SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 4, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9217-
9218N Index 150584/16

In re Wimbledon Financing Master Fund, Ltd.,
Petitioner-Respondent-Appellant,

-against-

David Bergstein, et al.,
Respondents.

- - - - -

Steven J. Katzman, et al.,
Nonparty Appellants-Respondents.

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Hubell & Associates LLC, New York (Barry A. Cozier of counsel), for appellants-respondents.

Kaplan Rice LLP, New York (Joseph A. Matteo of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 10, 2018, which, to the extent appealed from, granted petitioner's motion to hold nonparties Steven Katzman and Bienert, Miller & Katzman PLC (BMK) in civil contempt for willful neglect of restraining notices served on respondents Bergstein and Graybox, ordered Katzman and BMK to pay petitioner's attorneys' fees in connection with the motion, ordered Katzman to attach a copy of the May 10, 2018 (the order)

order to all motions for pro hac vice admission in New York for the next five years and to notify the court in a related California action of the order, and denied petitioner's request for monetary sanctions in the amount of funds paid in violation of the restraining notices, unanimously modified, on the law, to vacate so much of the order as directed Katzman to attach a copy of the order to all motions for pro hac vice admission in New York for the next five years, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 20, 2018, which directed Katzman to disclose "if, when and how" he became aware of the restraining notices, unanimously dismissed, without costs, as taken from a nonappealable order.

The motion court providently exercised its discretion in finding that Katzman was sufficiently aware of the restraining notices to be held, along with his firm, in civil contempt for wilful neglect of the notices (*see Kanbar v Quad Cinema Corp.*, 151 Misc 2d 439, 441 [App Term, 1st Dept 1991], *affd as modified* 195 AD2d 412 [1st Dept 1993]; *see also Security Trust Co. of Rochester v Magar Homes*, 92 AD2d 714, 715 [4th Dept 1983]["In order to satisfy due process requirements, a sanction for violation of CPLR 5222 may be imposed only after proof of knowledge, actual or constructive, of the restraining notice"]). CPLR 5251 provides contempt as a remedy for disobedience of a

restraining notice, whereas the procedure for the contempt punishment, is not supplied by the CPLR, but by Judiciary Law § 753 (*see* Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5251:1).

Katzman admitted that he received and reviewed copies of the notices, which were emailed to him 10 minutes after they were received by co-counsel Sills Cummis & Gross P.C., on July 21, 2017. Although the notices did not specify the settlement proceeds that were placed in BMK's escrow account, Katzman was sufficiently aware that Bergstein and Graybox "directly derived the benefits" of the transfer of those funds and thus had "sufficient interest in the funds . . . that the restraining notice applied to them" (*Matter of Two Sams Assoc., LLC v Schaeffer & Krongold LLP*, 2006 NY Slip Op 30848[U], *2 [Sup Ct, NY County 2006]).

Further, "[a] restraining notice may be employed against contingent property interests, including trusts that are managed by independent trustees with full control over disbursements to the judgment debtor" (*Amtrust N. Am., Inc. v Preferred Contrs. Ins. Co. Risk Retention Group, LLC*, 2016 WL 6208288, *6, 2016 US Dist LEXIS 145705, *16 [SD NY 2016]). Katzman and BMK cite no authority in support of their contention that the California action has a superior interest in the settlement proceeds.

The court appropriately limited the contempt sanction to petitioner's attorneys' fees (*see e.g. 1319 Third Ave. Realty Corp. v Chateaubriant Rest. Dev. Co., LLC*, 57 AD3d 340, 341 [1st Dept 2008]). We reject Katzman's contention that the court impermissibly engaged in attorney discipline by ordering him to give notification of the contempt order to the California court presiding over the aforementioned related action pending in that state. However, while we understand the court's concern in directing Katzman to attach a copy of the contempt order to any motion for his pro hac vice admission that may be made for the next five years (*see* Code of Judicial Conduct, Canon 1 [22 NYCRR § 100.1] ["A Judge Shall Uphold the Integrity and Independence of the Judiciary"]), whether to require such action is a matter of attorney discipline committed to the Attorney Grievance Committee of each department of the Appellate Division (*see Matter of Erdheim [Selkowe]*, 51 AD2d 705 [1st Dept 1976]). Accordingly, we modify the order under review to delete that requirement.

The April 20, 2018 order is not appealable as of right, and Katzman and BMK did not seek permission to appeal (*see* CPLR 5701[a], [c]; *Sommer v Kaufman*, 41 AD2d 520 [1st Dept 1973]).

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9512 The People of the State of New York, Ind. 5863/11
Respondent,

-against-

Troy Folk,
Defendant-Appellant.

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Christina Swarns, Office of the Appellate Defender, New York (Elizabeth R. Moulton of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 15, 2013, convicting defendant, after a jury trial, of assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 18 years, unanimously modified, on the law, to the extent of vacating the assault conviction and the weapon possession conviction under the third count of the indictment (Penal Law § 265.03[1]), and remanding for a new trial on those two counts, as well as other proceedings consistent with this decision, and otherwise affirmed.

The People concede that the trial court erred in admitting the grand jury testimony of a witness indicating that defendant fired an errant shot that struck a bystander as defendant and a

companion fled from another group following a verbal altercation. Specifically, the People acknowledge that the testimony was not admissible under the past recollection recorded exception to the hearsay rule, because the witness did not testify at trial that the grand jury testimony "correctly represented his knowledge and recollection when made" (*People v Taylor*, 80 NY2d 1, 8 [1992]; *see also People v Tapia*, __ NY3d __, 2019 NY Slip Op 02442, *2 [2019]), and was not admissible for impeachment purposes under CPL 60.35 because the witness's trial testimony that he could not remember the relevant events did not "affirmatively damage[] the case of the party calling him" (*People v Fitzpatrick*, 40 NY2d 44, 51 [1976]).

