concluding that there was no meaningful distinction between the term "income" and "security deposit," or between "rent" and "security deposit," and further that the HRA security voucher is a "lawful source of income" for purposes of Administrative Code § 8-107(5)(a)(1).

Discussion

We find that the court correctly concluded that HRA's security deposit vouchers are a "lawful source of income" under the City HRL (Administrative Code § 8-102) and are therefore included in the HRL's prohibition against discrimination by a landlord against a prospective tenant because of "any lawful source of income" (Administrative Code § 8-107[5][a][1]). "The term 'lawful source of income' includes income derived from social security, or any form of federal, state or local public assistance or housing assistance including section 8 vouchers"[1]

[1] The Section 8 voucher program provides federal assistance to low-income families to help them rent housing in the private market. The program "works as a rental subsidy," where the New York City Housing Authority pays part of the family's share of

(Administrative Code § 8-102; *see Tapia v Successful Mgt. Corp.*, 79 AD3d 422 [1st Dept 2010]).

Administrative Code § 8-107(5) prohibits a landlord from refusing to accept a Section 8 voucher from an existing tenant or refusing a lease to a prospective tenant who seeks to pay rent with a Section 8 voucher (*Rakhman v Alco Realty I, L.P.*, 81 AD3d 424 [1st Dept 2011]).

In *Alston v Starrett City, Inc.* (161 AD3d 37, 40 [1st Dept 2018]), this Court in addressing the City HRL, noted that the vouchers were used to cover rent as well as security deposits, however, we never expressly addressed the issue of whether security deposit vouchers constitute lawful sources of income. It is clear that the government-issued security vouchers constitute a form of public assistance and housing assistance. They are issued pursuant to Social Services Law § 143-c, contained in Title 1 of the Social Services Law, which is intended to "provide adequately for those unable to maintain themselves" (Social Services Law § 131 [1]). Social Services Law

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rent to the landlord on the family's behalf (https://www1.nyc.gov/site/nycha/section-8/about-section-8.page [last accessed April 14, 2020]; *see* 42 USC § 1437f). Thus, unlike HRA's security vouchers, which guarantee future payment in certain circumstances, the Section 8 rent vouchers are cash rent payments to the landlord.

§ 143-c(4) states that the section applies to "federally aided categories of public assistance." Clearly, they also constitute a form of housing assistance.

Plaintiff's arguments that the security deposit vouchers are not "income" because the term "income" applies to means of paying "rent," not means of paying a security deposit and that the City Council intended the phrase "lawful source of income" to refer only to cash, or cash equivalents, to pay rent are without merit. There is nothing in the statute or its legislative history to support such a conclusion.

In adding Administrative Code § 8-107(5), or "Local Law 10," to the City HRL, the City Council stated:

> "The Council hereby finds that some landlords refuse to offer available units because of the *source of income tenants . . . plan to use to pay the rent*. In particular, studies have shown that landlords discriminate against holders of section 8 vouchers because of prejudices they hold about voucher holders. This bill would make it illegal to discriminate on that basis"

(Administrative Code § 8-101 [Provisions of Section 1 of LL 10/2008] [emphasis added]).

In subsequent discussions of the added code section, the City Council stated that Local Law 10 would help maintain affordable housing by maximizing the use of Section 8 vouchers or

other forms of governmental rent payment in the City. The City Council further noted that the intent was to help those who have a Section 8 voucher to use that voucher quickly and to get to affordable housing. It was further contemplated that there would be other positive effects, such as reducing the level of homelessness and all the dislocation of families in the city. Plaintiff's arguments are also inconsistent with the requirement that the City HRL "be construed liberally" to accomplish its "uniquely broad and remedial purposes" (Administrative Code § 8-130 [a]).

The fact that the security vouchers are a guarantee of payment, rather than a cash payment, does not render them not "income," as they are an item of value, worth a payment of up to one month's rent on the tenant's behalf to compensate for unpaid rent or damages to an apartment.

While we disagree with Supreme Court's reasoning that the Department of Social Services may set the terms and conditions in such form "as the Department may require," we do find that dismissal of the third cause of action seeking a declaration that the voucher program violates Social Services Law § 143-c was

proper.[2] Supreme Court correctly found that HRA's security deposit voucher program does not violate Social Services Law § 143-c.

Social Services Law § 143-c is titled "Avoidance of abuses in connection with rent security deposits." It states that whenever a landlord requires that the landlord be "secured" for nonpayment of rent or damages as a condition to renting an apartment to a public assistance recipient, a Department of Social Services official may, "in accordance with the regulations of the department secure the landlord by either of the following means at the option of the local social services official:

> "(a) By means of an appropriate agreement between the landlord and the social services official, or
>
> "(b) By depositing money in an escrow account, not under the control of the landlord or his agent, subject to the terms and conditions of an agreement between the landlord and the social services official in such form as the department may require or approve . . . "

(Social Services Law § 143-c[1]).

