

REPORTS OF CASES
DECIDED IN THE
APPELLATE DIVISION
OF THE
SUPREME COURT
OF THE
STATE OF NEW YORK

THOMAS J.K. SMITH

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CASES DECIDED

IN THE

APPELLATE DIVISION

OF THE

SUPREME COURT

OF THE

STATE OF NEW YORK

[241 NYS3d 639]

GEORGE M. RICH et al., Respondents, v J.A. MADISON, LLC, Defendant, and JONATHAN ADLER ENTERPRISES, LLC, Appellant.

First Department, August 28, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Supreme Court, New York County (Emily Morales-Minerva, J.), entered September 24, 2024. The order found defendant Jonathan Adler Enterprises, LLC, liable for codefendant J.A. Madison, LLC's breach of contract and ordered that plaintiffs have judgment against Jonathan Adler Enterprises, LLC in the amount of \$179,660 plus interest from May 1, 2017.

Rich v J.A. Madison, LLC, 2024 NY Slip Op 33290(U), affirmed.

HEADNOTE

Corporations — Disregarding Corporate Entity — Piercing Corporate Veil

Supreme Court correctly found that plaintiffs sufficiently met their burden for piercing the corporate veil so as to hold defendant parent company liable for defendant retailer's breach of an agreement under which defendant retailer, in exchange for assuming plaintiffs' adjacent retail space lease, was required to pay plaintiffs a specified monthly sum until it vacated possession

of the premises. The evidence established that while each of defendant parent company's subsidiaries may have had its own profit and loss statements, the revenues from each of the subsidiaries were swept into a single account in the parent company's name at the end of each retail day. Thereby, defendants used a centralized cash management system, indicative of domination and control by the parent company, which rendered defendant retailer judgment-proof and unable to pay out on any of its obligations. In addition, the individual who signed the agreement was both the president of the parent company and also the president and only officer of defendant retailer, and the agreement was signed at substantially the same time as the lease assignment, which was signed and guaranteed by the parent company founder. All important papers, including payroll and service of process, were also directed to the parent company corporate offices for review and centralization of records. Defendant parent company then used its domination of defendant retailer to commit a wrong by stopping payments to plaintiffs under the agreement, causing defendant retailer to become judgment-proof, and then by dissolving the retailer after the action had been commenced, making plaintiffs' judgment nothing more than a pyrrhic victory.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Corporations §§ 52–54, 58, 61–64.

NEW YORK CONTRACT LAW (2d ed) §§ 3:9, 8:19, 8:21, 19:5, 19:8.

NY JUR 2d Business Relationships §§ 35, 38–40, 45–46.

ANNOTATION REFERENCES

Disregarding corporate existence. 34 ALR 597.

Liability of corporation for contracts of subsidiary. 38 ALR3d 1102.

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Query: (pierc! /s “corporate veil” /p (central! or same or
common or shar! /s “cash management” or payroll or offi-
cer!)) & (breach! /s lease or agreement or contract)

APPEARANCES OF COUNSEL

Kaplan Levenson P.C., New York City (*Steven M. Kaplan* of counsel), for appellant.

Goodfarb & Sandercock, LLP, New York City (*Elizabeth Sandercock* and *Adam D. Goodfarb* of counsel), for respondents.

OPINION OF THE COURT

KAPNICK, J.

Plaintiffs George M. Rich and Regina M. Rich, doing business as Guild Antiques II, had been leasing a store at 1095 Madison Avenue since 1985. In 2005, defendant J.A. Madison, LLC leased the adjacent store at 1097 Madison Avenue, and in 2010 wished to expand its retail space by assuming plaintiffs' lease for 1095 Madison Avenue. David Frankel, president of both J.A. Madison and the parent corporation defendant Jonathan Adler Enterprises (JAE), and Jonathan Adler, the founder of JAE, approached plaintiffs, who initially were not interested in assigning their lease. Ultimately, the various parties involved entered into an "Agreement and Consent" and an "Assignment and Assumption of Lease with Landlord's Consent and Modification of Lease." In addition, plaintiffs and J.A. Madison entered into a "Consulting Agreement" on September 1, 2010, pursuant to which J.A. Madison agreed to pay plaintiffs the sum of \$8,333.33 per month "until such date that the Company [J.A. Madison] vacates possession of the premises . . . [but] in no event . . . later than March 1, 2021." Although it was called a "Consulting" Agreement, there is no dispute that plaintiffs never did any "consulting" for J.A. Madison. Rather, the payments under this contract were solely in exchange for plaintiffs' agreeing to assign their lease so that J.A. Madison could expand its business into plaintiffs' adjacent premises, an arrangement affirmatively sought out by defendants. Payments were made monthly by the parent corporation, JAE, not J.A. Madison, until March 2017, when JAE's controller Carole DeCarlo indicated to plaintiffs that business was extremely difficult and asked for a rent concession, to which plaintiff George Rich did not agree. In April, May, and June of 2017, JAE paid only \$4,000 to plaintiffs, and on July 1, 2017, JAE stopped paying completely.

In January 2018, plaintiffs commenced the instant lawsuit. The first cause of action is against J.A. Madison for breach of the Consulting Agreement. The second cause of action alleges that JAE is liable for J.A. Madison's breach because the former dominated the latter. The third cause of action is for "damages" against both defendants.

After defendants answered, plaintiffs moved for summary judgment on their first cause of action, and JAE cross-moved for summary judgment dismissing the complaint as against it. Supreme Court granted plaintiffs' motion and denied JAE's cross-motion.

This Court affirmed, stating in relevant part that

"Plaintiffs raised issues of fact as to whether JAE

. . . dominated J.A. Madison with respect to the transaction so as to justify piercing the corporate veil . . . Plaintiffs pointed out that JAE paid all of J.A. Madison's debts under the consulting agreement; J.A. Madison never had its own bank account and was dissolved while this action was pending; the two companies occupied the same offices and had overlapping personnel, including the companies' president and controller; and plaintiffs communicated with these two individuals in negotiating the contracts and in addressing the late payments under the consulting agreement. These factors, taken together, . . . raised an issue of fact as to whether J.A. Madison was JAE's alter ego" (*Rich v J.A. Madison, LLC*, 211 AD3d 652, 653 [1st Dept 2022] [citations omitted]).

The case proceeded to a nonjury trial in 2024. The only witnesses produced were plaintiff George Rich and JAE's controller DeCarlo; approximately 28 exhibits were also admitted into evidence.

Although the trial court incorrectly stated at the beginning of its posttrial decision that "[t]he sole issue presented is whether defendant [JAE] . . . dominated its subsidiary in the transaction 'so as to justify piercing the corporate veil to hold' parent corporation liable for the breach [of the Consulting Agreement] and resulting damages," citing to our prior decision in this case (2024 NY Slip Op 33290[U], *2 [Sup Ct, NY County 2024]; *Rich*, 211 AD3d at 653), the court later properly recognized, in the "Conclusions of Law" section of its decision, that the correct test for piercing the corporate veil is two-pronged, by stating as follows:

"In the context of seeking to hold a parent corporation liable for its alter ego's actions, 'a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff'" (2024 NY Slip Op 33290[U], *9; see *Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512 [1st Dept 2009])."

Specifically, the Court in *Fantazia* held:

"In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised

complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff (see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity. No one factor is dispositive" (*Fantazia* at 512).

The trial court correctly found that plaintiffs sufficiently met their burden for piercing the corporate veil, so as to hold the parent, JAE, liable for defendant J.A. Madison's breach of the Consulting Agreement. While George Rich, a small business owner, as opposed to a global design company with retail locations worldwide, not surprisingly, may not have had any knowledge as to the adequacy or inadequacy of J.A. Madison's capitalization, DeCarlo testified at length as to the banking procedures utilized by JAE and its subsidiaries, including J.A. Madison. While each subsidiary may have had its own profit and loss statements, DeCarlo testified that the revenues from each of the subsidiaries were swept into a single account in JAE's name at the end of each retail day. We find this situation very similar to the scheme identified in *245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC* (223 AD3d 604, 605-606 [1st Dept 2024]), where this Court sustained the veil-piercing claim against the Icon garage landlords, finding that the plaintiff sufficiently alleged that Icon dominated the defendant tenant with respect to the transaction attacked, "disregarding corporate formalities and intermingling funds by transferring all of Tenant's revenue to itself each day" (*id.* at 605). That this may have been done legally and at the behest of JAE's lenders does not change the fact that J.A. Madison's bank account was in the name of JAE, not in its own name, and that defendants used a centralized cash management system, indicative of domination and control by the parent company, which rendered J.A. Madison judgment-proof and unable to pay out on any of

its obligations, including its obligations under the Consulting Agreement. Clearly, this constituted an “intermingling of funds” (*Fantazia*, 67 AD3d at 512).

One of the many factors considered by the trial court in reaching its conclusion, although certainly not the only one, was that Frankel was the president of JAE and was also the president *and only officer* of J.A. Madison, so there was an overlap of J.A. Madison’s only officer (*cf. Fantazia*, 67 AD3d at 512 [where this Court found that the mere fact that the president of one corporation was also a sub-board member and consultant to the other corporation was insufficient for finding domination]). It was also Frankel who introduced himself as president of JAE, not J.A. Madison, when he negotiated the Consulting Agreement with George Rich and signed it on behalf of J.A. Madison as its president. However, plaintiffs are not claiming that Frankel exercised complete control of J.A. Madison, but rather that JAE did so. For instance, it was JAE (not J.A. Madison) who made all the payments under the Consulting Agreement to plaintiffs from 2010 until 2017. Moreover, it was DeCarlo, the controller of JAE, the parent, not anyone from J.A. Madison, who attempted to renegotiate the terms of the Consulting Agreement, albeit unsuccessfully, with George Rich in 2017.

While J.A. Madison had its own store address and store manager, the address for service of process as well as the corporate offices for both defendants was at 333 Hudson Street. While J.A. Madison’s store manager may have had some discretion as to the inventory they would carry in their store, and the way they would deal with employee problems, they certainly had no discretion as to the banking and bookkeeping issues; nor did J.A. Madison administer its own payroll. All important papers and mail were sent to the corporate offices so, as DeCarlo testified, she could look them over and keep centralized records, and then forward any relevant papers to the individual stores, if necessary.

While JAE may have treated each of its subsidiaries, including J.A. Madison, as an independent profit center on paper, as mentioned before, the daily monetary intake of J.A. Madison was swept up into the corporate account of JAE at the end of each day. The lease for the store at 1095 Madison may have been in the name of J.A. Madison, but JAE, and Jonathan Adler himself, guaranteed the Agreement and Consent to the lease assignment, which was signed by Frankel on behalf of

both J.A. Madison and JAE, at substantially the same time as the Consulting Agreement, and considered a “part of the same transaction” (*Rich*, 211 AD3d at 653). The fact that JAE and Adler did not guarantee the subsidiary’s obligations under the Consulting Agreement is in no way determinative as to whether JAE dominated J.A. Madison. Further, there is no support for the inference made by the dissent that George Rich should have anticipated, at the time of executing the Consulting Agreement, the happening of an “unexpected turn of events” which would cause defendants to stop paying.

“Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised” (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]). However, under the totality of the circumstances presented here, we conclude that plaintiffs met their heavy burden of showing that “[JAE] exercised complete domination of [J.A. Madison] in respect to the transaction attacked[,] [specifically the Consulting Agreement]” (see *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016] [internal quotation marks omitted], *affd* 31 NY3d 1002 [2018]). Thus, we will address the second prong of the test—namely, whether plaintiffs met their burden to show “that such domination was used to commit a fraud or wrong against the plaintiff[s] which resulted in plaintiff[s]’ injury” (*id.* [internal quotation marks omitted]).

The trial court, in dealing with this second prong in its post-trial decision, found that JAE “exercised complete discretion in its decision to stop paying the rent as set forth in the subject transaction, which caused plaintiffs’ injury” (2024 NY Slip Op 33290[U], *11). The trial court went on to find that “[a]dding to said injury, [JAE] then exercised sole discretion to dissolve [J.A. Madison] during the pendency of this action, leaving plaintiff[s] with no recourse on proven damages—a wrong and injustice that invites a court in equity, as here, to intervene (see generally *Morris*, 82 NY2d at 141)” (*id.*).

“Wrongdoing in this context does not necessarily require allegations of actual fraud. While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also

suffice (see *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Allegations that corporate funds were purposefully diverted to make it judgment-proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory (*Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073 [2d Dept 2012])” (*Baby Phat*, 123 AD3d at 407-408 [emphasis added]; see also *BP 399 Park Ave. LLC v Pret 399 Park, Inc.* 150 AD3d 507, 508 [1st Dept 2017]).

The law does not require that the parent company’s actions be fraudulent, only that it result in a wrong or an inequity. The factual situation we find ourselves in here is very similar to the one contemplated by *Baby Phat*. The evidence presented at trial showed that JAE used its domination of J.A. Madison to commit a wrong against plaintiffs by stopping payments to plaintiffs under the Consulting Agreement, causing J.A. Madison to become judgment-proof, and then by dissolving J.A. Madison after this action had already been commenced, making plaintiffs’ judgment against J.A. Madison nothing more than a pyrrhic victory. The fact that J.A. Madison may have initially been created for a legitimate purpose of operating a store selling Jonathan Adler merchandise and products does not change the analysis.

Accordingly, the order of the Supreme Court, New York County (Emily Morales-Minerva, J.), entered September 24, 2024, which found defendant Jonathan Adler Enterprises, LLC liable for codefendant J.A. Madison, LLC’s breach of contract and ordered that plaintiffs have judgment against Jonathan Adler Enterprises, LLC in the amount of \$179,660.00 plus interest from May 1, 2017, should be affirmed, without costs.

RENWICK, P.J. (dissenting). In this breach of contract action, plaintiffs claim that defendant J.A. Madison breached its retail consultancy services agreement (Consulting Agreement) and that defendant Jonathan Adler Enterprises, LLC (JAE), the parent company of J.A. Madison, should be liable for the breach under a veil-piercing theory, as J.A. Madison was a mere instrumentality of it. On a prior appeal, we found that “[t]he court correctly granted plaintiffs summary judgment on their breach of contract claim against J.A. Madison” and that JAE’s

cross-motion for summary judgment dismissing the complaint against it was correctly denied (*Rich v J.A. Madison, LLC*, 211 AD3d 652, 652-653 [1st Dept 2022]). The case proceeded to a nonjury trial, in which the court found JAE liable for J.A. Madison's breach of contract. This appeal ensued.

On appeal, the majority finds "that plaintiffs sufficiently met their burden for piercing the corporate veil so as to hold the parent, JAE, liable for . . . J.A. Madison's breach of [contract]" (majority op at 5). I would find that piercing the corporate veil to hold JAE liable for the judgment against J.A. Madison was not warranted by the facts established at trial, absent a showing of abuse of the corporate form. Accordingly, I respectfully dissent.

As a general rule, a corporation exists independently of its owners, as a separate legal entity, and a corporation's owners are not liable for the debts of the corporation (*see Anderson v Abbott*, 321 US 349, 361-363 [1944]; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). Formation of a corporation by its owner for the purpose of limiting liability of the owner is perfectly legal and valid (*Morris*, 82 NY2d at 140). However, New York courts will disregard the corporate form, or pierce the corporate veil, to hold a corporation's owners liable for the debts of the corporation whenever necessary to prevent an injustice or to achieve equity (*id.* at 142). "Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised" (*id.* at 141; *see also* Stephen B. Presser, *Piercing the Corporate Veil* § 2:33 [1] at 2-291-2-293). However, "[g]enerally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018] [internal quotation marks omitted]). In other words, plaintiff must show both an abuse of the corporate form (the domination prong) and that the abuse was committed for the purpose of defrauding plaintiff or committing some other wrongdoing (the fraud prong) (*see id.* at 47-48; *see also TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]; *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept

2012]). Those who seek to pierce the corporate veil “bear a heavy burden” (*TNS Holdings*, 92 NY2d at 339; see *Etage Real Estate LLC v Stern*, 211 AD3d 632, 633 [1st Dept 2022]).

This heavy burden was not met here. Rather the majority focuses on the domination prong and gives short shrift to the equally important fraud prong. Without satisfying both prongs, piercing the corporate veil fails.

To begin, the majority makes much of the fact that David Frankel was both the president of JAE and J.A. Madison, and the only officer of J.A. Madison. However, this fact alone does not require that the corporate form be disregarded. Even if Frankel exercised complete control of J.A. Madison by having been the president of both JAE and J.A. Madison, such dominance alone is not enough (see *Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.*, 173 AD3d 568, 569 [1st Dept 2019]; *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12-13 [1st Dept 2016], *affd* 31 NY3d 1002 [2018]). Plaintiffs were required to establish that Frankel, through his domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against plaintiffs, which they failed to do.