We are not persuaded by the People's argument that admission of this evidence was harmless with regard to defendant's convictions for assault and for possession of a weapon with intent to use it unlawfully against another in violation of Penal Law § 265.03(1). There was other evidence that defendant committed these crimes, either as a principal or an accomplice, including a remark in a recorded prison telephone call that supported an inference that defendant was the shooter, and defendant's admission to police that although he did not believe his companion would shoot, he handed a revolver to his companion, who fired it. However, the evidence was not so overwhelming that

it can be reasonably concluded that "there is [no] significant probability . . . that the jury would have acquitted the defendant had it not been for the error or errors which occurred" (*People v Crimmins*, 36 NY2d 230, 242 [1975]). Defendant correctly argues that the disputed grand jury testimony, read into the record and relied on by the prosecutor in summation, effectively constituted the only eyewitness testimony indicating that defendant fired the weapon, or that he displayed it or used it to threaten the opposing group. Based on the record as a whole, we cannot discount the significant likelihood that, in the absence of this evidence, the jury may have had a reasonable doubt that defendant was the shooter, or, that if he was not, he shared the shooter's intent to cause serious physical injury, or that he intended for the weapon to be used unlawfully.

In contrast, we find that the court's error was harmless as to defendant's conviction of criminal possession of a weapon under Penal Law § 265.03(3), for simply possessing a loaded firearm outside his home or place of business. While denying that he fired the revolver, defendant admitted to police that he took it out of his pocket and handed it to his companion. Based principally on this evidence, there is no significant probability that exclusion of the inadmissible grand jury testimony would have resulted in defendant's acquittal of simple possession.

Defendant's legal sufficiency claims are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that, even if the inadmissible grand jury evidence is disregarded, the verdict as to all counts was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Because we are ordering a new trial on the counts indicated, we need not address defendant's other claims of trial error except in regard to whether defendant is also entitled to a new trial on the remaining count. We conclude that there is no reasonable possibility that any errors involving the admission of evidence or the court's jury instructions and conduct of the trial contributed to the verdict convicting defendant of simple weapon possession. We leave such matters to the sound discretion of the court in the event of a retrial on the other counts, should these issues arise (*see People v Evans*, 94 NY2d 499, 504-506 [2000]).

We also decline to reach defendant's claim that the sentence, including the sentence on the conviction we have sustained, should be reduced. Instead, we conclude that in light

of the changed circumstances, defendant should be resentenced on that conviction, regardless of whether the People elect to retry defendant on the other two counts.

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9513 Arlene Farkas, Index 151659/17
Plaintiff-Appellant,

-against-

River House Realty Co., Inc.,
et al.,
Defendants-Respondents.

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Jaroslawicz & Jaros PLLC, New York (David Tolchin and David Jaroslawicz of counsel), for appellant.

Kaufman Borgeest & Ryan LLP, New York (Laura B. Juffa of counsel), for River House Realty Co., Inc., John Allison, Manuel Balbontin, Charles Hughes, Jeffrey Leeds and Rosalind Walter, respondents.

Dilworth Paxson LLP, New York (Ira N. Glauber of counsel), for Elizabeth R. Kabler, respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 16, 2018, which, insofar as appealed from, granted defendants' motions to dismiss the complaint for failure to state a cause of action, unanimously affirmed, with costs.

Plaintiff owned a cooperative apartment (the Apartment) in the building owned by defendant River House. Plaintiff entered into a contract to sell the Apartment to the French Republic, for use as the official residence of its ambassador to the United Nations. Plaintiff alleges that defendants violated the anti-housing discrimination provisions of the New York State and City Human Rights Laws (State and City HRLs), or aided and abetted the

violation of those statutes, by imposing uniquely onerous conditions on approval of the sale (*see* Executive Law § 296[5][a][2]; Administrative Code of City of NY § 8-107[5][a][1][b]). Plaintiff has failed to state a claim under any of these statutes, however, as she has failed to plead any concrete factual allegations in support of her claim that defendants were motivated to frustrate the sale by anti-French bias (*see McCabe v Consulate Gen. of Can.*, 170 AD3d 449, 450 [1st Dept 2019]; *Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]).

This defect is likewise fatal to plaintiff's claims under Civil Rights Law (CRL) § 19-a. Plaintiff has further failed to plead that River House is a "publicly assisted housing accommodation" (CRL § 18-b[3][e]), a necessary element of a claim brought under CRL article 2-a (*see* CRL § 18-e; *Sisters of Resurrection, N.Y. v Country Horizons*, 257 AD2d 729, 731 [3d Dept 1999]; *Bachman v State Div. of Human Rights*, 104 AD2d 111, 111, 114 [1st Dept 1984]).

Plaintiff has failed to plead that there was an actual breach of her contract with the French Republic, an indispensable element of a claim for tortious interference with contract (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621 [1996]; *Alavian v Zane*, 101 AD3d 475, 476 [1st Dept 2012], *lv*

denied 21 NY3d 862 [2013]). Moreover, even according plaintiff the benefit of every favorable inference on this motion to dismiss on the pleadings, the record indicates that defendant Kabler, against whom plaintiff levels her tortious interference claim, had "justification" for opposing the sale (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

We have no occasion to consider Kabler's request for sanctions, in light of her failure to cross-appeal from the denial of her sanctions request below (*see Seldon v Spinnell*, 95 AD3d 779, 779 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013]).