As noted by its title, Social Services Law § 143-c was

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[2]To the extent defendants argue that plaintiff lacks standing to seek an order declaring the voucher program to be a violation of Social Services Law § 143-c and the Urstadt Law, they waived the argument by failing to raise it in their pre-answer motion to dismiss (CPLR 3211[a], [e]; *Matter of Fossella v Dinkins*, 66 NY2d 162, 167 [1985]).

enacted to prevent abuses of cash security deposits by both landlords, who previously retained cash deposits by making false claims for damages, and tenants, who converted cash deposits – paid from public assistance funds – to their own use after landlords returned them. By 1972, when the statute was enacted, the Department of Social Services calculated that it had little chance of recovering $25 to $30 million dollars in cash security deposits, due to such abuses. Thus, it was enacted to protect the City, not tenants.

Plaintiff's argument that the HRA security voucher is not an "appropriate agreement" with a landlord pursuant to Social Services Law § 143-c (1)(a), as a landlord is forced to accept the terms or be the subject of a complaint under the HRL is without merit.[3]

An enforceable agreement consists of an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound (*Kolchins v Evolution Mkts, Inc.*, 128 AD3d 47, 59 [1st Dept

[3]Plaintiff does not appear to argue that the program results in unconscionable agreements. In any event, defendants are correct that plaintiff failed to show, or raise any issue of fact whether, the vouchers were unreasonably favorable to defendants, as is required to establish an unconscionable agreement (*Cash4Cases, Inc. v Brunetti*, 167 AD3d 448, 449 [1st Dept 2018]; *Mazursky Group, Inc. v 953 Realty Corp.*, 166 AD3d 432, 433 [1st Dept 2018]).

2015], *affd* 31 NY3d 100 [2018]). To the extent that a landlord signs the security voucher, the landlord has accepted the offer and agrees to be bound by the terms and conditions of the voucher.

While, as plaintiff argues, the landlord is essentially compelled to "agree" to accept the security voucher, the fact that anti-discrimination laws require a landlord to agree to accept the voucher, even if under protest, does not, standing alone, render it an inappropriate agreement, or a contract of adhesion. "Adhesion is found where the party seeking to enforce the contract use[s] high pressure tactics or deceptive language in the contract and where there is inequality of bargaining power between the parties . . . . In addition, it must be shown that the contract inflicts substantive unfairness on the weaker party" (*Precision Mech. v Dormitory Auth. of State of N.Y.*, 5 AD3d 653, 654 [2d Dept 2004] [internal quotation marks omitted]; *see Molino v Sagamore*, 105 AD3d 922 [2d Dept 2013]).

Plaintiff has failed to make such a showing. Plaintiff does not identify any terms that are substantively unfair to it in the voucher form. Plaintiff does not challenge the security voucher's requirement that proof of unpaid rent or damages be submitted and verified. Nor does plaintiff allege that HRA

failed to pay plaintiff in any case where it sought payment pursuant to the guarantee in the voucher.

Nor do we find that the "threat" of being the subject of an anti-discrimination claim renders the agreement between the landlord and tenant voidable (*see Yoon Jung Kim v An*, 150 AD3d 590 [1st Dept 2017]). The threat to exercise a valid right does not constitute duress (*Marine Midland Bank v Mitchell*, 100 AD2d 733 [4th Dept 1984]).

Finally, we find that the voucher program does not violate the Urstadt Law (McKinney's Uncons Laws of NY § 8605). "The 'Urstadt Law was intended to check City attempts, whether by local law or regulation, to expand the set of buildings subject to rent control or stabilization'" (*Alston v Starrett City, Inc.*, 161 AD3d at 39, quoting *City of New York v New York State Div. of Hous. & Community Renewal*, 97 NY2d 216, 227 [2001]). Here, a landlord's acceptance of such security deposit vouchers "will have no impact in expanding the buildings subject to the rent stabilization law or expanding regulation under the rent laws" (*Tapia v Successful Mgt. Corp.*, 79 AD3d at 425 [internal quotation marks omitted]).

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

Accordingly the order of the Supreme Court, New York County (Julio Rodriguez, III, J.), entered June 5, 2019, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the second amended complaint seeking an order declaring that the Human Resources Administration's security deposit voucher program does not fall within the "source of income" provisions of the New York City Human Rights Law, and that the program was prohibited by the Urstadt Law and Social Services Law § 143-c, should be affirmed, without costs.

All concur.

Order Supreme Court, New York County (Julio Rodriguez, III, J.), entered June 5, 2019, affirmed, without costs.

Opinion by Webber, J. All concur.

Gische, J.P., Kapnick, Webber, Moulton, JJ.

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

ENTERED: MAY 28, 2020

CLERK