It is uncontested that J.A. Madison had a legitimate purpose in its formation and carried out its legitimate business of operating a store selling “Jonathan Adler” merchandise and products (see *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005] [(a)n inference of abuse (of the corporate structure) does not arise . . . where a corporation was formed for legal purposes or is engaged in legitimate business”), quoting *TNS Holdings*, 92 NY2d at 339-340). J.A. Madison operated as a separate entity from JAE, entering into a lease for a space on Manhattan’s Madison Avenue with its own manager and employees. Moreover, at its inception, the Consulting Agreement was an arm’s length transaction that benefited all parties involved, including plaintiffs. The Consulting Agreement, which was jointly entered into with two other agreements (the consent and assignment agreements), permitted J.A. Madison to expand its business into plaintiffs’ premises in exchange for a \$1 million fee, payable on monthly installments. At the time, both J.A. Madison and JAE were established businesses. Thus, plaintiffs could not possibly claim that JAE established J.A. Madison (one of JAE’s most profitable retail stores) to defraud plaintiffs. Nor did plaintiffs allege, let alone prove, that either JAE or J.A. Madison engaged in a

single act of deception or fraud at any stage of the parties' negotiations, from the inception and during the entire seven-year period of these transactions.

Ostensibly, the only wrong plaintiffs alleged is that JAE, through Frankel, acted improperly when he caused J.A. Madison to stop making the monthly payments, as mandated by the Consulting Agreement, and then dissolved J.A. Madison. Contrary to the majority's findings, there was nothing fraudulent, malfeasant, or illegal about Frankel's actions taken on behalf of JAE and J.A. Madison. Indeed, no evidence was adduced contradicting JAE comptroller Carole DeCarlo's explanation that these drastic actions taken were strictly a business decision to shut down a failing store. At the time, as DeCarlo explained, JAE and its subsidiaries were facing hard times and they asked all their landlords and vendors for concessions. When plaintiffs refused to help J.A. Madison address its dire situation, the latter exercised its reasonable business judgment to shut the store down.

Significantly, plaintiffs clearly understood that JAE and J.A. Madison were separate entities and plaintiffs negotiated the Consulting Agreement solely with J.A. Madison, not JAE. Thus, nothing prevented plaintiffs from protecting themselves from the unexpected turn of events by obtaining security or a personal guarantee from JAE and/or its owners. Having failed to do so, plaintiffs cannot now claim that they were deceived into contracting solely with J.A. Madison and, consequently, should be allowed to assert claims against JAE (*see Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d at 12-13; *G & Y Maintenance Corp. v Core Cont. Constr. LLC*, 215 AD3d 553, 554 [1st Dept 2023]; *Spectra Sec. Software v MuniBEX.com, Inc.*, 307 AD2d 835, 835-836 [1st Dept 2003]; *Hillcrest Realty Co. v Gottlieb*, 208 AD2d 803, 805 [2d Dept 1994]; *see also Brunswick Corp. v Waxman*, 599 F2d 34, 36 [2d Cir 1979]).

The majority, however, finds that plaintiffs should not be blamed for not anticipating the "happening of an 'unexpected [business] turn of events' which would cause defendants to stop paying," because plaintiffs were simply small business owners (majority op at—). However, nothing in the record suggests that plaintiffs were anything but sophisticated businesspeople. Indeed, plaintiffs not only leased a sizeable property on Madison Avenue, in the affluent Upper East Side of Manhattan, but they were able to negotiate a deal where J.A. Madison agreed

to pay plaintiffs \$8,333.33 per month until it vacated the premises, up to March 1, 2021, which constituted a potential total payment of more than \$1 million over a 10-year period. In the world of business, there's a widely accepted principle that the potential for a large reward typically comes with a concomitant or accompanying risk.

Contrary to the majority's determination, this simple breach of contract does not constitute the type of wrong warranting the piercing of the corporate veil (*see e.g. Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d at 12 ["a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil"], quoting *Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2d Dept 2013]; *see also New York City Waterfront Dev. Fund II, LLC v Pier A Battery Park Assoc., LLC*, 206 AD3d 565, 567 [1st Dept 2022] [The allegation that a corporation caused its subsidiary to breach a contract is insufficient to show the requisite wrongdoing]).

To be sure, the wrongdoing needed to pierce the corporate veil does not necessarily require allegations of actual fraud. However, the Court of Appeals has reiterated that the requirements of piercing the corporate veil are not easy to meet because the party seeking this rare legal remedy "bear[s] a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings*, 92 NY2d at 339; *see also Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]). The fact that J.A. Madison may have been judgment-proof at the time it was dissolved does not justify holding JAE liable for J.A. Madison's breach of contract, where there is no evidence of any intentionally deceptive or willfully unjust behavior at issue. The majority's suggestion that by "stopping payments to plaintiffs under the Consulting Agreement, [JAE] caus[ed] J.A. Madison to become judgment-proof" (majority op at 8) is mere speculation. Again, it is undisputed that what caused the unexpected downfall of J.A. Madison was strictly the failure to generate business.

Moreover, none of the cases the majority relies on supports piercing the corporate veil under these circumstances. This is not a case like *BP 399 Park Ave. LLC v Pret 399 Park, Inc.* (150 AD3d 507 [1st Dept 2017]), where the plaintiff brought suit against Pret 399 Park, Inc. (Pret) and its parent company,

Pret A Manger (USA), (Pret Parent) for breach of a commercial lease between the plaintiff and Pret (*id.* at 508). Pret Parent moved for summary judgment on the basis that it was not a signatory to the lease and the motion court granted summary judgment (*id.*).

This Court reversed the grant of summary judgment to Pret Parent because there was an issue of fact as to whether Pret Parent could be liable on a theory of piercing the corporate veil (*id.*). We found that the “[d]efendants did not dispute that Pret Parent—as opposed to Pret 399—was the entity operating a café at the premises” (*id.* at 508-509). More importantly, Pret Parent admitted that Pret was a shell, that is, a special purpose entity, an “assetless” LLC that was created expressly for the purpose of signing the lease so that Pret Parent would not have any liability under the lease (*id.* at 509). In *BP 399 Park Ave. LLC*, unlike this case, there was a question of fact as to whether the defendants’ actions were done for a nefarious purpose, as there was evidence suggesting that Pret Parent had essentially duped the plaintiff into entering into a lease with Pret, even though Pret Parent was actually the tenant and Pret was “an assetless entity” (*id.*).

Nor is this case like *Baby Phat* where the plaintiff entered into an agreement with the defendant’s wholly owned subsidiary, Phat Fashions, LLC (PFLLC) to purchase certain intellectual property. The plaintiff asserted a claim for alter ego liability against the defendant based upon the allegations that (i) it negotiated directly with the defendant, not PFLLC; (ii) the defendant grossly misrepresented certain royalty income that was due from certain trademarks that were being sold; and (iii) the defendant caused PFLLC to become judgment-proof by purposely diverting funds from PFLLC and dissolving PFLLC without making appropriate reserves for contingent liabilities (*Baby Phat*, 123 AD3d at 407-408). The defendant moved to dismiss the claim alleging that the plaintiff had not stated a claim for alter ego liability (*id.* at 407). The motion court denied the motion and this Court affirmed finding that the allegations were sufficient to satisfy the pleading standards for alter ego liability (*id.* at 408).

Unlike in *Baby Phat*, the trial evidence demonstrated that plaintiffs were keenly aware JAE and J.A. Madison were separate entities. They negotiated the Consulting Agreement solely with J.A. Madison, not JAE. Moreover, as indicated, there are no allegations or evidence of any acts by JAE’s of wrongdoing

or misrepresentation (or J.A. Madison) when the Consulting Agreement was negotiated and signed. In fact, plaintiffs admitted at trial that neither JAE nor J.A. Madison ever made any misrepresentations to them. The majority accentuates the fact that J.A. Madison's funds were diverted to JAE. However, from its store opening in 2010, J.A. Madison's revenue was swept from its own accounts to JAE's accounts as contractually required by J.A. Madison's lenders who held a first lien position on both JAE's and J.A. Madison's assets and bank accounts. Parenthetically, loan agreements requiring a daily sweep of accounts is a lawful business practice for lenders and financial institutions to reduce outstanding debt. Notably, there was no proof presented at trial that JAE purposefully diverted funds from J.A. Madison to render the latter judgment-proof. Indisputably, after executing the Consulting Agreement in 2010, plaintiffs always received its monthly \$8,333.33 fee until March 2017 when JAE and its subsidiaries began experiencing serious business setbacks. This business practice was not the type of improper diverting of funds that was alleged in *Baby Phat*.

Nor is this a case like *245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC* (223 AD3d 604 [1st Dept 2024]), where the plaintiff alleged that the defendants "conspired to divert garage revenue from Icon garage landlords (including plaintiff) by . . . daily sweeping all revenue collected by the tenants into an Icon-controlled master account and not paying any of it as rent, even if there was sufficient revenue to do so" (*id.* at 605 [internal quotation marks omitted]). As DeCarlo's unchallenged testimony made clear, this is not a case where J.A. Madison had the money to pay plaintiffs, even in the absence of the daily sweep required by their lenders.

For the foregoing reasons, I would reverse. Neither justice nor equity mandates piercing the corporate veil under the facts here. Plaintiffs obtained precisely what they bargained for, and they did not bargain for or contemplate the liability of JAE that they now seek to enforce. The creation of the subsidiary corporation under these circumstances to eliminate the responsibility of the parent corporation should be respected.

RODRIGUEZ III and ROSADO, JJ., concur with KAPNICK, J.; RENWICK, P.J., dissents in a separate opinion in which SHULMAN, J., concurs.

Order, Supreme Court, New York County, entered September 24, 2024, affirmed, without costs.

[243 NYS3d 1]

CITY OF NEW YORK, Appellant, v THOMAS STEVENSON JONES et al., Respondents, et al., Defendants.

First Department, September 4, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Supreme Court, New York County (Nicholas W. Moyne, J.), entered April 12, 2023. The order denied plaintiff's motion for summary judgment and set the matter down for a hearing.

City of New York v Jones, 2023 NY Slip Op 31105(U), affirmed.

HEADNOTE

Forfeitures and Penalties — Forfeiture of Proceeds or Instrumentality of Crime — Forfeiture of Truck for Violation of Food Vending Codes — Excessive Fines

In a proceeding under Administrative Code of City of NY §§ 17-321 (c) and 17-322 to forfeit defendant's truck for violation of food vending codes, plaintiff City of New York was not entitled to summary judgment because defendant raised material issues of fact as to whether the forfeiture was subject to and violated the Excessive Fines Clauses of the New York and United States Constitutions. The Excessive Fines Clauses prohibit a punitive forfeiture that is grossly disproportionate to the gravity of a defendant's offense. The Health Department never sought to test any of the items being sold to determine if their contents posed a danger to the public, there was no evidence the Health Department ever received any complaints about defendant selling spoiled or tainted food, there was no evidence that the Health Department had decided that public safety required forfeiture of the vehicle, and there was no evidence that there were any "victims" of the sale of items from the vehicle or that the proceeds of the forfeiture would be distributed to them. Accordingly, defendant raised issues of fact as to whether the forfeiture was, at least in part, punitive. Further, defendant asserted that the vehicle was worth approximately \$40,000, in contrast to the fines which totaled \$2,600, and that plaintiff's possession of his vehicle had caused him extreme financial hardship. There was no evidence that the sale of the items at issue did cause or could have caused any harm. Therefore, defendant also raised issues of fact as to whether, if the excessive fines analysis did apply, the forfeiture would be grossly disproportionate to the offense.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Forfeitures and Penalties §§ 16, 63–64.

CARMODY-WAIT 2d Action for a Penalty or Forfeiture or on a Recognizance §§ 135:34, 135:114–135:116, 135:120.

McKINNEY'S, NY Const, art I, § 5.

NY JUR 2d Forfeitures and Penalties §§ 97, 104–106.

US Const 8th Amend.

ANNOTATION REFERENCE

See ALR Index under Automobiles and Highway Traffic; Constitutional Law; Excess and Excessiveness; Fines, Penalties, and Forfeitures.

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Query: forfeit! /p (violat! /s vend! or “public health” or administrative) & (excess! /s fine! or penalt!)

APPEARANCES OF COUNSEL

Muriel Goode-Trufant, Corporation Counsel, New York City
(*Tahirih M. Sadrieh* and *Jamison Davies* of counsel), for appellant.

OPINION OF THE COURT

GESMER, J.

In late 2020, a New York City Department of Health inspector issued summonses to defendant Thomas Stevenson Jones for food vending without a license from his truck, selling food from an unapproved or unknown source, and not having food service operations separated from living or sleeping quarters in the vehicle. At a subsequent hearing before the Office of Administrative Trials and Hearings (OATH), Jones admitted to these violations and OATH imposed fines on him totaling \$2,600.

The City then commenced this proceeding in Supreme Court pursuant to Administrative Code of City of NY §§ 17-321 (c) and 17-322 to seize and order forfeiture of Jones’ truck. Administrative Code § 17-321 (a) permits both public health officials and the police to enforce food vending codes. Section 17-321 (c) (iii) and (v) permit police or public health officials to seize a food vending vehicle being used by an unlicensed vendor and any food being offered for sale. If forfeiture proceedings are not commenced, the vendor may be charged with the “reasonable costs for removal and storage payable prior to the release of such food, vehicle or pushcart” (*id.* § 17-321 [c] [v]). Section 17-322 (a) provides for forfeiture of “all property seized” from unlicensed food vendors “[i]n addition to any penalties imposed” pursuant to section 17-325. Section 17-325 (a) provides that vending food without a license is a misdemeanor

punishable by a fine of up to \$1,000, imprisonment for up to three months, or both. Section 17-325 (c) provides for additional fines for unlicensed food vendors.

The motion court denied the City's motion for summary judgment on the grounds that there are questions of fact as to: (1) whether the forfeiture provision at issue is punitive in nature; and (2) whether the value of the property seized is so disproportional to the fines imposed and any harm to society that it violates the Excessive Fines Clauses of the New York and United States Constitutions.¹ We now affirm.

This case is controlled by the decision of the Supreme Court in *Timbs v Indiana* (586 US 146 [2019]) which held that the Federal Excessive Fines Clause applies to the states, and the Court of Appeals' decision in *County of Nassau v Canavan* (1 NY3d 134 [2003]), which held that both the Federal and State Excessive Fines Clauses apply to civil in rem forfeitures. Both *Timbs* and *Canavan* held that civil in rem forfeitures are subject to the protection of the Excessive Fines Clause when they are at least partly punitive (*Timbs*, 586 US at 151 [Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense" (internal quotation marks omitted)]; *see also Canavan*, 1 NY3d at 139). When forfeiture "serves, at least in part, deterrent and retributive purposes," it is punitive (*Canavan*, 1 NY3d at 139-140).

"[F]orfeiture generally and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment" (*Austin v United States*, 509 US 602, 618 [1993]). That determination can be based on the presence of many factors, some of which are present here. In particular, courts have found forfeiture to be at least partially punitive where it is tied directly to commission of a criminal offense; where possession of the forfeited property itself is not a crime, so that removing it from the owner's possession serves no remedial public health or safety purpose; where there are dramatic variations in the value of forfeitable property; where the value of the forfeited property does not correlate with any harm caused to society or the cost of enforcement; and where forfeiture has been characterized as a deterrent (*see Austin*, 509 US at 620-621;

1. The US Constitution provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (US Const 8th Amend [emphasis added]). The New York Constitution contains identical language (NY Const, art I, § 5).

see also *Matter of Prince v City of New York*, 108 AD3d 114, 120 [1st Dept 2013] [civil penalty that bore no relationship to the loss sustained by the City, and was referred to as a “deterrent” in legislative history was punitive]). In addition, this Court has held that where, as here, the activity subject to civil sanction is completely barred, the sanction is punitive (see *Prince*, 108 AD3d at 121). The City correctly points out that the inclusion of an innocent owner exception, which the statutes at issue here lack, can be an indicator of punitive forfeiture (see *Austin*, 509 US at 619). However, its absence is not fatal to a determination that the forfeiture here is at least partially punitive (see *id.* at 610).

The forfeiture provisions at issue here are tied to the commission of a misdemeanor and enforceable by police (Administrative Code § 17-325 [a]). Indeed, the plain language of section 17-322 (a) indicates that forfeiture is a punishment for unlicensed food vendors “[i]n addition to” the other penalties listed in section 17-325 (see *Austin*, 509 US at 620-621).

However, possession of the forfeited property here is not itself a crime. Accordingly, removing it from the owner’s possession serves no apparent remedial purpose with regard to public health or safety (*id.* at 621 [“there is nothing even remotely criminal in possessing an automobile” (internal quotation marks omitted)]).

Jones’ claim that the forfeited vehicle is worth \$40,000 demonstrates that the statute at issue here provides for forfeiture of property that may have “dramatic variations in the value,” calling into question whether its forfeiture serves a purely remedial purpose or is at least partly punitive (*id.* at 621). Moreover, since the statute already provides that the City may charge the unlicensed food vendor whose property has been seized “reasonable costs for removal and storage payable prior to the release of such food, vehicle or pushcart” (Administrative Code § 17-321 [c] [v]), forfeiture of the vehicle appears to have little, if any, correlation to the cost of enforcement (see *Austin*, 509 US at 621; *Prince*, 108 AD3d at 120).