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9514 In re Oluwashola J.P.,

A Dependent Child Under the Age
of Eighteen Years, etc.,

Emma Z.T.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about November 21, 2017, which terminated respondent mother's parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that respondent, by reason of her mental illness, is unable at present and for the foreseeable future to provide proper and adequate care for her son (Social Services Law § 384-b[4][c]; *see Matter of Elizabeth H. [Ylein S.]*, 165 AD3d 402, 402-403 [1st Dept

2018]). Such evidence included a report and testimony from a court appointed psychologist who reviewed respondent's medical records, conducted her own mental health evaluation, which included a questionnaire and an extensive clinical interview, and concluded that respondent suffers from a combination of schizophrenia, characterized by paranoia and disorganized thoughts and behaviors, and a mood disorder (*see Matter of Jeremiah M. [Sabrina Ann M.]*, 109 AD3d 736 [1st Dept 2013], *lv denied* 22 NY3d 856 [2013]). Exacerbating respondent's ability to care for her son were the expert's conclusions that respondent had limited insight into her condition, a history of inconsistent engagement in treatment, and her noncompliance with the prescribed medication regimen (*see Matter of Priseten T. [Miatta T.]*, 147 AD3d 458 [1st Dept 2017]). Under the circumstances presented, it was not necessary for the psychologist to observe interactions between respondent and her son before reaching her conclusions (*see Matter of Inuel S. [Eunice* F.], 162 AD3d 586, 587 [1st Dept 2018]).

Respondent failed to sustain her burden of demonstrating that she was denied meaningful representation and that the alleged deficient representation resulted in actual prejudice *(Matter of Asia Sabrina N. [Olu N.]*, 117 AD3d 543, 544 [1st Dept 2014]). Specifically, respondent failed to establish that her

attorney's failure to call a specific mental health professional as an expert witness was not a strategic determination *(Matter of Gabrielle G. [Mike G.]*, 168 AD3d 589, 590 [1st Dept 2019], *lv denied* 32 NY3d 915 [2019]).

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9515 S.-B., on behalf of Index 156539/16
Deandre S.-B., et al.,
Plaintiffs-Appellants,

-against-

Damir Radincic,
Defendant-Respondent.

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Anthony M. DeFazio Law, PC, Beacon (Anthony M. DeFazio of counsel), for appellants.

Mintzer Sarowitz Zeris Ledva & Meyers LLP, New York (Thomas G. Darmody of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 5, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie that he neither created nor had actual or constructive notice of the alleged dangerous condition of his backyard, where the infant plaintiff (Deandre) was injured playing on tree logs (*see Delosangeles v Asian Ams. for Equality, Inc.*, 40 AD3d 550, 551 [1st Dept 2007]). Defendant testified that he had had the tree cut down and the logs stacked along a property fence line several years earlier and had never seen the logs anywhere else on the property. Deandre testified that he and his friends had arranged the logs in a line and were

jumping from log to log when he fell. The record shows that no one had complained to defendant, an out-of-possession landlord, about the logs before the accident, and Deandre testified that he had been playing on them for about 10 minutes when he fell.

Plaintiffs contend that it was foreseeable that children would move the logs. However, absent evidence of earlier incidents involving the logs or any complaint made to defendant about the logs, the possibility of children playing with them does not render the presence of the logs in the backyard foreseeably dangerous (*see Osorio v Thomas Balsley Assoc.*, 69 AD3d 402, 403 [1st Dept 2010]).

Plaintiffs also failed to raise an issue of fact as to whether Deandre could fully appreciate the risks of jumping onto logs. As Deandre himself created the danger by setting up and jumping on the logs while playing with his friends, plaintiffs cannot show that he was faced with a risk that was unassumed,

concealed or increased (*see Barretto v City of New York*, 229 AD2d 214, 218-219 [1st Dept 1997], *lv denied* 90 NY2d 805 [1997]).

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9516 Katherine Aston, et al, Index 160588/15
Plaintiffs-Appellants,

-against-

Algoma Hardwoods, Inc., et al.,
Defendants,

Dykes Lumber Co., Inc.,
Defendant-Respondent.

_____

Belluck & Fox, LLP, New York (Seth A. Dymond of counsel), for appellants.

Clyde & Co US LLP, New York (Peter J. Dinunzio of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 14, 2018, which granted defendant Dykes Lumber Co., Inc.'s (defendant) motion to dismiss the complaint as against it for lack of personal jurisdiction, unanimously affirmed, without costs.

Supreme Court correctly determined that it does not have personal jurisdiction pursuant to CPLR 302(a)(1) over defendant Dykes Lumber Co., Inc. Plaintiff, a New Jersey resident, alleges that she was injured in New Jersey by products allegedly sold at defendant's establishment in New Jersey. She has identified no activity of defendant in New York, either before or after its headquarters moved to New Jersey, that has a sufficient nexus to

the injury to confer jurisdiction pursuant to CPLR 302(a)(1) (*see generally D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 297-298 [2017]; *cf. Robins v Procure Treatment Ctrs., Inc.*, 157 AD3d 606 [1st Dept 2018] [where injury occurred as result of medical treatment at New Jersey facility by New Jersey defendant, evidence of defendant's advertising in New York and referral agreement with New York facility warranted jurisdictional discovery under CPLR 302(a)(1)]).

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9517 In re Paul Siegel, Index 156193/18
Petitioner-Appellant,

-against-

New York State Division of Housing
& Community Renewal, et al.,
Respondents-Respondents.

_____

Zingman & Associates PLLC, New York (Cheryl R. Ginsburg of counsel), for appellant.

Mark F. Palomino, New York (Aida P. Reyes of counsel), for New York State Division of Housing & Community Renewal, respondent.

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York (David Hershey-Webb of counsel), for Elizabeth Siracuse, respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered on or about August 30, 2018, which granted the petition brought pursuant to CPLR article 78 to the extent of annulling a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated November 4, 2013, finding that respondent Elizabeth Siracuse overpaid rent in a certain amount, and directing petitioner to refund or credit that amount to Siracuse, with treble damages plus interest, remanded the matter to DHCR for de novo review upon proper service of notice, and directed that petitioner be afforded the opportunity to answer and otherwise respond to the

overcharge complaint dated March 20, 2011 within 60 days of such service, unanimously affirmed, without costs.

DHCR issued the November 2013 determination improperly assessing damages against petitioner, who had not received proper notice of a rent overcharge complaint filed in March 2011 by Siracuse, who subleased an apartment from petitioner. Under these circumstances, the court properly declined to dismiss the DHCR proceeding, and instead remanded the rent overcharge matter to DHCR for de novo review and ordered DHCR to provide petitioner with adequate notice and an opportunity to be heard (*see Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 221 [1st Dept 2002]).

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: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9518 The People of the State of New York, Respondent, Ind. 4525/15

-against-

Ariel M., Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered January 12, 2017, unanimously affirmed.

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

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

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

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9519 Sergey Rodionov, etc., Index 651976/16
Plaintiff-Appellant,

Alexander Ezhkov, etc.,
Plaintiff,

-against-

William Donald Redfern also known as
Donald Redfern), et al.,
Defendants-Respondents,

Peter Voletsky, et al.,
Defendants.

_____

Otterbourg, P.C., New York (Pauline McTernan of counsel), for appellant.

Bachner & Associates, P.C., New York (Michael F. Bachner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 5, 2018, to the extent it granted defendants William Donald Redfern, Fabienne Delaunay, and Ellen Rachelle Wittman's motion to dismiss the complaint against them on grounds of, inter alia, forum non conveniens (CPLR 327[a]), unanimously affirmed, without costs.

The court correctly dismissed the complaint on grounds of forum non conveniens. The court properly balanced the factors set forth in *Islamic Republic of Iran v Pahlavi* (62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]) in finding New York to be

an inconvenient forum for the dispute. Although defendants employed a New York limited liability company and a New York investment account in carrying out the alleged fraudulent scheme, the bulk of the fraudulent transactions occurred in Cyprus, with most of the litigants and witnesses being domiciled or located there (*see Metz v Davis Polk & Wardwell*, 133 AD3d 501 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]; *Davidson Extrusions v Touche Ross & Co.*, 131 AD2d 421, 423 [2d Dept 1987]). Given the lack of a substantial nexus to New York, litigating the dispute here would impose a burden on New York courts (*see Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 [1972]. Further, Cyprus is an adequate alternative forum for litigating the dispute (*see LaSala v Bank of Cyprus Pub. Co.*, 510 F Supp 2d 246, 255-256 [SD NY 2007]).

In light of the foregoing, we need not reach the parties' remaining contentions.

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9520 Gail Goldson, Index 21551/15E
Plaintiff-Respondent,

-against-

Ronald Mann, M.D.,
Defendant-Appellant.

_____

Pilkington & Leggett, P.C., White Plains (Michael N. Romano of counsel), for appellant.

The Law Offices of Christopher P. Di Giulio, P.C., New York (William Thymius of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered March 23, 2018, which, inter alia, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to meet his prima facie burden of demonstrating that he did not depart from good and accepted medical practice in examining plaintiff during an independent medical examination (IME), or that any such departure was not a proximate cause of plaintiff's injury to her left shoulder (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]). Defendant's expert affirmation, which relied on defendant's testimony regarding his custom and practice of examining patients during his IMEs, was insufficient. Defendant's testimony did not establish a deliberate and repetitive practice sufficient to show

evidence of his behavior during plaintiff's examination, as he testified that his examination varied depending on the examinee (*see Rivera v Anilesh*, 8 NY3d 627, 634 [2007]). Therefore, the expert's reliance on such testimony to conclude that defendant had not deviated from the accepted standard of care rendered his affirmation insufficient (*compare id.* at 635-636).

Defendant's expert also failed to establish that defendant did not cause or exacerbate plaintiff's left shoulder condition. He failed to address differences in plaintiff's MRI findings or statements made by plaintiff's treating physician, which suggested that plaintiff had suffered a new injury after the IME. The expert also ignored plaintiff's testimony that defendant had forcefully pushed her left arm over her head and caused a new injury (*see Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]), and provided no support for his statement that plaintiff's post-IME injuries were degenerative in nature, and not traumatically induced (*see Frias v James*, 69 AD3d 466, 467 [1st Dept 2010]).

In light of defendant's failure to establish prima facie entitlement to summary judgment, plaintiff's opposition need not

be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In any event, plaintiff's testimony and medical records clearly raised triable issues.

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

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9521 Stefano Bonventre, Index 153756/15
Plaintiff-Respondent,

-against-

Soho Mews Condominium, et al.,
Defendants-Appellants,

Penmark Management LLC, et al.,
Defendants.

Gallo Vitucci Klar LLP, New York (Chad E. Sjoquist of counsel), for appellants.

David Horowitz, P.C., New York (David Fischman of counsel), for respondent.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 4, 2019, which denied the motion of defendants Soho Mews Condominium and Sequoia Property Management Corp. for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's account of the accident makes clear that neither the ladder on which he climbed nor the surface on which the ladder was placed was defective or dangerous. Rather, it was the positioning and use of the ladder that caused plaintiff's fall. Furthermore, there is no evidence that defendants exercised any

supervisory control or had any input in the ultimate positioning of the ladder, which plaintiff admittedly discussed with his supervisor (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Ventura v Ozone Park Holding Corp.*, 84 AD3d 516, 517 [1st Dept 2011]).