Finally, there is some indication in the statutory history of the forfeiture provision of the food vending laws that it was, at least in part, intended to serve the traditionally punitive goal of deterrence (see *Austin*, 509 US at 620-621; *Prince*, 108 AD3d at 120-121). The relevant sections of the food vending laws were enacted in 1977 (formerly Administrative Code § D22-16.0, as added by Local Law No. 77 [1977] of City of NY § 2) to ad-

dress complaints from City officials, private business owners, and the public that street vendors operated without a license, which caused them not to be subject to taxation by the City, and clogged the sidewalks. The legislation provided for regulation of food vendors by the Department of Public Health for the first time “with emphasis on inspections and safety of the food, cart, stand or vehicle, and its placement” (NY City Council Proceedings July 7 to Dec. 29, 1977, vol II at 1453-1454). It strengthened enforcement by increasing fines for violations and by directing, for the first time, forfeiture of vehicles, carts, and goods upon a determination of unlicensed vending (Administrative Code § 17-322 [a] [formerly § D22-17.0, as added by Local Law No. 77 [1977] of City of NY § 2]). On September 22, 1976, Mayor Beame’s administration and the City Council issued a joint press release supporting the legislation “aimed at driving an estimated 10,000 illegitimate peddlers from the city’s streets” through “severe penalties, including . . . fines, forfeiture of goods and even prison terms for unlicensed peddlers” (NYLS Local Law No. 77 [1977] of City of NY at 26). At the public hearing on the bill, Sidney Baumgarten, who was then the special assistant to Mayor Beame and head of the Mid-town Taskforce, stated that seizure of merchandise, increased fines and jail terms for unlicensed vendors were important “deterrent[s]” (*id.*, vol 3 at 21 [Edward Ranzal, *Police Challenged on Peddlers’ Law*, NY Times, Oct. 7, 1976 at 51]). Community Board 10 held its own hearing and then issued a resolution recommending that the forfeiture provision be replaced with a provision providing for the return of property to the vendor upon presentation of a license because the legislation already provides for fines and imprisonment and “there is no need for double punishment” (*id.* at 140). The Statement on Behalf of the Frankfurter Vending Industry on the proposed bill stated that the forfeiture provisions “are harsh, unduly punitive, and unnecessary for any legitimate purpose,” such as “preserving public health,” and it is “clear . . . that any seizure or forfeiture is unrelated to evidentiary or other prosecutorial needs and is merely an excuse for imposing a more severe penalty upon the vendor” (*id.* at 93, 98-99, 109). Thus, the legislative history of the food vending forfeiture statute indicates that it was intended to completely prohibit unlicensed food vendors through the imposition of forfeiture as a deterrent, making clear that the forfeiture provision was at least partly punitive (*see Austin*, 509 US at 620; *Prince*, 108 AD3d at 121).

Here, as the motion court found, Jones raised questions of fact as to whether the forfeiture of his truck “is, at least in part, punitive and meant as a deterrence, rather than simply remedial.” The City states that the forfeiture provision at issue is “designed to protect public health, safety, and welfare by ensuring compliance.” However, a penalty that ensures compliance through forfeiture, in the absence of any threat to public health, safety or welfare, suggests that it serves the goal of deterrence, which “has traditionally been viewed as a goal of punishment” (*United States v Bajakajian*, 524 US 321, 329 [1998]). Here, the motion court found that the Health Department never sought to test any of the items being sold to determine if their contents posed a danger to the public, there was no evidence the Health Department ever received any complaints about Jones selling spoiled or tainted food, there was no evidence that the Health Department had decided that public safety required forfeiture of the vehicle, and there was no evidence that there were any “victims” of the sale of items from the vehicle or that the proceeds of the forfeiture would be distributed to them. Accordingly, the City failed to establish, as a matter of law, that forfeiture under Administrative Code §§ 17-321 (a), (c) (iii), and 17-322 (a) was purely remedial. In any event, Jones raised issues of fact as to whether the forfeiture was, at least in part, punitive, and thus subject to the Excessive Fines Clauses of the New York and US Constitutions.

A “punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense” (*Bajakajian*, 524 US at 334; *see also Canavan*, 1 NY3d at 140). In determining gross disproportionality, the Court of Appeals has held that courts should consider

“such factors as the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged, and the economic circumstances of the defendant” (*Canavan*, 1 NY3d at 140; *see also Property Clerk, N.Y. City Police Dept. v Nurse*, 185 AD3d 459, 460-461 [1st Dept 2020]).

Here, Jones asserts that the vehicle is worth approximately \$40,000. In contrast, the fines total just \$2,600. Jones further

asserted in his affidavit that the City's possession of his vehicle had caused him "extreme financial hardship" and prevented him from operating his business lawfully in places outside of New York City that do not require a food vending license. There is no evidence that the sale of the items at issue did cause or could have caused any harm. Therefore, Jones also raised issues of fact as to whether imposing a forfeiture on his property, which had a value far in excess of both the fines imposed and any damage to society, violated the Excessive Fines Clauses of the New York State and US Constitutions.

The City relies on this Court's one-paragraph order in *City of New York v Nadler* (304 AD2d 491 [1st Dept 2003]). However, that case, decided seven months before *Canavan* and 16 years before *Timbs*, does not address at all whether forfeiture of a food vendor's vehicle for violation of local vending codes violates the Excessive Fines Clause of the New York or US Constitutions. Thus, *Nadler* does not prevent us from considering these constitutional issues under now prevailing Excessive Fines Clause jurisprudence.

In *Nadler*, the motion court denied the City's motion for summary judgment seeking forfeiture of a licensed food vendor's cart based on a violation of the Administrative Code's provision requiring that the person selling food from the cart be a licensed food vendor. The motion court granted the vendor's motion for summary judgment in his favor, denying forfeiture and directing return of his cart. This Court reversed, granted the City's motion for summary judgment, and held that "mandatory and unqualified" language in the Administrative Code provisions leaves courts with "no discretionary authority" to direct return of the cart (*Nadler*, 304 AD2d at 491). In making this finding, this Court quoted *Matter of Property Clerk of N.Y. City Police Dept. v Ferris* (77 NY2d 428, 431 [1991]) as to the mandatory nature of the statutory language. In *Ferris*, the vendor did not claim that the forfeiture violated the Excessive Fines Clause.

The only other case this Court cited in *Nadler* is *Matter of Henry v Alquist* (127 AD2d 60, 64 [2d Dept 1987]). In *Alquist*, the Court held that the statutory language at issue was mandatory, as this Court did in *Nadler*. The *Alquist* trial court found that civil forfeiture under the New York State Public Health Law of Ms. Alquist's car used in the sale of a controlled substance that resulted in her criminal conviction was "excessive." On appeal, without discussing any cases interpreting the

State or Federal Excessive Fines Clauses, the Second Department reversed based on the mandatory language in the civil forfeiture statute at issue.² The Second Department further stated, “[t]o the extent that the trial court’s determination may be interpreted as a holding that the forfeiture sanction in this case would violate the State and Federal constitutional proscriptions against cruel and unusual punishment . . . we find it to be in error,” noting that the civil forfeiture was “separate from any criminal penalties that may be imposed upon any of the individuals involved in the drug transactions” (*Alquist*, 127 AD2d at 65). The Second Department further stated, “[t]his . . . is not to say that under no circumstances may a court deem the forfeiture statute unconstitutional as applied in a particular case” (*id.* at 66).

Like *Nadler*, *Alquist* was decided before the Court of Appeals’ decision in *Canavan*, which held that a civil in rem forfeiture is subject to the New York and Federal Excessive Fines Clauses where it is at least partly punitive (*see Canavan*, 1 NY3d at 140). *Canavan* relied heavily on the U.S. Supreme Court’s opinion in *Austin*, which held that “civil proceedings may advance punitive as well as remedial goals” (*Austin*, 509 US at 610), and that the civil classification of a forfeiture is irrelevant in determining whether it violates the Federal Excessive Fines Clause (*id.* [“the question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment”]). Moreover, *Alquist* was decided before the U.S. Supreme Court opinions that today establish that the Federal Excessive Fines Clause is applicable to the states (*Timbs*, 586 US 146) and that forfeitures, whether brought against an individual criminally (*see Bajakajian*, 524 US 321) or in a civil in rem proceeding (*see Timbs*, 586 US 146; *Austin*, 509 US 602) as in *Alquist*, fall within the protection of the New York State and Federal Excessive Fines Clause when they are at least partially punitive (*see Timbs*, 586 US at 154; *Bajakajian*, 524 US at 321; *Austin*, 509 US at 619; *Canavan*, 1 NY3d at 139).

2. The only case dealing with any constitutional issue cited by the Second Department in *Alquist* was *Calero-Toledo v Pearson Yacht Leasing Co.* (416 US 663 [1974]). That case involved forfeiture of a yacht used unlawfully without the owner’s knowledge in connection with criminal activity. However, *Calero-Toledo* did not address whether the forfeiture violated the Excessive Fines Clause. Rather, it explored whether the forfeiture violated the innocent owner’s due process rights under the Fifth and Fourteenth Amendments to the US Constitution.

Accordingly, this Court's opinion in *Nadler* does not prevent us from addressing the constitutional issue of whether the civil forfeiture at issue here is subject to and violates the Excessive Fines Clauses of the US and New York Constitutions in light of subsequent U.S. Supreme Court and Court of Appeals jurisprudence.

Jones' opposition to the City's motion raised material issues of fact requiring further proceedings, including the ordered hearing, in order to determine whether the civil forfeiture here is subject to the Excessive Fines Clause of the US and New York Constitutions because it is not entirely remedial in nature, and serves, at least in part, deterrent and/or retributive purposes (*see Canavan*, 1 NY3d at 139-140), and whether, if the excessive fines analysis does apply, the forfeiture would be grossly disproportionate to the offense (*see Property Clerk, N.Y. City Police Dept. v Nurse*, 185 AD3d 459, 460-461).

Accordingly, the order of Supreme Court, New York County (Nicholas W. Moyne, J.), entered April 12, 2023, which denied plaintiff City of New York's motion for summary judgment and set the matter down for a hearing, should be affirmed, without costs.

KERN, J.P., MOULTON, KAPNICK and PITT-BURKE, JJ., concur.

Order, Supreme Court, New York County, entered April 12, 2023, affirmed, without costs.

[241 NYS3d 531]

In the Matter of ANDREW F. PLASSE, an Attorney, Respondent.
GRIEVANCE COMMITTEE FOR THE SECOND, ELEVENTH, AND
THIRTEENTH JUDICIAL DISTRICTS, Petitioner.

Second Department, September 10, 2025

PROCEDURAL SUMMARY

DISCIPLINARY PROCEEDING instituted by the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts. Respondent was admitted to the bar on February 16, 1982, at a term of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

HEADNOTE**Attorney and Client — Disciplinary Proceedings — Suspension**

Respondent attorney committed professional misconduct by engaging in a pattern and practice of misappropriating client funds entrusted to him as a fiduciary, incident to his practice of law; commingling his personal funds with client funds in his escrow account; and failing to maintain the required bookkeeping records for his escrow account (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.15 [a], [d]). In mitigation, respondent offered his remorse and lack of venality, evidence of his positive character, his pro bono work, and the remedial measures he had undertaken. In aggravation, respondent was previously publicly censured for, among other things, failing to satisfy a judgment for approximately three years and failing to retain funds for a lien after acknowledging the lien, and had also received a prior admonition and letter of advisement. Under the totality of the circumstances, respondent was suspended from the practice of law for a period of one year.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 62, 64–65.

CARMODY-WAIT 2d Officers of Court §§ 3:284–3:285, 3:287,
3:325, 3:330, 3:333.

22 NYCRR 1200.0, rule 1.15 (a), (d).

NY JUR 2d Attorneys at Law §§ 437, 441, 511, 518–519,
525, 527.**ANNOTATION REFERENCE**

Attorney's commingling of client's funds with his own as ground for disciplinary action—modern status. 94 ALR3d 846.

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APPEARANCES OF COUNSEL

David W. Chandler, Brooklyn (*Susan Korenberg* of counsel),
for petitioner.

Michael S. Ross, New York City (*Eugene Gormakh* of
counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

The Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts commenced a formal disciplinary proceeding pursuant to 22 NYCRR 1240.8 against the respondent by serving and filing a notice of petition and a verified petition, both dated July 14, 2022. The petition contains four charges of professional misconduct. The respondent served and filed an answer dated August 29, 2022. By decision and order on application dated October 19, 2023, this Court, pursuant to 22 NYCRR 1240.8 (b) (1), referred the matter to the Honorable David B. Vaughan, as Special Referee, to hear and report. In a report dated July 22, 2024, the Special Referee sustained the four charges in the petition. By notice of motion dated September 19, 2024, the Grievance Committee moves to confirm the Special Referee’s report and to impose such discipline upon the respondent as this Court deems just and proper. In response, the respondent submits an affirmation in which he does not oppose the Special Referee’s findings but offers arguments in mitigation and requests that the discipline imposed be limited to a six-month suspension.

The Petition

The petition alleges four charges of professional misconduct surrounding the respondent’s escrow account. The respondent maintained an attorney escrow account at Capital One Bank entitled “Andrew F. Plasse, IOLA Attorney Trust Account” with an account number ending in x-0369 (hereinafter the escrow account).

Charge one alleges that between February 1, 2018, and March 25, 2019, the respondent deposited settlement checks into the escrow account, totaling \$305,100.77, on behalf of 14 clients. Between September 4, 2018, and May 23, 2019, the respondent made disbursements on behalf of these client matters

and the escrow account balance repeatedly fell below what he was required to maintain.

On December 11, 2018, the respondent was required to be holding at least \$11,621.60 in the escrow account. However, on that day, the balance in the escrow account had been depleted to \$8,689.16, creating a \$2,932.44 deficiency.

On January 15, 2019, the respondent was required to be holding at least \$25,037.47 in the escrow account. However, on that day, the balance in the escrow account had been depleted to \$21,782.54, creating a \$3,254.93 deficiency.

On February 8, 2019, the respondent was required to be holding at least \$15,656.43 in the escrow account. However, on that day, the balance in the escrow account had been depleted to \$6,251.50, creating a \$9,404.93 deficiency.

On March 1, 2019, the respondent was required to be holding at least \$24,378.51 in the escrow account. However, on that day, the balance in the escrow account had been depleted to \$7,945.13, creating a \$16,433.38 deficiency.

On April 23, 2019, the respondent was required to be holding at least \$72,980.40 in the escrow account. However, on that day, the balance in the escrow account had been depleted to \$63,113.26, creating a \$9,867.14 deficiency.

On May 23, 2019, the respondent was required to be holding at least \$6,710.23 in the escrow account. However, on that day, the balance in the escrow account had been depleted to \$26.32, creating a \$6,683.91 deficiency.

Based on the above, the respondent was charged with engaging in a pattern and practice of misappropriating client funds entrusted to him as a fiduciary, incident to his practice of law, in violation of rule 1.15 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0).

Charge two alleges that on March 4, 2019, the respondent deposited a check into the escrow account in the amount of \$20,241.39, representing an earned legal fee on behalf of the respondent's client, Joseph Haggerty. On March 8, 2019, the respondent deposited a check into the escrow account in the amount of \$33,264.92, representing an earned legal fee on behalf of the respondent's client, Odell Barksdale. Both checks were deposited into the escrow account while the respondent maintained client funds on deposit. Based on the foregoing, the respondent was charged with commingling personal funds with client funds in the escrow account in violation of rule 1.15 (a) of the Rules of Professional Conduct.

Charge three alleges that between December 14, 2018, and May 20, 2019, the respondent routinely failed to promptly withdraw earned legal fees from the escrow account, while he maintained client funds on deposit in the escrow account. Based on the foregoing, the respondent was charged with commingling personal funds with client funds in the escrow account in violation of rule 1.15 (a) of the Rules of Professional Conduct.

Charge four alleges that the respondent failed to maintain an accurate ledger or similar record for the escrow account showing the source of all funds deposited therein, the names of all persons for whom the funds were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed. Based on the foregoing, the respondent was charged with failing to maintain the required bookkeeping records for the escrow account in violation of rule 1.15 (d) of the Rules of Professional Conduct.

The Hearing Record

A hearing was held on March 12, 2024. The Grievance Committee rested on eight exhibits entered into evidence without objection to prove its case in chief. The respondent admitted to all of the charges in the petition, testified on his own behalf in mitigation, and did not call any witnesses. The respondent submitted 32 exhibits, which included 13 character letters in support of his good character and reputation.

The respondent testified that he opened his own practice in 1993 in Manhattan where he handled workers' compensation litigation, prisoner litigation, and personal injury cases. The respondent's office moved to a few different locations in Manhattan and eventually to Flushing in 2015. By this point, the respondent mostly was handling cases involving incarcerated individuals at Rikers Island, as well as incarcerated individuals in state prisons. Although the respondent does not contest the allegations in the petition, he offered a number of exhibits in explanation and in mitigation as to each of the charges.

The respondent explained that while he believes there is a minor discrepancy in the petition regarding the total amount of settlement checks in the account, he does not deny the charge of misappropriation. The respondent testified that he had written checks amounting to more than he was holding on deposit in the escrow account, resulting in deficiencies ranging

from approximately \$3,000 to \$16,000 over a six-month period from December 2018 to May 2019.