Since defendant Watson Gold Designs, Inc. did not oppose defendants' motion for summary judgment dismissing its cross claim, the cross claim should have been dismissed (*see e.g. Cassell v City of New York*, 159 AD3d 603 [1st Dept 2018].

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9522 In re Vanessa R.,
Petitioner-Respondent,

-against-

Christopher A.E. (Anonymous),
Respondent-Appellant.

_____

Larry S. Bachner, New York, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

_____

Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about May 8, 2017, which, after a fact-finding hearing, found that respondent committed the family offenses of harassment in the second degree and assault in the second degree, and issued a one-year order of protection against him, unanimously modified, on the law, to vacate the finding of assault in the second degree, and otherwise affirmed, without costs.

Although the order of protection has expired by its own terms, it still imposes enduring consequences, and therefore this appeal is not moot (*see Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, 671-672 [2015]).

The finding that respondent committed acts in 2012 that constitute assault in the second degree is not supported by a fair preponderance of the evidence (*see* Family Court Act § 832).

Petitioner testified that respondent, while "on top of [her] [in bed]" caused some bruising to her legs, which she treated at home with an ice pack. This evidence does not establish that respondent intended to cause her "serious physical injury" and caused her such injury (Penal Law §§ 120.05[1]; 10.00[10]).

Nor does it support a finding of assault in the third degree (Penal Law § 120.00[1]), as petitioner urges on appeal. Even assuming that the bruising on petitioner's legs would support a finding of physical injury (Penal Law § 10.00[9]), the evidence fails to establish respondent's intent to cause her such injury (*see Matter of Buskey v Buskey*, 133 AD3d 655, 656 [2d Dept 2015]). Petitioner testified that respondent said he was "play fighting" and that she accepted this explanation without giving it another thought. It would not be rational to infer from this evidence that respondent intended to cause physical injury to petitioner.

The finding that respondent committed the family offense of harassment in the second degree is supported by a fair preponderance of the evidence, which shows that respondent's conduct was intended to harass, annoy or alarm petitioner (Penal Law § 240.26). Petitioner testified that respondent made several threatening phone calls to her and followed her around the neighborhood, which alarmed petitioner and served no legitimate

purpose (*see e.g. Matter of Jacobs v Jacobs*, 138 AD3d 742 [2d Dept 2016], *lv denied* 28 NY3d 901 [2016]). Petitioner and her then eight-year-old daughter also testified to an incident in which respondent forced the child to consume a pack of gum, which caused her to vomit, and then to eat her own vomit. Contrary to respondent's contentions, there is no basis for disturbing the Referee's credibility determinations (*see Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]).

The finding that respondent committed acts that constituted the family offense of harassment in the second degree warranted the issuance of the order of protection (*see Matter of Doris M. v Yarenis P.*, 161 AD3d 502, 503 [1st Dept 2018]).

Respondent's contentions that the Referee abused her discretion by failing to appoint an attorney for petitioner's daughter and to conduct a more extensive allocution of the child are unpreserved for appellate review (*see Dana-Sitzer v Sitzer*, 48 AD3d 354 [1st Dept 2008]) and in any event without merit.

We reject respondent's argument that Family Court never obtained jurisdiction over this matter because no signed stipulation of consent to the order of reference appears in the record. Respondent implicitly consented by participating in the

proceedings without challenging the Referee's jurisdiction (*see Matter of Hui C. v Jian Xing Z.*, 132 AD3d 427, 427 [1st Dept 2015]).

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9523 The People of the State of New York, Respondent, Ind. 3043/12

-against-

Osmondo Smith, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered November 12, 2016, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The initial reluctance of the eyewitnesses to provide defendant's name was satisfactorily explained, and their testimony was corroborated by other evidence. Defendant's arguments concerning matters not presented to the jury is unavailing, because "[o]ur review of the . . . weight of the evidence is limited to the evidence actually introduced at trial" (*People v Dukes*, 284 AD2d 236, 236 [1st Dept 2001], *lv denied* 97 NY2d 681 [2001]).

The court properly admitted two 911 calls as excited utterances. Defendant did not preserve his claim that the calls should have been excluded on the ground that the callers did not indicate that they had seen the crime, and we decline to review it in the interest of justice. As an alternative holding, we find that it was inferable from the circumstances that the callers had the opportunity to observe personally what they described to the 911 operator (*see generally People v Cummings*, 31 NY3d 204, 209-210 [2018]). In any event, all the information in the calls was cumulative to other evidence.

Defendant's arguments regarding a photo identification are without merit. The witness knew defendant for several years and gave the police a shortened form of his first name. The use of photographs was solely for the purpose of finding the person the witness had already named. While the truthfulness of her accusation of defendant was at issue, "suggestiveness" was not a concern (*see People v Gissendanner*, 48 NY2d 543, 552 [1979]).

To the extent the issue is reviewable, we find that the court providently exercised its discretion in denying defendant's request for sealed records of the deceased's arrest for assault. Defendant's claim that those sealed records contained information

relevant or helpful to his defense is based on speculation (*see People v Gamble*, 18 NY3d 386, 398-399 [2012]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9525 Madonna Ciccone, etc., Index 156454/17
Plaintiff-Appellant-Respondent,

-against-

Gotta Have It! Collectibles, Inc.
doing business as Gotta Have
Rock and Roll LLC, et al.,
Defendants-Respondents-Appellants,

John Does #1-200 (a fictitious name),
Defendants.

_____

Proskauer Rose LLP, New York (Russell T. Gorkin of counsel), for appellant-respondent.

Bernstein Cherney LLP, New York (Hartley T. Bernstein of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about April 23, 2018, which denied plaintiff's motion for a preliminary injunction, granted defendants' motion to dismiss the complaint, denied sub silentio defendants' motion for sanctions, and denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, without costs.

Plaintiff seeks to enjoin defendants from auctioning off certain personal property allegedly belonging to her, which defendant Darlene Lutz acquired by virtue of her former friendship with plaintiff and consigned to defendant online auction house and its principals for sale. Plaintiff asserts

claims for conversion and replevin against defendants.

The court correctly dismissed the complaint as against Lutz because plaintiff's claims of conversion and replevin against Lutz are barred by the very broad release in the 2004 settlement agreement between plaintiff and Lutz. Even if both claims did not technically accrue by the date of the release, they both arose "by reason of any event, transaction or other relationship or cause" occurring before then - i.e., the transfer of plaintiff's property to Lutz, which indisputably occurred before 2004.

The court also properly dismissed the complaint as against the auction house defendants. As we have found that Lutz, and not plaintiff, is the rightful owner of the personal property at issue based on the 2004 settlement agreement, Lutz was free to do with the property as she wished, which included consigning the property to the auction house defendants for sale. As plaintiff no longer owns the property, she may not maintain claims for conversion and replevin against the auction house defendants (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]; *Solomon R. Guggenheim Found v Lubell*, 77 NY2d 311, 317 [1991]).

Additionally, we find that the motion court properly denied plaintiff's motion for leave to amend the complaint. The new

allegations asserted in the amended complaint do not change the determination that the property at issue does not belong to plaintiff and thus, she cannot maintain claims for conversion and replevin against defendants.

We also find that the motion court providently exercised its discretion in denying, sub silentio, defendants' request for sanctions.

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9526 In re Richard G.,
Petitioner-Appellant,

-against-

Adrienne S.,
Respondent-Respondent.

_____

Larry S. Bachner, New York, for appellant.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about September 11, 2017, which, upon renewal, granted respondent mother's motion to dismiss petitioner father's petition for modification of the parenting schedule, unanimously affirmed, without costs.

Application by the father's assigned counsel to withdraw as counsel is granted (*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 which could be raised on this appeal. We agree with counsel that the

court's decision was well within the bounds of its discretion.

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9528 The People of the State of New York, Ind. 967/14
Respondent,

-against-

Daquan Lanier,
Defendant-Appellant.

_____

Portale Randazzo LLP, White Plains (Richard A. Portale of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert Neary, J.), rendered November 2, 2016,

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

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

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

ENTERED: JUNE 4, 2019

CLERK

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

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9529 In re Michael O'Connor, Index 101413/16
Petitioner-Appellant,

-against-

William J. Bratton, etc., et al.,
Respondents-Respondents.

_____

Law Offices of Joseph A. Romano, P.C., Garden City (Timothy McEnaney of counsel), for appellant.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Carmen Victoria St. George, J.), entered December 11, 2017, which denied the petition to annul respondents' determination, dated May 11, 2016, denying petitioner's application for accident disability retirement benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Credible evidence supports the medical board's determination that the origin of petitioner's arrhythmia, tachycardia, and syncope was unknown, and not related to hypertension or job-related stress (*see generally Matter of Goldman v McGuire*, 101 AD2d 768, 770 [1st Dept 1984], *affd* 64 NY2d 1041 [1985]). Accordingly, the medical board rebutted General Municipal Law § 207-k's presumption that petitioner's disabling condition was

incurred in the line of duty (*see e.g. Matter of Titza v Kelly*, 138 AD3d 498 [1st Dept 2016]; *Matter of Hogg v Kelly*, 93 AD3d 507 [1st Dept 2012] *Matter of DeMonico v Kelly*, 49 AD3d 265 [1st Dept 2008]).

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

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9530 Cynthia I. Caimares, Index 20620/17E
Plaintiff-Respondent,

-against-

Aimee Erickson, et al.,
Defendants-Appellants,

David M. Jakubowicz, M.D., et al.,
Defendants.

_____

Vogrin & Frimet, LLP, New York (Francine L. Semaya of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered May 29, 2018, which granted plaintiff's motion to lift the stay of these proceedings, unanimously affirmed, without costs.

Plaintiff, diagnosed with advanced-stage breast cancer, commenced this action to recover for injuries sustained due to defendants' alleged failure to inform her of the results of an October 28, 2014 mammography or refer her for follow-up evaluation. Pursuant to an order of the South Carolina Court of Common Pleas, dated September 21, 2017, and a Clarification Order of the same court, dated February 8, 2018 (Stay Orders), issued in connection with the liquidation of Oceanus Insurance Company,

a Risk Retention Group, this action was administratively stayed, because defendant Aimee Erickson, FNP, is insured by Oceanus.

In accord with our recent decision in *Givens v Kingsbridge Hgts. Care Ctr., Inc.*, __ AD3d __, 2019 NY Slip Op 02967, *2 [1st Dept, April 18, 2019]), we hold that lifting the stay in this case does not violate the Uniform Insurers Liquidation Act (UILA) (Insurance Law §§ 7408–7415), because Oceanus is a risk retention group (RRG) and exempt from state laws such as the UILA.

The Full Faith and Credit Clause of the US Constitution (US Const, art IV, § 1) does not dictate a different result. That clause does not require a state to apply a foreign state's law in violation of its own legitimate public policy *(Givens*, 2019 NY Slip Op 02967, *1, citing *Crair v Brookdale Hosp. Med. Ctr., Cornell Univ.*, 94 NY2d 524, 528 [2000]). Most of defendants-appellants' public policy arguments rely upon New York's adoption of the UILA, but, as indicated, UILA is not relevant here. Moreover, defendants' emphasis on New York's interest in preserving liquidation proceedings from outside interference is misplaced; the liquidation proceedings at issue here were commenced out of state and concern a non-domiciliary RRG (*cf. Matter of Knickerbocker Agency [Holz]*, 4 NY2d 245 [1958]; *Lac D'Amiante du Quebec, Ltee v American Home Assur Co.*, 864 F2d 1033 [3d Cir 1988]).