The respondent explained that in May 2019, he moved his residence, and that during the move he lost his physical ledger books and his office computer was broken. The respondent stated that he had kept a running ledger through QuickBooks on his computer since 2005. Once the respondent realized that his handwritten escrow ledger and computer ledger were destroyed during his move in May 2019, he started a new ledger by creating Microsoft Word documents for each client using his Capital One banking application to advise him how much was available in the escrow account. However, with his files destroyed, he could not determine exactly how much money belonged to each client, so he recreated his ledgers from memory for each client to the best of his ability. These recreated ledgers are what he provided during the Grievance Committee's investigation. The respondent acknowledged that there may be some errors in his recreated ledgers but stated that it was "not [his] style, it has never been to take money from [his] clients."

The respondent stated that he knew that the escrow account was short "a few thousand, I am not exactly sure," that he was attempting to figure it out, and that he was doing the best he could. The respondent was not sure how the deficiencies occurred and acknowledged that any discrepancies were due to bookkeeping errors on his part.

The respondent stated that he now understands the rule regarding earned legal fees in the escrow account, but asserted that, regarding the two checks he deposited into the escrow account referenced in charge two, he was unsure whether he would be obligated to satisfy his clients' liens from his legal fees and, therefore, he kept the money in the escrow account until the liens were resolved. The respondent stated that he understood that leaving legal fees in the escrow account for 60 days may not be considered prompt, and he apologized for his misinterpretation of the rule. The respondent stated that he now removes legal fees promptly in "quick increments" and no longer leaves earned legal fees in the escrow account.

Regarding the bookkeeping records, the respondent stated that he maintained handwritten individual client ledgers with each client having a separate page in his ledger book. The respondent stated he kept these records for almost 20 years until he lost them when he moved in May 2019. However, the mis-

appropriation of client funds charged in charge one predated the respondent's move and the loss of his ledgers.

In addition to the 13 character letters submitted, the respondent also submitted evidence of his pro bono work with incarcerated individuals, including a list of settlements for pro bono cases that he handled.

The Special Referee's Report

In a report dated July 22, 2024, the Special Referee sustained the four charges of professional misconduct in the petition, noting that, prior to the hearing, the respondent admitted to all of the charges contained in the petition. The Special Referee indicated that, in mitigation, the respondent stated: as to charge one, that his conduct was not venal or malicious; as to charge two, he had a good-faith belief that the payments were not earned legal fees as he believed they were subject to liens; as to charge three, since 2019, he has promptly paid all earned legal fees; and as to charge four, he lost all of his files when he moved.

Findings and Conclusion

In view of the evidence adduced at the hearing and the respondent's admissions, we find that the Special Referee properly sustained the four charges in the petition. Accordingly, the Grievance Committee's motion to confirm the Special Referee's report is granted. In determining an appropriate measure of discipline, the respondent requests that this Court limit the discipline imposed to a six-month suspension in view of the evidence offered in mitigation including, inter alia, his remorse, his lack of venality, the evidence of his positive character, his pro bono work, and the remedial measures he has undertaken. Notwithstanding the mitigation advanced, the respondent failed to honor his obligations as a fiduciary. Moreover, this Court considers the respondent's prior disciplinary history, including the respondent's prior public censure for, among other things, failing to satisfy a judgment for approximately three years and failing to retain funds for a lien after acknowledging the lien (*see Matter of Plasse*, 17AD3d 33 [1st Dept]), as well as the respondent's receipt of an admonition in 2000 and a letter of advisement in 2020 for unrelated professional misconduct, which is an aggravating factor.

Under the totality of the circumstances, we find that the respondent's conduct warrants his suspension from the practice

of law for a period of one year (*see Matter of Dave*, 205 AD3d 70 [2d Dept 2022]).

LaSALLE, P.J., DILLON, DUFFY, BARROS and CHRISTOPHER, JJ., concur.

Ordered that the Grievance Committee's motion to confirm the Special Referee's report is granted; and it is further,

Ordered that the respondent, Andrew F. Plasse, is suspended from the practice of law for a period of one year, commencing October 10, 2025, and continuing until further order of this Court. The respondent shall not apply for reinstatement earlier than July 10, 2026. In such application (*see* 22 NYCRR 1240.16), the respondent shall furnish satisfactory proof that during the period of suspension, he (1) refrained from practicing or attempting to practice law, (2) fully complied with this opinion and order and with the terms and provisions of the rules governing the conduct of disbarred or suspended attorneys (*see id.* § 1240.15), (3) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11 (a), and (4) otherwise properly conducted himself; and it is further,

Ordered that the respondent, Andrew F. Plasse, shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see id.* § 1240.15); and it is further,

Ordered that pursuant to Judiciary Law § 90, the respondent, Andrew F. Plasse, shall desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that if the respondent, Andrew F. Plasse, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency, and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 1240.15 (f).

[240 NYS3d 523]

In the Matter of JOHN J. HALTON (Admitted as JOHN JOSEPH HALTON), an Attorney, Respondent. GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, Petitioner.

Second Department, September 10, 2025

PROCEDURAL SUMMARY

RESPONDENT was admitted to the bar on March 27, 1991, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department as John Joseph Halton. By order to show cause dated January 12, 2023, that Court, pursuant to 22 NYCRR 1240.12 (c) (3) (iii), directed respondent to show cause at a hearing before a Special Referee why a final order of suspension, censure, or disbarment should not be made based on his convictions on August 18, 2021, in Nassau County District Court, of aggravated driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (2-a) (a), and on February 11, 2022, in the Town of Southold Justice Court, Suffolk County, of driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (3), both unclassified misdemeanors.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Public Censure

Respondent attorney was guilty of professional misconduct based upon his convictions of aggravated driving while intoxicated and driving while intoxicated, both unclassified misdemeanors (Vehicle and Traffic Law § 1192 [2-a] [a]; [3]). Under the totality of the circumstances, including that respondent completed the terms of his sentencing, engaged in therapy, had remained sober, and secured rewarding nonlegal employment, and the absence of aggravating circumstances, respondent was publicly censured for his unlawful conduct.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 29–30, 40, 82–83, 86, 91;
AM JUR 2d Automobiles and Highway Traffic § 340.
CARMODY-WAIT 2d Officers of Court §§ 3:244, 3:249, 3:258,
3:273, 3:323, 3:325, 3:327, 3:330.
MCKINNEY'S, Vehicle and Traffic Law § 1192 (2-a) (a); (3).
NY JUR 2d Attorneys at Law §§ 362, 365, 400–401, 511,
518, 524; NY JUR 2d Automobiles and Other Vehicles
§§ 879–880.

ANNOTATION REFERENCE

Misconduct involving intoxication as ground for disciplinary action against attorney. 1 ALR5th 874.

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Query: “grievance committee” & (“driving while intoxicated” OR “aggravated driving while intoxicated”) & (public! /3 censure!)

APPEARANCES OF COUNSEL

Catherine A. Sheridan, Hauppauge (*Rona I. Kugler* of counsel), for petitioner.

John J. Halton, Bay Shore, respondent pro se.

OPINION OF THE COURT

Per Curiam.

By affirmation dated May 24, 2022, on notice to the respondent, the Grievance Committee for the Tenth Judicial District advised this Court that on December 24, 2020, the respondent was arrested in Hempstead and charged with: (1) aggravated driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (2-a) (a), (2) driving while intoxicated per se, based on blood alcohol content of 0.08 percent or more, in violation of Vehicle and Traffic Law § 1192 (2), and (3) driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (3), all unclassified misdemeanors, and three traffic infractions. On August 18, 2021, in Nassau County District Court the respondent pleaded guilty to aggravated driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (2-a) (a), in satisfaction of all of the charges. During his plea, the respondent admitted to operating a motor vehicle on a public roadway with a blood alcohol content of 0.18 percent or higher after drinking “some beers.” The respondent was sentenced to a term of incarceration of seven days and a conditional discharge of one year, with the conditions that his driver license be revoked for one year, that he install an ignition interlock device in any vehicle that he owned or operated for one year, that he remain in an alcohol treatment program, that he complete the Impaired Driver Program, and that he attend a Victim Impact Panel. He was also required to pay \$1,395 in fines and surcharges.

The Grievance Committee also advised this Court that, in an unrelated matter, on March 7, 2021, and while the matter in Nassau County District Court was still pending, the respondent was arrested in Southold and charged with driving while

intoxicated, in violation of Vehicle and Traffic Law § 1192 (3), an unclassified misdemeanor, and refusal to submit to a breath test, in violation of Vehicle and Traffic Law § 1194 (1) (b). The allegations against the respondent included, *inter alia*, that a 911 call was received reporting that a vehicle was driving in an erratic manner by randomly stopping and making U-turns. A police officer arrived at the scene and observed the vehicle make a U-turn. The police officer conducted a traffic stop, and, upon finding the respondent to be driving the vehicle, determined that the respondent was intoxicated. The respondent refused to submit to chemical testing to determine his blood alcohol content. On February 11, 2022, the respondent pleaded guilty to driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (3). At his plea and sentencing, the respondent admitted to drinking at least six to seven beers prior to or during the operation of his vehicle and that this rendered him intoxicated. The respondent was sentenced to a term of incarceration of 45 days, his driver license was revoked for 18 months, and he was required to pay \$1,400 in fines and surcharges.

By order to show cause dated January 12, 2023, this Court, pursuant to 22 NYCRR 1240.12 (c) (3) (iii), directed the respondent to show cause at a hearing before Honorable Peter B. Skelos, as Special Referee, why a final order of suspension, censure, or disbarment should not be made based on his convictions of aggravated driving while intoxicated and driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (2-a) (a) and (3), respectively, both unclassified misdemeanors.

After a hearing on April 25, 2023, the Special Referee filed a report dated January 2, 2024, setting forth his finding that the respondent failed to establish that a sanction of public discipline should not be imposed. The Grievance Committee now moves to confirm the Special Referee's report and to impose such discipline upon the respondent as this Court deems just and proper. The respondent submits no papers in response to the Special Referee's report or the Grievance Committee's motion.

Prior to his hearing before the Special Referee, the respondent submitted an affidavit attesting that he had completed all aspects of the Nassau County District Court sentence, except that he was not eligible for the Impaired Driver Program at that time. He attested that he was continuing his alcohol treatment program and that, with regard to his Southold conviction,

tion, he had completed his jail sentence but had yet to pay his fine. He stated that he had not timely filed a record of his convictions with this Court because he “was distraught and extremely emotionally impaired” following his incarceration but had sent the Grievance Committee a letter dated January 14, 2022, providing information about both his first conviction and second arrest, and another letter dated March 23, 2022, regarding, among other things, his second conviction.

At the hearing before the Special Referee, the respondent did not dispute his criminal convictions and presented only mitigation evidence, including that, in the time leading up to his arrests, he was very troubled to be out of work due to the COVID-19 pandemic and had experienced personal challenges including the ending of a long-term relationship. He further noted his unblemished disciplinary record during his 32 years of practice of the law and that he took full responsibility for his “bad choices,” had accepted his punishment, served jail time twice, and had paid all of the fines assessed against him. The respondent expressed gratitude that no one was injured by his impaired driving, as well as his awareness that his conduct endangered lives. He testified that he had successfully completed treatment, including individual and group therapy, as well as random urine tests which all showed negative results for alcohol, and that he had stopped drinking alcohol. The respondent submitted an affirmation of his therapist, stating, *inter alia*, that the respondent had completed alcohol treatment and was emotionally and psychologically stable. The respondent further testified that he had secured rewarding employment at a rehabilitation and nursing center in client services and that he could commute to this employment by bus, as his driver license had not been reinstated.

In a report dated January 2, 2024, the Special Referee summarized the evidence in the record and found no aggravating factors. In mitigation, the Special Referee found that the respondent had taken full responsibility for the conduct which resulted in his convictions, completed the terms of his sentencing, including his incarceration and early release, engaged in therapeutic treatment for about 1½ years, received negative chemical testing results, and had not practiced law in the three years prior to the hearing but was engaged in nonlegal employment which brought him personal satisfaction from helping others. The Special Referee concluded that, in light of the respondent’s two convictions, and not withstanding the mitigat-

ing evidence and absence of aggravating circumstances, the respondent failed to establish that a sanction of public discipline should not be imposed.

The Grievance Committee moves to confirm the Special Referee's report and for this Court to impose such discipline upon the respondent as it may deem just and proper. The Grievance Committee notes that the respondent has no disciplinary history.

The respondent does not cross-move or submit any response to the Grievance Committee's motion.

Findings and Conclusion

In view of the evidence adduced, the Grievance Committee's motion to confirm the Special Referee's report is granted. Under the totality of the circumstances, including evidence that the respondent completed the terms of his sentencing, engaged in therapy, has remained sober, and has secured rewarding nonlegal employment, the respondent is publicly censured for the unlawful conduct that resulted in his convictions of aggravated driving while intoxicated and driving while intoxicated (*see Matter of Lovell*, 232 AD3d 64 [2d Dept 2024]; *Matter of Battaglia*, 177 AD3d 16 [2d Dept 2019]).

LaSALLE, P.J., DILLON, BARROS, CONNOLLY and LOVE, JJ., concur.

Ordered that the Grievance Committee's motion to confirm the Special Referee's report is granted; and it is further,

Ordered that the respondent, John J. Halton, admitted as John Joseph Halton, is publicly censured for his professional misconduct.

[241 NYS3d 465]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TONY EDWARDS, Appellant.

Second Department, September 10, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Suffolk County Court (Karen M. Wilutis, J.), dated August 30, 2023. The order designated defendant a level one sexually violent offender pursuant to Correction Law article 6-C after a hearing.

HEADNOTE

Crimes — Sex Offenders — Sex Offender Registration Act — Sexually Violent Offender — As-Applied Due Process Challenge to Foreign Registration Clause

The foreign registration clause of Correction Law § 168-a (3) (b), insofar as applied to defendant designating him a sexually violent offender as a result of criminal conduct that occurred outside of New York, and would not otherwise have resulted in such designation if the same conduct occurred within the state, violated state and federal constitutional guarantees of substantive due process. The foreign registration clause defines a “sexually violent offense” as a “conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred” (Correction Law § 168-a [3] [b]). Defendant’s out-of-state conviction did not include all of the essential elements of any of the enumerated sexually violent offenses set forth in Correction Law § 168-a (3) (a). Designating a defendant as sexually violent merely because he or she had an out-of-state sex conviction requiring out-of-state registration, regardless of whether that underlying offense is violent, bears no rational relationship to the legitimate governmental interest of informing the public of threats posed by sex offenders. In addition, the requirements of federal law are fulfilled by requiring out-of-state sex offenders to register as sex offenders when they move into New York according to their appropriate risk level. The requirement that an out-of-state sex offender’s status automatically transmutes into that of a sexually violent offender simply by virtue of moving to New York is not rationally related to any federal requirement.

RESEARCH REFERENCES

By the Publisher’s Editorial Staff

AM JUR 2d Constitutional Law §§ 609, 627; AM JUR 2d Mentally Impaired Persons §§ 131, 134, 138.

LAFAVE, ET AL., CRIMINAL PROCEDURE (4th ed) § 26.6.

McKINNEY’S, Correction Law §§ 168–a (3) (a), 168–a (3) (b).

NY JUR 2d Constitutional Law §§ 412, 414, 424; NY JUR 2d Penal and Correctional Institutions §§ 382, 386.

ANNOTATION REFERENCES

State statutes or ordinances requiring persons previ-

ously convicted of crime to register with authorities. 36 ALR5th 161.

Validity, Construction, and Application of State Statutory Requirement that Person Convicted of Sexual Offense in Other Jurisdiction Register or Be Classified as Sexual Offender in Forum State. 34 ALR6th 171

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APPEARANCES OF COUNSEL

Laurette D. Mulry, Riverhead (*Mark J. Ermmarino* of counsel), for appellant.

Raymond A. Tierney, District Attorney, Riverhead (*Christopher Turk* and *Glenn Green* of counsel), for respondent.

OPINION OF THE COURT

TAYLOR, J.

The main question we answer on the defendant’s appeal, which concerns an issue of first impression in the Appellate Division, Second Department, is whether the County Court’s designation of the defendant as a sexually violent offender pursuant to New York’s Sex Offender Registration Act (SORA) (Correction Law art 6-C), and in particular Correction Law § 168-a (3) (b), violated his constitutional rights to substantive due process. For the reasons that follow, we hold that Correction Law § 168-a (3) (b), which required the defendant to be designated as a sexually violent offender as a result of criminal conduct that occurred outside of New York, and would not otherwise have resulted in such designation if the same conduct occurred within the state, violated state and federal constitutional guarantees of substantive due process insofar as that statute was applied to the defendant under the particulars of this case.

I. Factual and Procedural Background

According to an investigation by the Palm Beach County Sheriff’s Office, on or about June 10, 2004, the defendant, then 22 years old, engaged in sexual contact with a 13-year-old victim.