Defendants cite no case that supports their assertion that the public policy goal of centralizing proceedings against insolvent insurers takes precedence over this State's policy goals of compensating tort victims. Plaintiff's position to the contrary is particularly persuasive, given the unavailability of indemnity funds to compensate her for harms attributable to defendant Erickson (*see* Insurance Law § 5906). To the extent defendants herald the creation of RRGs by federal law as a solution to a former insurance crisis, the record before us does not demonstrate that plaintiff received a benefit from any aspect of the solution. While Erickson would have knowingly assumed the risk of being insured by Oceanus (*see* 15 USC [Liability Risk Retention Act] § 3902[a][1]), there is no basis on which to find that plaintiff similarly knowingly assumed that risk, or even was aware of the risk, or that she reaped any benefit from having assumed it, such as, for example, lower medical bills.

The record does not support defendants' argument that the court discriminated against RRGs, in violation of the Liability Risk Retention Act. The court ruled against defendants on the basis of case law and statutory authority, not personal animus. It did not condition Oceanus's continued operation in New York upon conduct otherwise prohibited by statute (*see National Warranty Ins. Co. v Greenfield,* 24 F Supp 2d 1096 [D Or 1998],

affd 214 F3d 1073 [9th Cir 2000], *cert denied* 531 US 1104 [2001]). It merely held that a pending action by a severely ailing plaintiff could proceed.

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: JUNE 4, 2019

CLERK

Acosta, J.P., Richter, Kapnick, Kahn, Kern, JJ.

9531N Wells Fargo Bank National Association, etc., Plaintiff-Respondent, Index 651415/16

-against-

Andalex Aviation II, LLC, et al., Defendants.

- - - - -

Eleonora Silverman, Nonparty Appellant.

_____

Law Offices of Craig Avedisian, P.C., New York (Craig Avedisian of counsel), for appellant.

Zeichner Ellman & Krause LLP, New York (David S.S. Hamilton of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles Ramos, J.), entered on or about December 17, 2018, denying appellant's motion for a protective order and to quash a subpoena ad testificandum, unanimously affirmed, with costs.

The court correctly denied the motion to quash the deposition subpoena, served pursuant to CPLR 6220, as movant failed to carry her prima facie burden of showing that the discovery sought was irrelevant or that it was obvious that "the process [would] not lead to legitimate discovery" (*Liberty Petroleum Realty, LLC v Gulf Oil*, L.P., 164 AD3d 401, 403 [1st Dept 2018]). Moreover, service at movant's usual place of abode

within the state of New York was sufficient to comply with CPLR 308(4) (*see Feinstein v Bergner*, 48 NY2d 234, 239 [1979]).

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

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9532N 357 W 54th Street LLC, Index 162831/15
Plaintiff-Respondent,

-against-

Madalina Iacob,
Defendant-Appellant.

_____

Madalina Iacob, appellant pro se.

Lawrence J. Silberman, P.C., New York (Lawrence J. Silberman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered December 5, 2018, which denied defendant's motion for summary judgment dismissing the complaint and for sanctions, unanimously affirmed, without costs.

Defendant's motion was untimely and she failed to establish good cause for the delay (CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). Even if the motion were timely, she failed to meet her prima facie burden of establishing that plaintiff fraudulently altered the sublease to remove her guarantor (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In any event, defendant does not explain how, as a matter of law, the inclusion of a guarantor would totally shield her from liability for the fines incurred from her short-term rentals of the apartment.

We have considered defendant's remaining contentions and find them unavailing. We decline plaintiff's request to impose sanctions.

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

ENTERED: JUNE 4, 2019

CLERK

Acosta, P.J., Richter, Kapnick, Kahn, Kern, JJ.

9533N Continental Industries Group, Inc., Plaintiff-Appellant, Index 653215/12

-against-

Hakan Ustuntas, et al., Defendants-Respondents.

_____

Shipman & Goodwin LLP, New York (Michael T. Conway of counsel), for appellant.

Gunay Law, P.C., New York (Petek Gunay of counsel), for respondents.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered June 18, 2018, which, inter alia, granted defendants' motion for discovery sanctions and awarded attorneys' fees and costs, unanimously affirmed, with costs.

The motion court's decision was a provident exercise of discretion (*see generally Arts4All, Ltd. v Hancock*, 54 AD3d 286 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *cert denied* 559 US 905 [2010]). The record demonstrates that plaintiff exhibited a continued pattern of noncompliance without any excuse, and provided ever-changing and irreconcilable statements with respect to the unavailability of documents. Such conduct sufficiently supports a finding that plaintiff intentionally made the requested emails unavailable to defendants (*see Fish &*

Richardson, P.C., 75 AD3d 419 [1st Dept 2010]). Furthermore, plaintiff's conduct over more than five years deprived defendants of the opportunity to take meaningful discovery and present a full defense, and caused defendants to expend an unnecessary amount of time and resources (*see Pegasus Aviation I., Inc. v Variq Logistica, S.A.*, 26 NY2d 543 [2015]).

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

ENTERED: JUNE 4, 2019

CLERK

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

9125 NexBank, SSB, Index 652072/13
Plaintiff-Respondent-Appellant,

-against-

Jeffrey Soffer, et al.,
Defendants-Appellants-Respondents.