In November 2004, the defendant entered a plea of guilty in a Circuit Court of the State of Florida to one count of lewd or

lascivious battery in violation of Florida Statutes § 800.04 (4) (a) (hereinafter the out-of-state conviction). Pursuant to the plea, the defendant was sentenced to five years of sex offender probation. The defendant was also required to register as a sex offender in Florida (*see id.* § 943.0435 [1] [b], [h] [1] [a] [I]; [2]).

On or about March 28, 2023, the New York State Board of Examiners of Sex Offenders (hereinafter the Board) was notified that the defendant was residing at an address in Suffolk County. Pursuant to the requirements of SORA, the Board determined that the defendant was required to register as a sex offender in New York. Accordingly, the Board prepared a case summary and a risk assessment instrument that assessed the defendant a total of 40 points and recommended, in conformity with his presumptive risk level according to that score (*see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3, ¶ 3 [2006] [hereinafter Guidelines]*), that the defendant be designated a level one sex offender.

Thereafter, the People prepared their own risk assessment instrument, which assessed the defendant additional points under, *inter alia*, risk factor 11 for “drug or alcohol abuse.” Nonetheless, the People agreed with the Board’s recommendation that the defendant be designated a level one sex offender. Pursuant to Correction Law § 168-a (3) (b), the People also provided notice of their intent to seek a “sexually violent offender” designation for the defendant based on the out-of-state conviction because the defendant was required to register as a sex offender in Florida.

On August 30, 2023, the County Court conducted a hearing to determine the defendant’s risk level pursuant to Correction Law § 168-n. At the hearing, the People argued that the defendant should be designated as a sexually violent offender based on the out-of-state conviction, regardless of whether the underlying criminal offense, as defined by Florida law, would have qualified as a sexually violent offense if it had been committed and prosecuted in New York.

Following the hearing, the County Court determined, *inter alia*, that pursuant to Correction Law § 168-a (3) (b), the defendant must be designated as a sexually violent offender because of the out-of-state conviction. The defendant appeals, challenging, *inter alia*, the constitutionality of Correction Law § 168-a (3) (b) insofar as applied to him.

II. Legal Framework

a. Substantive Due Process

Under the 14th Amendment to the United States Constitution and article I, § 6 of the New York State Constitution, the state government may not deprive an individual “of life, liberty, or property, without due process of law” (US Const, Fourteenth Amend, § 1; see *People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d 187, 198 [2020]). “[T]he guarantee of ‘due process of law’” includes “‘a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them’” (*People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d at 198, quoting *Zinermon v Burch*, 494 US 113, 125 [1990]; see *DeShaney v Winnebago County Dept. of Social Servs.*, 489 US 189, 200 [1989]; *McCarthy v County of Nassau, N.Y.*, 230 AD3d 485, 487-488 [2d Dept 2024]).

“Substantive due process provides heightened protection against government interference with certain fundamental rights and liberty interests” (*People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d at 198 [internal quotation marks omitted]). Within this context, fundamental rights are those “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed” (*id.* [internal quotation marks omitted]; see *People v Knox*, 12 NY3d 60, 67 [2009]).

Substantive due process prohibits the State from infringing upon “a ‘fundamental’ liberty interest ‘unless the infringement is narrowly tailored to serve a compelling state interest’” (*People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d at 199, quoting *Reno v Flores*, 507 US 292, 302 [1993]). However, “where no fundamental right is infringed [upon,] legislation is valid if it is rationally related to legitimate government interests” (*People v Knox*, 12 NY3d at 67; see *Washington v Glucksberg*, 521 US 702, 728 [1997]; *People ex rel. Johnson v Superintendent, Adirondack Corr. Facility*, 36 NY3d at 199).

The defendant’s “as-applied” challenge to the constitutionality of Correction Law § 168-a (3) (b), as the term implies, calls on this Court to consider whether the statute can be constitutionally applied to this particular defendant under the unique facts of his case (*People v Brown*, 41 NY3d 279, 284 [2023] [internal quotation marks omitted]).

b. SORA and Due Process

“A SORA proceeding, which is civil in nature, determines the risk of reoffense by a person convicted of a qualifying sex offense” (*People v Pettigrew*, 14 NY3d 406, 408 [2010]). “The legislature’s stated goals in enacting SORA were ‘to protect the public from the danger of recidivism posed by sex offenders, to assist the criminal justice system to identify, investigate, apprehend and prosecute sex offenders, and to comply with the Federal Crime Control Act’” (*People v Parris*, 153 AD3d 68, 75 [2d Dept 2017], quoting *People v Stevens*, 91 NY2d 270, 275 [1998]). “To achieve these objectives, SORA details a registration and notification system for individuals convicted of sex offenses based on a three-tier classification regime and authorizes the dissemination of certain information about those individuals to vulnerable populations and the public” (*id.* at 76 [citations and internal quotation marks omitted]). “An offender is required by law to register as a sex offender for a period that correlates with his [or her] particular risk level and designation” (*id.* [internal quotation marks omitted]).

Correction Law § 168-h (2) provides, *inter alia*, that “[t]he duration of registration and verification for a sex offender who, on or after March eleventh, two thousand two, is designated a . . . sexually violent offender, . . . or who is classified as a level two or level three risk, shall be annually for life.” Otherwise, a “level one [offender], evidencing a low risk of reoffense,” is “relieved of the duty to register after 20 years” (*People v Mingo*, 12 NY3d 563, 571 [2009]; *see* Correction Law § 168-h). Registration requirements for level one sex offenders include, among other things, annual verification of address (*see* Correction Law § 168-f [2] [b]), in-person appearances every three years for the purpose of providing a current photograph (*see id.* § 168-f [2] [b-3]), and timely notice of “any change of address, internet accounts with internet access providers belonging to such offender, internet identifiers that such offender uses, or his or her status of enrollment, attendance, employment or residence at any institution of higher education” (*id.* § 168-f [4]). A defendant who fails to register is subject to criminal prosecution in state and federal court (*see id.* § 168-t; 18 USC § 2250 [a]).

The Court of Appeals has characterized a defendant’s liberty interest in not being subject to SORA as equivalent to not having “a misleading label attached to one’s serious crime,” and has held that such an interest is not fundamental for the

purposes of evaluating a related substantive due process claim (*People v Knox*, 12 NY3d at 67). Thus, in this case, because the substantive due process right implicated by the defendant's designation as a sexually violent offender is not fundamental, the challenged provision of the Correction Law, insofar as applied to the defendant, must be upheld if it is rationally related to a legitimate government interest.

The acts of the Legislature are presumed to be constitutional and, therefore, a defendant bears a heavy burden in establishing that challenged legislation is unconstitutional as applied to him or her (*see id.* at 69; *People v Malloy*, 228 AD3d 1284, 1288 [4th Dept 2024]; *People v Taylor*, 42 AD3d 13, 16 [2d Dept 2007]). A party making such a contention must show that the challenged "statute is so unrelated to the achievement of any combination of legitimate purposes as to be irrational" (*People v Knox*, 12 NY3d at 69 [internal quotation marks omitted]; *see People v Malloy*, 228 AD3d at 1288; *People v Taylor*, 42 AD3d at 16). In other words, "[a] challenged statute will survive rational basis review so long as it is rationally related to any conceivable legitimate State purpose . . . [and] courts may even hypothesize the Legislature's motivation or possible legitimate purpose" (*People v Malloy*, 228 AD3d at 1288 [internal quotation marks omitted], quoting *Myers v Schneiderman*, 30 NY3d 1, 15 [2017]; *see People v Taylor*, 42 AD3d at 16).

c. SORA's Foreign Registration Clause

Correction Law § 168-a (3) defines a "sexually violent offense" in three different ways. First, a sexually violent offense is one of several felony offenses enumerated in the Penal Law (*see id.* § 168-a [3] [a] [i]-[iii]). Second, a sexually violent offense is "a conviction of an offense in any other jurisdiction which includes all of the essential elements of any such [enumerated] felony" (*id.* § 168-a [3] [b]). Third, as relevant here, a sexually violent offense is a "conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred" (hereinafter the foreign registration clause) (*id.*).

Likewise, a "sex offense" is defined as, inter alia, a conviction of "a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred" (*id.* § 168-a [2] [d] [ii]). Accordingly, both a "sex offense" and a "sexually violent offense" are defined by the same language with respect to felony convictions in out-of-state jurisdictions that require sex offender

registration in those jurisdictions (*see People v Talluto*, 39 NY3d 306, 313 [2022]).

Notably, “[t]he Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge of the Courts of the State of New York . . . has concluded that subdivision (3) (b)’s foreign registration clause was added in error and, accordingly, has recommended every year since 2010 that the legislature delete it” (*id.*). While the Court of Appeals in *People v Talluto* acknowledged the possibility that the foreign registration clause may be the result of a “legislative drafting error” (*see id.* at 314-315), the Court emphasized that it was not determining the constitutionality of that provision (*see id.* at 310; *cf. People v Brown*, 41 NY3d at 284; *People v Malloy*, 228 AD3d at 1289). Rather, in *Talluto*, the Court, as an issue of “pure statutory interpretation,” held that SORA does not provide courts with the discretion to disregard the “unambiguous statutory definition of ‘sexually violent offender’” as set forth in the foreign registration clause (*People v Talluto*, 39 NY3d at 310, 315).

1. Legislative History of the Foreign Registration Clause

“In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act” (hereinafter the JWA) (*People v Diaz*, 32 NY3d 538, 540 [2018]). “The JWA conditioned federal funding on states establishing ‘programs that require . . . a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense’ to register a current address with the State” (*id.*, quoting former 42 USC § 14071 [a] [1] [A], as added by Pub L 103-322, 108 US Stat 2038). “Under these two broad categories of convictions, the JWA set forth a list of offenses that required registration” (*id.*).

In 1995, the New York State Legislature enacted SORA in response to the JWA (*see* L 1995, ch 192; *People v Talluto*, 39 NY3d at 312; *People v Diaz*, 32 NY3d at 540). “SORA, in its original form, encompassed out-of-jurisdiction convictions of only those offenses that satisfied the essential elements test for a sex offense or a sexually violent offense”; therefore, “[t]here was no foreign registration clause” (*People v Talluto*, 39 NY3d at 312 [internal quotation marks omitted], citing L 1995, ch 192, § 2).

“After several amendments to the JWA, including Megan’s Law as well as the Pam Lychner Act, Congress added a reciprocity requirement in 1997” (*People v Diaz*, 32 NY3d at 541 [footnotes omitted]). The reciprocity requirement

“directed states to ‘include in [their] registration program[s] residents who were convicted in another State’ of at least the offenses enumerated in the federal scheme (former 42 USC § 14071 [b] [7], as added by Pub L 105-119, tit I, § 115, 111 US Stat 2440, 2463), while allowing states to require ‘coverage of any offenses beyond those [enumerated under 42 USC § 14071 (a) (3) (A)-(B)]’ as a ‘matter of state discretion’ ” (*id.*, quoting 64 Fed Reg 572-01, 573 [1999]).

In 1999, the New York State Legislature “responded by amending the definitions of ‘sex offense’ and ‘sexually violent offense’ to add . . . foreign registration clauses” to both definitions (*People v Talluto*, 39 NY3d at 312, citing L 1999, ch 453, §§ 1-2). According to the Governor’s Program Bill Memorandum, “the language was added because the essential elements test was deemed to be noncompliant with the recent congressional directive” (*id.*, citing L 1999, ch 453, Governor’s Program Bill Mem No. 116 at 6; *see* Bill Jacket, L 1999, ch 453).

“The Adam Walsh Child Protection and Safety Act of 2006, which superseded the JWA, continues to place compliance requirements on states subject to guidelines issued by the Attorney General” (*People v Diaz*, 32 NY3d at 541; *see* 34 USC §§ 20912, 20927).

III. The Defendant’s As-Applied Due Process Challenge

a. Preservation

The defendant’s contention on appeal that his designation as a sexually violent offender pursuant to Correction Law § 168-a (3) (b) violated his constitutional rights to substantive due process was preserved for appellate review when defense counsel objected to said designation at the SORA hearing on due process grounds (*see* CPL 470.05 [2]).

b. Merits

We hold that the foreign registration clause, insofar as applied to the defendant, is not rationally related to a legitimate government interest, and therefore violates his substantive due process rights (*see People v Brown*, 41 NY3d at 284).

In particular, we agree with the Appellate Division, Fourth Department’s conclusion that

“designating [a] defendant as sexually violent merely because he [or she] had an out-of-state sex

conviction requiring out-of-state registration, regardless of whether that underlying offense is violent—as is currently required by the text of Correction Law § 168-a (3) (b)—bears no rational relationship to the legitimate governmental interest of informing the public of threats posed by sex offenders” (*People v Malloy*, 228 AD3d at 1289).

In fact, labeling a defendant as a sexually violent offender regardless of whether the underlying offense involved violence may have the adverse effect of misleading the public as to the level of risk posed by him or her (*see People v Brown*, 41 NY3d at 291; *People v Malloy*, 228 AD3d at 1289). Moreover, the government’s interest in protecting the public from the potential harm posed by sex offenders “is already served by requiring [a] defendant to register in New York as a sex offender” (*People v Malloy*, 228 AD3d at 1288; *see People v Cromwell*, 229 AD3d 1176, 1178 [4th Dept 2024]).

To the extent that the People contend that the foreign registration clause is rationally related to the legitimate government interest of bringing New York into compliance with the federal law that conditions federal funding on the establishment of the sex offender registration framework set forth in the JWA and its amendments and successor statutes (*see generally* 34 USC § 20911 *et seq.*; *People v Diaz*, 32 NY3d at 540-541), that contention is without merit. SORA was enacted by the New York State Legislature in 1995 in response to an act of Congress that conditioned federal funding on states establishing sex offender registries (*see People v Talluto*, 39 NY3d at 312; *People v Diaz*, 32 NY3d at 540-541; *see also* L 1995, ch 192). The foreign registration clause was added later, only after Congress implemented “a reciprocity requirement, directing states to require sex offender registration of residents convicted of offenses in other states that fit within the federal scheme” (*People v Talluto*, 39 NY3d at 312; *see* L 1999, ch 453, §§ 1-2; *People v Diaz*, 32 NY3d at 541; *People v Bullock*, 125 AD3d 1, 8-9 [1st Dept 2014]).

To comply with federal law, the states must meet or exceed criteria related to, *inter alia*, the duration of sex offender registration, appearance frequency, and website disclosure requirements (*see* 34 USC §§ 20911-20915; *see also* Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed Reg 38030-01 [2008] [hereinafter National Guidelines]). Thus, the requirements of

federal law relate to substance, not form or terminology (*see* National Guidelines at 38053). In fact, federal law no longer uses the term “sexually violent offense” (*see* 34 USC § 20911) and, even under the JWA, that term was simply a proxy for any registrable sex offense that was not specifically an offense committed against a minor (*see* former 42 USC § 14071 [a] [3]). The federal requirements are fulfilled by requiring out-of-state sex offenders to register as sex offenders when they move into New York according to their appropriate risk level. SORA’s additional requirement that an out-of-state sex offender’s status automatically transmutes into that of a sexually violent offender simply by virtue of moving to New York is not rationally related to any federal requirement. The registration laws of certain states do not include a category of “sexually violent offenses” (*see People v Talluto*, 39 NY3d at 314 [discussing the absence of the term “sexually violent offense” in Michigan’s sex offender registration law]; NJ Stat Ann § 2C:7-2; *cf.* Fla Stat § 775.21 [4] [a] [1] [Florida uses the term “sexual predator” but not sexually violent offense or offender]). Hence, the foreign registration clause is not just overinclusive (*see People v Knox*, 12 NY3d at 69), but potentially unrelated to whether the offense involved violence.*

Notably, the defendant pleaded guilty to violating Florida Statutes former § 800.04 (4) (a), which, at the time of his plea, provided that “[a] person who . . . [e]ngages in sexual activity with a person 12 years of age or older but less than 16 years of age . . . commits lewd or lascivious battery, a felony of the second degree” (eff Oct. 1, 2000 to Aug. 31, 2005). Had the defendant been prosecuted for that conduct in New York, at most, he would have been guilty of sexual abuse in the second degree, which does not constitute a sexually violent offense (*see* Correction Law § 168-a [3]), and is only a misdemeanor (*see* Penal Law § 130.60 [2]). The defendant’s out-of-state conviction does not include all of the essential elements of any of the enumerated sexually violent offenses set forth in Correction Law § 168-a (3) (a). Thus, the defendant was designated as a sexually violent offender solely by virtue of the foreign registration clause (*see People v Cromwell*, 229 AD3d at 1177).

* A number of states define sexually violent offenses that occur in a foreign jurisdiction by utilizing the language of “substantially similar” or “substantially equivalent” to a sexually violent offense that occurs within such state (*see e.g.* Tex Code Crim Proc Ann § 62.001 [6] [E]; Ohio Rev Code Ann § 2971.01 [L] [2]; Mass Gen Laws ch 6, § 178C [“a like violation”]).

The New York State Legislature evidently has determined that sex offenders who committed the same acts in New York upon which the defendant's out-of-state-conviction was predicated, and, like the defendant, are later determined to be a level one sex offender (*see* Correction Law § 168-n; Guidelines at 1-7), do not pose a risk to society significant enough to require annual sex offender registration and verification for life. Under the circumstances of this case, that result should not change simply because the defendant committed his offense in a different state (*see People v Zellefrow*, 229 AD3d 1069, 1071 [4th Dept 2024]).

In sum, we hold that the foreign registration clause, insofar as applied to the defendant designating him a sexually violent offender, was not rationally related to a legitimate government interest (*see People v Brown*, 41 NY3d at 290; *People v Malloy*, 228 AD3d at 1289).

IV. The Defendant's Remaining Contentions

The defendant's facial challenge to the foreign registration clause on due process grounds is without merit. "Generally, a party making a facial challenge to a regulation has the extraordinary burden . . . of proving beyond a reasonable doubt that the challenged provision suffers wholesale constitutional impairment" (*Matter of Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transp.*, 40 NY3d 55, 61 [2023] [internal quotation marks omitted]; *see Matter of 1160 Mamaroneck Ave. Corp. v City of White Plains*, 211 AD3d 723, 725 [2d Dept 2022]). "Thus, a facial challenge must fail so long as there are circumstances under which the challenged provision could be constitutionally applied" (*Matter of Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transp.*, 40 NY3d at 61 [internal quotation marks omitted]).

Here, the defendant failed to establish beyond a reasonable doubt that there are no circumstances under which the foreign registration clause could be constitutionally applied (*see People v Malloy*, 228 AD3d at 1291-1292; *cf. People v Suttle*, 209 AD3d 451, 452-453 [1st Dept 2022]; *see also People v Talluto*, 39 NY3d at 316 [Wilson, J., dissenting]).

Furthermore, the defendant's contention that the County Court erred in assessing him 15 points under risk factor 11, related to alleged drug or alcohol abuse, is academic because deducting those points would not alter his presumptive risk level, which was the lowest possible risk level, and from which

the court did not depart (*see People v Torres*, 210 AD3d 1027, 1028 [2d Dept 2022]).

The defendant's contentions that the foreign registration clause violates the Equal Protection Clauses of the United States and New York Constitutions are unpreserved for appellate review.

Accordingly, the order is modified, on the law and the facts, by deleting the provision thereof designating the defendant a level one sexually violent offender, and substituting therefor a provision designating the defendant a level one sex offender; as so modified, the order is affirmed.

DUFFY, J.P., MILLER and HOM, JJ., concur.

Ordered that the order is modified, on the law and the facts, by deleting the provision thereof designating the defendant a level one sexually violent offender, and substituting therefor a provision designating the defendant a level one sex offender; as so modified, the order is affirmed, without costs or disbursements.

[241 NYS3d 225]

In the Matter of DAPHNA ZEKARIA, a Suspended Attorney, Respondent. ATTORNEY GRIEVANCE COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, September 11, 2025

PROCEDURAL SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on July 14, 1997, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Disbarment

Pursuant to the automatic disbarment provisions of Judiciary Law § 90 (4), respondent ceased to be an attorney upon her plea of guilty to the felonies of grand larceny in the second degree, grand larceny in the third degree, and scheme to defraud in the first degree (Penal Law §§ 155.40 [1]; 155.35 [1]; 190.65 [1] [b]).

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 86, 91; AM JUR 2d Larceny § 37.

CARMODY-WAIT 2d Officers of Court § 3:271.

McKINNEY'S, Judiciary Law § 90 (4); Penal Law §§ 155.35 (1); 155.40 (1); 190.65 (1) (b).

NY JUR 2d Attorneys at Law § 388; NY JUR 2d Criminal Law: Substantive Principles and Offenses §§ 898–899, 1259.

ANNOTATION REFERENCE

Disciplinary action against attorney prior to exhaustion of appellate review of conviction. 76 ALR3d 1061.

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Query: (judiciary /7 90) (automatic! /5 disbar!) & plea! /5 guilty /p grand-larceny /7 third-degree second-degree /p scheme /3 fraud! defraud

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York City (*Raymond Vallejo* of counsel), for petitioner.

Daphna Zekaria, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent Daphna Zekaria was admitted to the practice of law in the State of New York by the Second Judicial Department on July 14, 1997. At the outset of the Attorney Grievance Committee (AGC)'s underlying investigation into the instant matter, respondent maintained a registered office for the practice of law within the First Judicial Department. Respondent later relocated to Huntington, NY, in the Second Judicial Department. On consent of the AGC for the Tenth Judicial District, the AGC for the First Judicial Department has continued to handle all matters concerning respondent (*Matter of Zekaria*, 230 AD3d 19 [1st Dept 2024]).

By order entered June 18, 2024, this Court, pursuant to Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.9 (a) (1) and (3), suspended respondent from the practice of law effective immediately and until further order of this Court. This Court's suspension of respondent was based on her noncompliance with the AGC's investigation into her conversion of client funds held in her escrow account, namely her failures to answer complaints against her, appear for an examination under oath pursuant to a subpoena, and comply with lawful demands of the courts and AGC to produce her escrow account information and bank records (*id.* at 23).

On May 21, 2025, respondent was convicted in the Supreme Court, Suffolk County, upon her plea of guilty, of two counts of grand larceny in the second degree, a class C felony (Penal Law § 155.40 [1]); one count of grand larceny in the third degree, a class D felony (Penal Law § 155.35 [1]); and one count of scheme to defraud in the first degree, a class E felony (Penal Law § 190.65 [1] [b]). Respondent also pleaded guilty to one count of criminal contempt in the second degree, a class A misdemeanor (Penal Law § 215.50 [3]). She is scheduled to be sentenced in 2026.

Respondent's conviction stems from her representation of three individuals. Respondent, a partner at a law firm, was hired to represent a woman during her divorce and the sale of her marital home. Respondent was expected to hold roughly \$150,000, the proceeds of the sale of her client's home, in her escrow account. However, instead of dispersing the funds when her client's divorce was finalized, respondent improperly used

the funds for personal and/or business purposes. In a separate matter, respondent was hired by a lottery winner to hold a portion of his funds in escrow and invest an additional portion on his behalf, but instead, respondent made large transfers of the funds to other individuals. Respondent was also retained by an elderly woman to help her contest eviction proceedings, for which respondent received \$17,500 but performed no legal work on the woman's behalf. Instead, respondent improperly used the funds for personal and/or business purposes.

The AGC now moves for an order striking respondent's name from the roll of attorneys, pursuant to Judiciary Law § 90 (4) (a) and (b) and 22 NYCRR 1240.12 (c) (1), on the ground that she was convicted of a felony as defined by Judiciary Law § 90 (4) (e) and has therefore been automatically disbarred (*see Matter of Solny*, 213 AD3d 24 [1st Dept 2023]; *Matter of Scharf*, 193 AD3d 118 [1st Dept 2021]; *Matter of Carlebach*, 163 AD3d 192 [1st Dept 2018]). The AGC further asserts that its motion is timely even though respondent has yet to be sentenced because she was automatically disbarred at the time of her guilty plea (*see Matter of Birnbaum*, 206 AD3d 122, 123 [1st Dept 2022]; *Matter of Ravelo*, 163 AD3d 98 [1st Dept 2018]). Respondent consented to service of the instant motion by first-class mail on July 24, 2025, but has not submitted a response.

Pursuant to Judiciary Law § 90 (4), respondent was automatically disbarred when she entered a guilty plea to the felonies of grand larceny in the second degree, grand larceny in the third degree, and scheme to defraud in the first degree. Further, although respondent has yet to be sentenced, the instant motion is nevertheless timely, as respondent was disbarred by operation of law when she pleaded guilty (*see Matter of Del Valle*, 227 AD3d 22, 24 [1st Dept 2024]; *Matter of Migdol*, 209 AD3d 99, 101 [1st Dept 2022]; *Matter of Bernstein*, 78 AD3d 94, 96 [1st Dept 2010] ["(f)or the purposes of automatic disbarment, conviction occurs at the time of plea or verdict"]).

Accordingly, the AGC's motion should be granted and respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York pursuant to Judiciary Law § 90 (4) (a) and (b) and 22 NYCRR 1240.12 (c) (1), effective nunc pro tunc to May 21, 2025 (date of conviction), and until further order of this Court.

MANZANET-DANIELS, J.P., KENNEDY, FRIEDMAN, MENDEZ and ROSADO, JJ., concur.

Wherefore, it is ordered that the motion by the Attorney Grievance Committee for the First Judicial Department for an

order pursuant to Judiciary Law § 90 (4) (a) and (b) and 22 NYCRR 1240.12 (c) (1) is granted, and respondent, Daphna Zekaria, is disbarred and her name stricken from the roll of attorneys in the State of New York, effective nunc pro tunc to May 21, 2025, and until further order of this Court; and

It is further ordered that, pursuant to Judiciary Law § 90, respondent, Daphna Zekaria, is commanded to desist and refrain from (1) the practice of law in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding herself out in any way as an attorney and counselor-at-law; and

It is further ordered that, respondent, Daphna Zekaria, shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see* 22 NYCRR 1240.15), which are made part hereof; and

It is further ordered that if respondent, Daphna Zekaria, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith.

[241 NYS3d 227]

In the Matter of EKAETTE PATTY-ANNE EDDINGS, an Attorney,
Respondent. ATTORNEY GRIEVANCE COMMITTEE FOR THE
FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, September 11, 2025

PROCEDURAL SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on January 7, 2003, at a term of the Appellate Division of the Supreme Court in the First Judicial Department.

HEADNOTE**Attorney and Client — Disciplinary Proceedings — Interim Suspension**

Pursuant to the reciprocal disciplinary provision of 22 NYCRR 1240.13, respondent was immediately suspended from the practice of law on an interim basis predicated upon similar discipline imposed by the Colorado Supreme Court for failing to refund an unearned fee, failing to cooperate with the Colorado disciplinary investigation, and neglecting the underlying immigration matter.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 37–38, 53, 60, 66–67.
CARMODY-WAIT 2d Officers of Court §§ 3:248, 3:254, 3:258,
3:260.
22 NYCRR 1200.0, rules 1.3 (b), 1.16 (e), 8.4 (d); 1240.13.
NY JUR 2d Attorneys at Law §§ 499, 510, 512.

ANNOTATION REFERENCES

Failure to cooperate with or obey disciplinary authorities as ground for disciplining attorney—modern cases. 37 ALR4th 646.

Reciprocal Discipline of Attorneys—Commingling or Other Mishandling of Client Funds. 45 ALR5th 175.

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or investigat!) or (refund or return /3 fee) or (neglect! /3 cli-
ent) & (interim! /3 suspen!)

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York City (Louis J. Bara of counsel), for petitioner.

Ekaette Patty-Anne Eddings, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent Ekaette Patty-Anne Eddings was admitted to the practice of law in the State of New York by the First Judicial Department on January 7, 2003. This Court has jurisdiction over respondent as the admitting Judicial Department pursuant to the Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.7 (a) (2).

By order dated May 7, 2025, the Colorado Supreme Court interimsly suspended respondent from the practice of law upon reasonable cause to believe respondent abandoned an immigration client (M.M.) and knowingly failed to refund him for unearned fees. While respondent is not admitted to the practice of law in Colorado, the Colorado Supreme Court retained jurisdiction over the matter based on respondent's practice of federal law within the state pursuant to Colorado Rules of Civil Procedure (CRCP) rule 242.1 (a) (2).

In February 2023, respondent agreed to prepare and file immigration forms on behalf of M.M. M.M. paid respondent \$3,159 in advance for the agreed upon work and signed a client care letter expressly stating that the payment was not a retainer, that respondent would "begin work in assisting the client in this matter immediately" and that "[a]ll fees are due and payable upon commencement of said work." Respondent failed to perform the work and deposited \$2,609.00 of the unearned fee into her personal checking account.

In May 2024, M.M. discovered that respondent did not perform the agreed upon work and requested a refund. Respondent refunded M.M. only \$575. Respondent converted the remainder of M.M.'s funds for her personal use.

In April 2025, the Colorado Office of Attorney Regulation Counsel filed an amended petition for interim suspension based on respondent's alleged professional misconduct pursuant to CRCP rule 242.22. On May 5, 2025, the Presiding Disciplinary Judge recommended respondent's interim suspension, finding there was reasonable cause to believe respondent's conduct caused M.M. substantial harm. The court also noted that re-

spondent failed to cooperate in the investigation by refusing to produce any substantive information regarding the alleged misconduct. On May 7, 2025, the Colorado Supreme Court imposed the recommended interim suspension.

The Attorney Grievance Committee of the State of New York (the AGC) now seeks an order from this Court pursuant to Judiciary Law § 90 (2), 22 NYCRR 1240.13, and the doctrine of reciprocal discipline, interimly suspending respondent, predicated on the discipline imposed in Colorado. The AGC asserts that none of the defenses pursuant to 22 NYCRR 1240.13 are applicable and interim suspension is appropriate because the misconduct also violated the New York Rules of Professional Conduct (22 NYCRR 1200.0). The AGC further notes that this Court has previously imposed reciprocal discipline when an attorney has been disciplined in a state where they are not admitted to the practice of law (*see Matter of Ziankovich*, 180 AD3d 140 [1st Dept 2020]).

Respondent opposes and requests the AGC's motion be dismissed but does not assert any of the enumerated defenses. Instead, she argues that the proceeding is unlawful as she was not admitted to the practice of law in Colorado, which then requires the AGC to conduct its own independent investigation. Regardless, she contends that the dispute was settled and the complaint was withdrawn.

As an initial matter, we find the AGC has no obligation to conduct its own independent investigation (22 NYCRR 1240.13 [a]; *see e.g. Matter of Ziankovich*, 180 AD3d 140).

On the merits, respondent fails to raise or establish any of the applicable defenses (*see Matter of Milara*, 194 AD3d 108, 110 [1st Dept 2021]). Respondent received notice of the allegations at issue as she was served with the Colorado amended petition seeking her interim suspension. The Colorado Presiding Disciplinary Judge's findings underlying the interim suspension are sufficiently supported by the record. Additionally, the Colorado decision establishes respondent's failure to refund the unearned fee, failure to cooperate with the Colorado investigation, and neglect of the underlying immigration matter. There is no evidence countering these findings. This misconduct constitutes misconduct in violation of New York Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.3 (b), 1.16 (e), and 8.4 (d) (*see Matter of Ziankovich* at 145 [reciprocal discipline of suspension based on suspension in Colorado for failure to return unearned fees to client]).

While respondent asserts that she and her client have now “settled” their dispute and the complaint at issue has been withdrawn, she fails to provide documentary evidence supporting this position. Additionally, there is no evidence that the Colorado court vacated or modified any of the findings of misconduct underlying her interim suspension.

With respect to sanctions, we find interim suspension is the appropriate reciprocal discipline as it is comparable to the discipline imposed in Colorado and follows this Court’s precedent (see *Matter of Carrillo*, 219 AD3d 1 [1st Dept 2023]; *Matter of Winters*, 160 AD3d 168 [1st Dept 2018]; *Matter of Pohlmeier*, 226 AD2d 52 [1st Dept 1996]).

Accordingly, the AGC’s motion should be granted, and interim suspension imposed, effective immediately, and until further order of this Court.

MOULTON, J.P., KENNEDY, FRIEDMAN, GONZÁLEZ and MENDEZ, JJ., concur.

Wherefore, it is ordered that the motion by the Attorney Grievance Committee for the First Judicial Department for reciprocal discipline, pursuant to Judiciary Law § 90 (2) and 22 NYCRR 1240.13, is granted, and respondent, Ekaette Patty-Anne Eddings, is intermily suspended from the practice of law, effective immediately, and until further order of the Court; and

It is further ordered that, pursuant to Judiciary Law § 90, during the period of suspension, respondent, Ekaette Patty-Anne Eddings, is commanded to desist and refrain from (1) the practice of law in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding herself out in any way as an attorney and counselor-at-law; and

It is further ordered that, during the period of suspension, respondent, Ekaette Patty-Anne Eddings, shall comply with the rules governing the conduct of disbarred or suspended attorneys (see 22 NYCRR 1240.15), which are made part hereof; and

It is further ordered that if respondent, Ekaette Patty-Anne Eddings, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith.

[243 NYS3d 14]

CRAIG MCMILLIAN et al., Respondents, v OUT-LOOK SAFETY LLC, Respondent, and RESTANI CONSTRUCTION CORP. et al., Appellants, et al., Defendant.

First Department, September 11, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Supreme Court, New York County (Andrea Masley, J.), entered on or about January 30, 2024. The order, among other things, granted plaintiffs' motion for class certification.

McMillian v Out-Look Safety LLC, 2024 NY Slip Op 30336(U), affirmed.