_____

Meister Seelig & Fein LLP, New York (Christopher J. Major of counsel), for appellants-respondents.

Debevoise & Plimpton LLP, New York (Shannon Rose Selden of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 18, 2017, which, insofar as appealed from, denied defendants' motion for partial summary judgment and granted in part and denied in part plaintiff's motion for partial summary judgment, unanimously modified, on the law, to deny plaintiff's motion in its entirety, and to grant so much of defendants' motion as sought to dismiss plaintiff's claim for damages for purported harm caused by the alleged unmarketability of Town Square Las Vegas (Town Square), and otherwise affirmed, without costs.

The history of this extensive litigation, useful as background for the present appeal, is recited in our order deciding a prior appeal (*see* 144 AD3d 457 [1st Dept 2016]).

The difference between the unencumbered value of Town Square

and its value as encumbered by a lis pendens and an action (in Nevada state court) for specific performance for transfer of that property is not a loss that was *incurred* by plaintiff, as required by defendants' guaranty. Under New York law, which governs the guaranty, "'incurred means become liable for'" (*Rubin v Empire Mut. Ins. Co.*, 25 NY2d 426, 429 [1969], quoting *Beekman v Van Dolsen*, 70 Hun 288, 294 [1893]). Clearly, plaintiff did not *become liable for* the difference between the encumbered and unencumbered value of Town Square.

Plaintiff contends that the above definition of "incurred" applies only in the insurance context. However, while *Rubin* dealt with insurance, *Beekman*, which *Rubin* quoted, involved a guaranty. Moreover, although plaintiff sues for breach of a guaranty, it relies on cases involving a covenant against encumbrances or a warranty of title (*see Yonkers City Post No. 1666, Veterans of Foreign Wars of U.S. v Josanth Realty Corp.*, 67 NY2d 1029 [1986]; *West 90th Owners Corp. v Schlechter*, 165 AD2d 46 [1st Dept 1991], *lv dismissed* 77 NY2d 939 [1991]). However, "[a] guaranty is to be interpreted in the strictest manner" (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]). Rules about warranty of title should not be "indiscriminately extended[ed]" to the guaranty context (*L. Smirlock Realty Corp. v Tit. Guar.*

Co., 97 AD2d 208, 222 [2d Dept 1983], *mod on other grounds* 63 NY2d 955 [1984]).

In any event, the measure of damages for breach of the covenant against encumbrances is either the cost of removal of the encumbrance or the difference in value between the land with the encumbrance and without it (*Smirlock*, 97 AD2d at 222). Where an encumbrance cannot be removed, the measure of damages ordinarily will be the difference between the value of the property without the defect in title and its value with the defect (*id.* at 226). In the case at bar, the defect – the lis pendens and the Nevada action – could be removed. Hence, the measure of damages would be plaintiff's cost to remove the defect, i.e., its attorneys' fees in the Nevada litigation, which has been otherwise resolved.

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

ENTERED: JUNE 4, 2019

CLERK

Friedman, J.P., Richter, Tom, Gesmer, Moulton, JJ.

9620 Paramount Leasehold, L.P., Index 653668/11
Plaintiff-Respondent,

-against-

43rd Street Deli, Inc. doing
business as Bella Vita Pizzeria,
Defendant-Appellant.

_____

Camarinos Law Group, LLC, New York (Michael D. Camarinos of counsel), for appellant.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered June 19, 2018, which granted plaintiff's motion to set a hearing date to determine the amount of its reasonable attorneys' fees, costs, and disbursements, and denied defendant's cross motion to bar plaintiff's application for attorneys' fees, unanimously affirmed, without costs.

Plaintiff established its entitlement to attorneys' fees under the parties' lease agreement by proving that defendant breached the percentage rent clause (*see Paramount Leasehold, L.P. v 43rd St. Deli, Inc.*, 136 AD3d 563 [1st Dept 2016], *lv dismissed in part, denied in part* 28 NY3d 1024 [2016]) and that it, plaintiff, was thus the prevailing party in this dispute (*see Graham Ct. Owner's Corp. v Taylor*, 115 AD3d 50, 55 [1st Dept

2014], *affd* 24 NY3d 742 [2015]; *Cier Indus. Co. v Hessen*, 136 AD2d 145, 149 [1st Dept 1988]).

Plaintiff did not waive its right to attorneys' fees by postponing its application therefor until after the merits determination (*see Monacelli v Farrington*, 240 AD2d 296 [1st Dept 1997]; *Grand Concourse Estates LLC v Ture*, 63 Misc 3d 139[A], 2019 NY Slip Op 50564[U] [App Term, 1st Dept 2019]; *101 Maiden Lane Realty Co., LLC v Ho*, 2002 NY Slip Op 50499[U] [App Term, 1st Dept 2002]). Even a landlord's acceptance of a tenant's payment in satisfaction of a money judgment for rent "does not equate with an accord and satisfaction on the issue of attorneys' fees" (*see Snake River Development, L.L.C. v Andrew K & Associates, Inc.*, 2003 NY Slip Op 51450[U] [App Term, 1st Dept 2003]), citing, inter alia *815 Park Ave. Owners Inc. v Metzyer*, 250 AD2d 471 [1st Dept 1998]). Nor did plaintiff delay impermissibly in seeking attorneys' fees.

Defendant's reliance on *Jay's Stores, Inc. v Ann Lewis Shops* (15 NY2d 141, 147 [1965]) and *Hellstern v Hellstern* (279 NY 327,

333 [1938]) in support of its theory of res judicata is misplaced. Those cases, and the policy that underlies them, have no application here, where there is no risk of re-litigation of the same issue and no possibility of inconsistent judgments.

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

ENTERED: JUNE 4, 2019

CLERK