HEADNOTE

Actions — Class Actions — Class Certification — Prevailing Wage Claim

Supreme Court properly granted class certification upon determining that plaintiffs met the CPLR 901 (a) factors in an action alleging that, during a specified period, members of the class served as nonunion construction site “flaggers” entitled to be paid at the prevailing wage for public works projects, but that defendants had a uniform practice of paying the members a lower rate by classifying them as “crossing guards” or “traffic control.” Plaintiffs’ testimony about their work and that of others they observed at the various jobsites, as well as payroll and other records, sufficiently supported a finding of numerosity. Commonality was established by a showing that common issues predominated in the action, namely the central issue addressing harm effectuated through a variety of approaches but within a common systematic plan. That each class member may have possessed unique factual circumstances did not negate the commonality factor. Typicality was established by plaintiffs’ assertions that their claims are typical of and based upon the same legal theories as those of the class because they are derived from the same course of conduct. Finally, Supreme Court’s amendment to the definition of the class to exclude reference to “whether public works contracts required the payment of prevailing wages on subject projects” as applying to the ultimate issue of liability avoided an impermissible “fail safe” class.

RESEARCH REFERENCES

By the Publisher’s Editorial Staff

AM JUR 2d Parties §§ 47, 49–52, 54, 56, 58–60, 63, 65, 67–68, 71–73, 75, 77; AM JUR 2d Public Works and Contracts §§ 213–214, 226.

CARMODY-WAIT 2d Parties §§ 19:283–19:284, 19:288, 19:294–19:295; 19:313, 19:316–19:317, 19:325;
CARMODY-WAIT 2d Proceeding Against a Body or Officer §§ 145:1102, 145:1106.

McKINNEY'S, CPLR 901 (a).

NY JUR 2d Parties §§ 244–245, 249–252, 257–258, 278–279, 283; NY JUR 2d Public Works and Contracts §§ 97, 109.

NEW YORK LAW OF TORTS § 16:49.

SIEGEL, NY PRAC (6th ed) §§ 139, 141–142, 147.

ANNOTATION REFERENCE

See ALR Index under Class Actions; Numerosity; Public Works and Contracts; Typicality.

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Query: (class /3 certif!) & “prevailing wage” & (typicality OR numerosity OR flagger)

APPEARANCES OF COUNSEL

Peckar & Abramson, P.C., New York City (*Mark A. Rosen* of counsel), for Restani Construction Corp., appellant.

Cole Schotz P.C., New York City (*Brian L. Gardner, Jason R. Finkelstein* and *Courtney G. Hindin* of counsel), for Triumph Construction Corp., appellant.

Cohen Seglias Pallas Greenhall & Furman, PC, New York City (*Jonathan Landesman* of counsel), for Elecnor Hawkeye, LLC, appellant.

Pelton Graham, LLC, New York City (*Brent E. Pelton* and *Taylor B. Graham* of counsel), for Craig McMillian and others, respondents.

OPINION OF THE COURT

MENDEZ, J.

This putative class action asserts that members of the class provided services as nonunion construction site “flaggers,” as defined by the New York City Comptroller, and were entitled to be paid at the prevailing wage for public works projects in New York City from April 16, 2018, through January 28, 2024 (the class period). The amended class action complaint asserts causes of action for breach of contract as third-party beneficiaries, and unjust enrichment. It alleges that the members of the class worked as “flaggers” for Out-Look Safety LLC, which subcontracted with defendants, the general contractors, to provide services for defendants’ construction projects, and that

defendants had a uniform practice of paying members of the class at a considerably lower rate by classifying them as “crossing guards” or “traffic control.”

CPLR 901 (a) sets forth five factors required to obtain class certification, which are commonly referred to as, “numerosity, commonality, typicality, adequacy of representation and superiority” (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). A class action can be maintained pursuant to CPLR 902 only if the five prerequisite factors stated in CPLR 901 (a) are met (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421-422 [1st Dept 2010]).

Supreme Court’s determination under CPLR 902 as to the adequate representation of the class is not challenged on appeal. Although defendants refer to CPLR 902, they specifically address only the four factors stated in CPLR 901.

Plaintiffs met their minimal evidentiary burden of showing that their claim to have worked as “flaggers” rather than “traffic controllers” at various jobsites was not a sham (*see Weinstein v Jenny Craig Operations, Inc.*, 138 AD3d 546, 547 [1st Dept 2016]). Plaintiffs’ testimony about their work and that of others they observed at the various jobsites, as well as payroll and other records, sufficiently supported a finding of numerosity (*see Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 481 [1st Dept 2009]).

Commonality was established by plaintiffs’ showing that common issues predominated in the action. Commonality is to be construed liberally, and should not be confused with identity or unanimity; rather, it is determined by predominance of the asserted legal issues (*see Maddicks v Big City Props., LLC*, 34 NY3d 116, 125-127 [2019], citing *Maul*, 14 NY3d at 513-514). The central legal issue in this case is “whether defendants utilized the class members in roles that would have entitled them to prevailing wages as non-union construction ‘flaggers’ during the class period.” In this case, predominance is satisfied by the central issue, which “addresses harm effectuated through a variety of approaches but within a common systematic plan” (*Maddicks*, 34 NY3d at 125).

Defendants argue that the need for individualized assessments of the tasks performed by each class member undermines commonality. We disagree. The fact that each class member may possess their “own unique factual circumstances” does not mean that the commonality factor fails or that it is fatal to the class action (*see Maul*, 14 NY3d at 514). A class action is a

superior vehicle for resolution of prevailing wage disputes. The only questions that are peculiar to each individual class member concern damages, and the issue of damages can be severed after resolution of the predominant issues (*see Brown v Mahdessian*, 206 AD3d 511, 512 [1st Dept 2022]; *Stecko v RLI Ins. Co.*, 121 AD3d 542, 543 [1st Dept 2014]; *Orgill v Ingersoll-Rand Co.*, 110 AD3d 573, 574 [1st Dept 2013]).

Typicality was established by plaintiffs' assertions that their claims are typical of those of the class because they are derived from the same course of conduct, namely that defendants failed to pay prevailing wages to nonunion workers who performed flagger duties. The named plaintiffs' claims are also based upon the same legal theories as members of the class (*see Kozak v Kushner Vil. 329 E. 9th St. LLC*, 232 AD3d 542, 545 [1st Dept 2024]). Defendant Elecnor Hawkeye, LLC's assertions that the representative plaintiffs did not work at its jobsite are unavailing. The representative plaintiffs provided evidence, including their deposition testimony, that work was performed for three days at that site. Furthermore, typicality does not require that the named plaintiffs' claims be identical to those of the class (*see Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991]).

Plaintiffs established the superiority of this class action to other methods of litigating the claims at issue. Contrary to defendants' contention, plaintiffs were not required to exhaust administrative remedies prior to filing this common-law breach of contract action (*see De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 22 AD3d 404, 405 [1st Dept 2005]). *Brandy v Canea Mare Contr., Inc.* (34 AD3d 512, 514 [2d Dept 2006]) is not to the contrary.

Defendants assert that the class definition constitutes an impermissible "fail safe" class under the Federal Rules of Civil Procedure (FRCP), rule 23 (b). A "fail safe" class exists "when the class itself is defined in a way that precludes membership unless the liability of the defendant is established" (*Spread Enters., Inc. v First Data Merchant Servs. Corp.*, 298 FRD 54, 69 [ED NY 2014], quoting *Kamar v Radio Shack Corp.*, 375 Fed Appx 734, 736 [9th Cir 2010]). A "fail safe" class is impermissible because it prevents an adverse judgment being entered against plaintiffs (*see id.* at 69). Defendants argue that the sole issue in the case is whether or not a particular member was in fact acting as a "flagger" and thus that class membership and liability are inextricably intertwined.

At the outset, Supreme Court was not required to apply the standards utilized by the federal courts in FRCP rule 23 (b), given the recognition that CPLR 901 (a) should be more broadly construed (*see Maul*, 14 NY3d at 509). Additionally, a finding of a “fail-safe” class does not necessarily result in a bar to certification of the class, as courts have discretion to “construe the complaint or redefine the class to bring it within the scope of Rule 23” (*Hicks v T.L. Cannon Corp.*, 35 F Supp 3d 329, 357 [WD NY 2014]).

Here, the Supreme Court’s decision amended the definition of the class to avoid an impermissible “fail safe” class under FRCP rule 23 (b), by excluding reference to “whether public works contracts required the payment of prevailing wages on subject projects” as applying to the ultimate issue of liability. Supreme Court amended the definition of the class to state, “all persons employed by Out-Look Safety LLC at any time since April 16, 2018 through January 28, 2024, who worked as non-union construction flaggers on Restani, Safeway, Triumph, and/or Hawkeye projects requiring the payment of prevailing wages in New York City” (2024 NY Slip Op 30336[U], *12-13). Defendants’ argument that to show membership one must show liability has been addressed, and they did not propose any alternative language to Supreme Court’s amended definition. Additionally, the parties, including defendants, often used the term “flagger” interchangeably with “crossing guard” or “traffic controller” and it would be up to the class member to show the work actually performed. Accordingly, Supreme Court’s amendment is proper and does not result in a “fail safe” class definition.

Defendants’ remaining arguments have been considered and found to be unavailing.

Accordingly, the order, of the Supreme Court, New York County (Andrea Masley, J.), entered on or about January 30, 2024, which, among other things, granted plaintiffs’ motion for class certification, should be affirmed, with costs.

WEBBER, J.P., SCARPULLA, RODRIGUEZ III, PITT-BURKE, JJ., concur.

Order, Supreme Court, New York County, entered on or about January 30, 2024, affirmed, with costs.

[242 NYS3d 109]

In the Matter of ALEX JOSEPH KAMINSKI, an Attorney, Respondent. GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, Petitioner.

Second Department, September 17, 2025

PROCEDURAL SUMMARY

RESPONDENT was admitted to the bar on September 17, 2014, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department. By decision and order on motion dated September 26, 2023, that Court, pursuant to 22 NYCRR 1240.12 (c) (3) (iii), directed respondent to show cause at a hearing before a Special Referee why a final order of suspension, censure, or disbarment should not be made based on his conviction on October 3, 2022, of driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (3), an unclassified misdemeanor.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Public Censure

Respondent attorney was guilty of professional misconduct arising from his second misdemeanor conviction of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). Notwithstanding that respondent accepted full responsibility for his actions, submitted character testimony showing that he was well regarded at work, was believed to have integrity, appeared to have supportive people in his life, and expressed genuine remorse, he did not continue to seek objective third-party support once his mandated remedial activities had been completed. Under the totality of the circumstances, respondent was publicly censured for the unlawful conduct which resulted in his conviction.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 35, 82–83, 86, 91.

CARMODY-WAIT 2d Officers of Court §§ 3:249, 3:273, 3:325, 3:327, 3:330.

McKINNEY'S, Vehicle and Traffic Law § 1192 (3).

NY JUR 2d Attorneys at Law §§ 400–401, 511, 518–519, 522, 525.

ANNOTATION REFERENCE

Misconduct involving intoxication as ground for disciplinary action against attorney. 1 ALR5th 874.

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Query: (public! /3 censur!) & (misdemeanor /s (driving /3 intoxicated) or DWI or DUI)

APPEARANCES OF COUNSEL

Catherine A. Sheridan, Hauppauge (*Stacey J. Sharpelletti* of counsel), for petitioner.

Long Tuminello, LLP, Bay Shore (*Michelle Aulivola* of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

By affirmation dated February 17, 2023, on notice to the respondent, the Grievance Committee for the Tenth Judicial District advised this Court that on October 3, 2022, the respondent pleaded guilty in the Supreme Court, Nassau County, before the Honorable Tammy S. Robbins, to driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (3), an unclassified misdemeanor, and leaving the scene of an accident with property damage, in violation of Vehicle and Traffic Law § 600 (1) (a), a traffic infraction.

By decision and order on motion dated September 26, 2023, this Court directed the respondent to show cause at a hearing before David I. Ferber, as Special Referee, why a final order of suspension, censure, or disbarment should not be made, based on his criminal conviction. After a hearing conducted on May 22, 2024, the Special Referee issued a report dated July 18, 2024, setting forth his findings and concluding that the respondent had not demonstrated why a final order of suspension, censure, or disbarment should not be made. The Grievance Committee now moves to confirm the Special Referee's report and to impose such discipline upon the respondent as this Court deems just and proper. In response, the respondent submits an affirmation in opposition to the motion to confirm and requests a private admonition.

On October 3, 2022, the respondent pleaded guilty to the above-mentioned charges pursuant to an agreed upon disposition with the Nassau County District Attorney's Office. The agreed upon disposition provided for the respondent to be incarcerated for a period of 80 days. At the end of that period of incarceration the respondent would be sentenced to time served with three years of Recidivist Alcohol Probationer Program probation, his driver license would be revoked for a

minimum of six months, and he would be required to attend a Victim Impact Panel and an Impaired Driver Program, perform 100 hours of community service through probation, install an ignition interlock device for any vehicle the respondent would drive, and pay restitution for any property damage. On December 19, 2022, upon his release from jail, the respondent was sentenced in the Supreme Court, Nassau County, before the Honorable Teresa Corrigan, in accordance with the agreed upon disposition. In addition, the court imposed a \$500 fine, \$175 surcharge, a \$25 crime victim's assistance fee, a \$50 DNA fee, and an additional \$195 driving while intoxicated surcharge.

The record shows that on January 26, 2022, at approximately 10:15 p.m., Nassau County police officers responded to a report of a car accident in the vicinity of Park Avenue and East Clinton Avenue in Roosevelt. According to a 911 caller, a blue Jeep Wrangler was driving southbound on Park Avenue and collided with several parked cars. When the police officers arrived at the scene, they observed the respondent in the driver's seat of a blue Jeep Wrangler, which had collided with a legally parked, unoccupied Nissan Sentra. When the police officers approached the respondent, they observed him to have red, watery eyes, slurred speech, and a strong odor of alcohol emanating from his breath. The police officers also observed two empty 24 ounce Truly margarita-flavored hard seltzers on the front passenger side floorboard. When the police officers attempted to conduct a field sobriety test, they observed that the respondent was unsteady on his feet and, ultimately, he refused to proceed with the test. The respondent also refused to submit to a breathalyzer test. The police officers located an eyewitness who reported that he had observed the respondent driving southbound in the northbound lane of traffic and colliding with an unoccupied parked Honda, which then hit a parked gray Ford Explorer. Thereafter, the eyewitness observed that the respondent continued to drive southbound on Park Avenue, driving onto a sidewalk and then colliding with the Nissan Sentra, at which point the respondent's vehicle became inoperable. The respondent was arrested at 10:35 p.m. and transported to the police station.

The record indicates that the respondent previously pleaded guilty on November 17, 2017, to a charge of driving while intoxicated, in violation of Vehicle and Traffic Law § 1192 (3).

At a hearing before the Special Referee, the respondent testified that in 2016, he joined his current law firm, Davis & Fer-

ber, as an associate working in its labor and employment practice. Davis & Ferber represents approximately 60 labor unions, including law enforcement unions, healthcare unions, and teachers unions. The respondent testified that in April 2017, he was arrested for driving while intoxicated and ultimately received a conditional discharge. Thereafter, the respondent attended a nine-week program through Catholic Charities, adhered to the conditions of his discharge, and did not continue treatment after his mandated time, as he felt he had no issue with alcohol.

With respect to the respondent's arrest on January 26, 2022, inter alia, for driving while intoxicated, the respondent testified that he had been at a cigar lounge near Eisenhower Park in East Meadow with clients and prospective clients. The respondent stated that he arrived at the cigar lounge straight from work and had a couple of drinks. He also testified he had nothing to eat. The respondent stated that upon leaving the cigar lounge and getting into his car, he started driving the wrong way. He explained that his phone had died so while he was waiting for it to charge in the car, he got turned around and started driving in the wrong direction. The respondent had intended to drive home. The respondent could not recall what happened that caused him to hit multiple parked cars, but stated that he was advised that his vehicle struck a parked car and then, as he proceeded away from the parked car, he lost control of his car and struck another parked car.

Shortly after his arrest, the respondent attended a 12-week treatment program at the Kenneth Peters Center, which consisted of group counseling one time per week, a one-time orientation group, participation in at least one outside self-help meeting per week, and random weekly toxicology tests. The respondent testified that after being released from jail, he initially attended Alcoholics Anonymous meetings on a weekly basis and then attended once a month, but at the time of the hearing he had not attended a meeting in approximately one year. When asked about his current level of sobriety, the respondent stated that he has not had an alcoholic drink since his arrest in 2022 and he does not intend to drink alcohol. The respondent stated that becoming a father has changed him. The respondent submitted a Substance Abuse Evaluation, which he had completed in order to restore his driver license, to show that he did not need any further treatment.

The Special Referee found that the respondent admitted to having driven his car while intoxicated. The Special Referee

noted that the character testimony showed that the respondent is well regarded at work, is believed to have integrity, and appears to have supportive people in his life. The Special Referee found that the respondent expressed genuine remorse, however the Special Referee found it troubling that the respondent did not continue to seek objective third-party support via Alcoholics Anonymous or another organization once his mandated remedial activities had been completed.

In requesting a private admonition, the respondent contends that he established at the hearing that he has taken both mandatory and voluntary steps in furtherance of his continued sobriety. He further contends that he demonstrated that he has had a complete lifestyle change since the birth of his son in January 2023 and that he takes full responsibility and has expressed remorse for his actions. The respondent notes that he has done charitable work, although he admits that the community service he performed was to satisfy required community service hours pursuant to his agreed upon disposition.

The respondent contends that his misconduct did not harm any clients, as his arrest occurred in the late evening hours following his attendance at a social event. The respondent notes that he has fully cooperated with law enforcement and the Grievance Committee in its investigation, that he self-reported his conviction, and that he testified candidly at his hearing. The respondent states that he has complied with the terms of his probation.

Findings and Conclusion

We find that the Special Referee properly concluded that the respondent failed to meet his burden of establishing why this Court should not issue a final order of suspension, censure, or disbarment based on his conviction on October 3, 2022. In view of the evidence adduced, the Grievance Committee's motion to confirm the report of the Special Referee is granted.

Under the totality of the circumstances, the respondent is publicly censured for the unlawful conduct which resulted in his conviction (*see Matter of Fleming*, 223 AD3d 25 [2d Dept 2023]; *Matter of Eisenfeld*, 175 AD3d 154 [2d Dept 2019]).

LA SALLE, P.J., DILLON, DUFFY, BARROS and TAYLOR, JJ., concur.

Ordered that the Grievance Committee's motion to confirm the Special Referee's report is granted; and it is further,

Ordered that the respondent, Alex Joseph Kaminski, is publicly censured for his professional misconduct.

[242 NYS3d 569]

LEAH W., Plaintiff, v KEITH W., Defendant.

In the Matter of F.W. and Another, Infants. KEITH W., Appellant; Administration for Children's Services, Respondent.

First Department, September 23, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Supreme Court, New York County (Michael L. Katz, J.), entered on or about November 29, 2024. The order denied respondent's motion to preclude the Administration for Children's Services from introducing into evidence video recordings of forensic interviews with the subject children at the Family Court Act article 10 fact-finding hearing.

HEADNOTE**Records — Sealing of Records upon Termination of Criminal Action in Favor of Accused — Videotaped Interview by Independent Victims' Assistance Agency**

Respondent father was not entitled to an order precluding petitioner Administration for Children's Services from introducing videotaped interviews of his two daughters conducted at a child advocacy center (CAC) by an independent victims' assistance agency employee as evidence in a Family Court Act article 10 proceeding alleging that he sexually abused both daughters, which was commenced after criminal sex abuse charges were dismissed due to lack of witness cooperation. CPL 160.50 (1) (c) specifies that, where a criminal action or proceeding terminates in favor of the accused, "all official records and papers . . . relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed." Neither petitioner nor the victims' assistance agency are included in this list of entities in section 160.50 (1) (c), and petitioner has a different mission and a different burden of proof. Nor were the videos "official records and papers" related to respondent's arrest or prosecution, notwithstanding that the interviews were observed by a multidisciplinary task force involving multiple law enforcement and non-law enforcement actors. As permitted by Social Services Law § 423-a (2) (f), the forensic interviews were made in the CAC's regular course of business as an initial information-gathering process, not inherently tied to any arrest or prosecution that might follow. Moreover, while the videotaped interviews are confidential under section 423-a (5) (a), they "shall" be disclosed for the purpose of investigation, prosecution and/or adjudication in any relevant court proceeding.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Courts § 27.

CARMODY-WAIT 2d Disclosure § 42:169; CARMODY-WAIT 2d Proceedings Involving Abused and Neglected Children, Destitute Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:93, 119A:105, 119A:110; CARMODY-WAIT 2d Disposition of Records and Property §§ 208:2, 208:4, 208:7.

McKINNEY'S, CPL 160.50 (1) (c); Social Services Law § 423-a (2) (f); (5) (a).

NEW YORK FAMILY COURT PRACTICE (2d ed) § 2:60.

NY JUR 2d Criminal Law: Procedure §§ 3764–3766; NY JUR 2d Domestic Relations: Family Court Proceedings §§ 648–649, 682.

ANNOTATION REFERENCES

Restricting access to judicial records. 175 ALR 1255.

Restricting public access to judicial records of state courts. 84 ALR3d 598.

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APPEARANCES OF COUNSEL

Mantel McDonough Riso, LLP, New York City (*Kevin M. McDonough* and *Sophie Spears* of counsel), for appellant.

Muriel Goode-Trufant, Acting Corporation Counsel, New York City (*Rebecca L. Visgaitis* and *Claude S. Platten* of counsel), for respondent.

Rosemary Rivieccio, New York City, Attorney for the Children.

OPINION OF THE COURT

GONZÁLEZ, J.

On October 6, 2023, the children of respondent father were interviewed by a Safe Horizon employee at the Manhattan Child Advocacy Center (CAC). The videotaped interviews were observed by a multidisciplinary team comprised of a detective from the New York City Police Department's Special Victims Unit and representatives from the Manhattan District Attorney's Office and Child Protective Services in a separate room. On October 10, 2023, respondent father was arrested

and charged with first-degree sex abuse and endangering the welfare of a child. On July 15, 2024, the criminal charges were dismissed due to a lack of witness cooperation.

On October 11, 2023, Administration for Children's Services (ACS) commenced a Family Court Act article 10 proceeding against the father, alleging that he sexually abused both of his daughters. ACS informed the father that it would seek to introduce the videotaped interviews at the fact-finding hearing. He subsequently moved to preclude ACS from introducing the videos or a transcript of the interviews.

Criminal Procedure Law § 160.50 specifies that, where a criminal action or proceeding terminates in favor of the accused, "all official records and papers . . . relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed" (*see* CPL 160.50 [1] [c]). The statute "serves the laudable goal of insuring that one who is charged but not convicted of an offense suffers no stigma as a result of his [or her] having once been the object of an unsustained accusation" (*see Matter of Hynes v Karassik*, 47 NY2d 659, 662 [1979]). However, not all documents or records constitute "official records" under CPL 160.50 (*see Matter of Harper v Angiolillo*, 89 NY2d 761, 766 [1997]). Although the statute "specifies judgments and orders of a court as items 'included' in the category of official records and papers, the statute is otherwise silent on the nature of such 'official' material" (*see id.* at 765-766).

The forensic interviews at CAC were part of the children's protective investigation. ACS obtained the videos from Safe Horizon. Safe Horizon, an independent victims' assistance agency tasked with gathering information about the children's safety, is the official creator and custodian of the master tape. The father overlooks the plain language of CPL 160.50, which defines the records subject to sealing as being on file with the "division of criminal justice services, any court, police agency, or prosecutor's office." Neither ACS nor Safe Horizon are included in this list, and the father fails to explain why ACS, an agency with a different mission and a different burden of proof, cannot use the videotape. The videotaped interviews are thus not subject to sealing under the statute.

The videos are not "official records and papers" related to the father's arrest or prosecution. The Social Services Law permits CAC to conduct a forensic interview of a child by a trained

professional that must “be conducted in a manner which is neutral and fact-finding and coordinated to avoid duplicative interviewing” (see Social Services Law § 423-a [2] [f]). These videotaped interviews are confidential, but “shall” be disclosed for the purpose of investigation, prosecution and/or adjudication in any relevant court proceeding (see Social Services Law § 423-a [5] [a]). The interviews were made in CAC’s regular course of business and not in conjunction with law enforcement relating to the father’s prosecution. Even so, the mere existence of a multidisciplinary task force involving multiple law enforcement and non-law enforcement actors is not dispositive (see *People v Wilcox*, 192 AD3d 1540, 1541 [4th Dept 2021], *lv denied* 37 NY3d 961 [2021]).

The argument advanced by ACS and the attorney for the children, which analogizes the CAC videos to 911 recordings, is persuasive. This Court has held that 911 calls are not official records within the meaning of CPL 160.50, as the 911 system serves a broader purpose than solely relating to criminal arrests and prosecutions (see *Matter of Krystal N. [Juan R.]*, 193 AD3d 602, 602 [1st Dept 2021], *lv denied* 37 NY3d 906 [2021] [“Family Court properly declined to strike the 911 tapes from the record after (respondent’s) acquittal in Criminal Court because those records were not official recordings relating to respondent’s arrest or prosecution and thus were not subject to the sealing statute”]; *Matter of Dockery v New York City Hous. Auth.*, 51 AD3d 575, 575 [1st Dept 2008], *lv denied* 11 NY3d 704 [2008]). Similar to a 911 call, which is handled by the NYPD and may or may not lead to a police response and criminal proceeding, a forensic interview at CAC is an initial information-gathering process, not inherently tied to any arrest or prosecution that may follow.

The recorded interviews of the children, in which they gave their own accounts of the father’s actions to an independent forensic interviewer, did not contain any information about the father’s arrest or discontinued prosecution. Sealing the videotaped interviews would undermine the CAC and multidisciplinary model. Although we recognize that there is a delicate balance between the compelling need to protect the welfare of children and the right of criminal defendants to be free from the stigma of an unsustained prosecution, CPL 160.50 should not be used to override the truth-finding and child-protective missions of the Family Court.

Accordingly, the order of the Supreme Court, New York County (Michael L. Katz, J.), entered on or about November

29, 2024, which denied respondent father's motion to preclude petitioner Administration for Children's Services from introducing into evidence video recordings of forensic interviews with the subject children at the Family Court Act article 10 fact-finding hearing, should be affirmed, without costs.

MANZANET-DANIELS, J.P., SHULMAN, RODRIGUEZ III and PITT-BURKE, JJ., concur.

Order of the Supreme Court, New York County, entered on or about November 29, 2024, affirmed, without costs.

[241 NYS3d 809]

In the Matter of ELIZABETH DIANE BRODY, a Suspended Attorney, Respondent.

Second Department, September 24, 2025

PROCEDURAL SUMMARY

APPLICATION by respondent pursuant to 22 NYCRR 1240.10 to resign as an attorney and counselor-at-law. Respondent was admitted to the bar on January 30, 2002, at a term of the Appellate Division of the Supreme Court in the Third Judicial Department. By decision and order on motion of the Appellate Division, Second Department, dated August 12, 2024, respondent was immediately suspended from the practice of law, pursuant to 22 NYCRR 1240.9 (a) (1), (3) and (5), based on uncontroverted evidence that she, inter alia, defaulted in responding to judicial subpoenas and failed to cooperate with the Grievance Committee's investigation (*see Matter of Brody*, 2024 NY Slip Op 72531[U]).

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Resignation

Inasmuch as resignor's proffered resignation complied with the requirements of 22 NYCRR 1240.10 in that her affidavit attested that the resignation was submitted voluntarily, without coercion or duress, and with full awareness of the consequences, and she acknowledged that the Court's approval of the application would result in the entry of an order disbarring respondent, and that she could not successfully defend herself against pending charges of professional misconduct or additional charges of professional misconduct if they were predicated upon the matters under investigation, resignor's resignation was accepted and she was immediately disbarred.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 31, 37, 40, 44.

CARMODY-WAIT 2d Officers of Court §§ 3:248, 3:312, 3:334.

22 NYCRR 1240.10.

NY JUR 2d Attorneys at Law §§ 362–363, 495, 497.

ANNOTATION REFERENCE

Propriety of attorney's resignation from bar in light of pending or potential disciplinary action. 54 ALR4th 264.

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APPEARANCES OF COUNSEL

Courtny Osterling, White Plains, for petitioner.

Elizabeth Diane Brody, Cornwall, respondent pro se.

OPINION OF THE COURT

Per Curiam.

The respondent, Elizabeth Diane Brody, has submitted an affidavit sworn to on October 17, 2024, in support of her application to resign as an attorney and counselor-at-law (*see* 22 NYCRR 1240.10). The respondent acknowledges in her affidavit that she is currently the subject of a disciplinary proceeding commenced by the Grievance Committee for the Ninth Judicial District, pursuant to 22 NYCRR 1240.8 by the service and the filing of a notice of petition and a verified petition, both dated March 18, 2024, alleging four charges of professional misconduct. By letter dated September 18, 2024, charge four was withdrawn. The petition, as amended, alleges that the respondent engaged in conduct prejudicial to the administration of justice and conduct adversely reflecting on her fitness as a lawyer by failing to timely or fully cooperate with the Grievance Committee and failing to comply with this Court’s subpoenas and engaged in conduct that adversely reflects on her fitness as a lawyer by issuing a check for an amount that she did not have in her escrow account, in violation of rule 8.4 (d) and (h) of the Rules of Professional Conduct (22 NYCRR 1200.0). In addition, the respondent acknowledges that she is currently the subject of an investigation by the Grievance Committee involving allegations that she: (1) misappropriated \$300,000 of client funds held on behalf of West 128th Street, LP, and/or NY Residential Property Works, LLC; (2) may have engaged in additional misappropriations or misapplications of funds that have not been identified as of the date of her affidavit due to the fact that there is no full accounting of client funds held in her attorney trust account; (3) failed to pay over funds upon request by a party entitled to the same; (4) engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, including misrepresenting facts to a court; (5) engaged in contemptuous conduct by failing to comply with a court order; (5) filed a frivolous motion with a court; and (6)

failed to cooperate with additional investigations by the Grievance Committee. The respondent attests that she cannot successfully defend against the charges and allegations based upon the facts and circumstances of her professional misconduct as described herein.

The respondent also avers that her resignation is freely and voluntarily tendered, without coercion or duress by anyone, and with full awareness of the consequences, including that the Court's acceptance and approval shall result in the entry of an order of disbarment striking her name from the roll of attorneys and counselors-at-law.

As to the issue of restitution, the respondent consents to the entry of an order by the Court, pursuant to Judiciary Law § 90 (6-a), directing that she make monetary restitution to West 128th Street, LP, and/or NY Residential Property Works, LLC, or the appropriate representatives of those entities in the sum of \$300,000 and that she reimburses the Lawyers' Fund for Client Protection of the State of New York (hereinafter the Lawyers' Fund) for any sum that the Lawyers' Fund paid as a result of any misappropriation on her part. The respondent further acknowledges that her resignation is submitted subject to any future application that may be made by the Grievance Committee for an order, pursuant to Judiciary Law § 90 (6-a), directing that she make restitution or reimburse the Lawyers' Fund, and she consents to the Court's continuing jurisdiction to make such an order.

The respondent also acknowledges and agrees that pending the issuance of an order accepting her resignation, she will not undertake to represent any new clients or accept any retainers for future legal services to be rendered and that there will be no transactional activity in any fiduciary account to which she has access, other than for payment of funds held therein on behalf of clients or others entitled to receive them.

Lastly, the respondent acknowledges that in the event the Court accepts her resignation, the order resulting therefrom and the records and documents filed in relation to the aforementioned allegations, including her affidavit, shall be deemed public records pursuant to Judiciary Law § 90 (10).

The Grievance Committee recommends that the Court grant the respondent's application to resign.

Inasmuch as the respondent's application to resign complies with the requirements of 22 NYCRR 1240.10, the application is granted, and effective immediately, the respondent is disbarred,

and her name is stricken from the roll of attorneys and counselors-at-law.

LaSALLE, P.J., DILLON, DUFFY, BARROS and DOWLING, JJ., concur.

Ordered that the application of the respondent, Elizabeth Diane Brody, a suspended attorney, to resign as an attorney and counselor-at-law is granted; and it is further,

Ordered that pursuant to Judiciary Law § 90, effective immediately, the respondent, Elizabeth Diane Brody, is disbarred, and her name is stricken from the roll of attorneys and counselors-at-law; and it is further,

Ordered that the respondent, Elizabeth Diane Brody, shall continue to comply with the rules governing the conduct of disbarred or suspended attorneys (*see* 22 NYCRR 1240.15); and it is further,

Ordered that pursuant to Judiciary Law § 90, effective immediately, the respondent, Elizabeth Diane Brody, shall continue to desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding herself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that pursuant to Judiciary Law § 90 (6-a) (a), the respondent, Elizabeth Diane Brody, shall reimburse the Lawyers' Fund for Client Protection of the State of New York for any award made to West 128th Street, LP, and/or NY Residential Property Works, LLC, or the appropriate representatives of those entities; and it is further,

Ordered that in the event no awards have been made by the Lawyers' Fund for Client Protection of the State of New York to West 128th Street, LP, and/or NY Residential Property Works, LLC, or the appropriate representatives of those entities, the respondent, Elizabeth Diane Brody, shall make monetary restitution to West 128th Street, LP, and/or NY Residential Property Works, LLC, or the appropriate representatives of those entities in the amount of \$300,000, pursuant to Judiciary Law § 90 (6-a); and it is further,

Ordered that in the event that partial awards have been made by the Lawyers' Fund for Client Protection of the State

of New York to West 128th Street, LP, and/or NY Residential Property Works, LLC, or the appropriate representatives of those entities, the respondent, Elizabeth Diane Brody, shall make partial restitution to West 128th Street, LP, and/or NY Residential Property Works, LLC, or the appropriate representatives of those entities to the extent that West 128th Street, LP, and/or NY Residential Property Works, LLC, or the appropriate representatives of those entities have not been fully reimbursed, pursuant to Judiciary Law § 90 (6-a); and it is further,

Ordered that pursuant to Judiciary Law § 90 (6-a) (d), this opinion and order may be entered as a civil judgment, and such judgment shall be enforceable as a money judgment in any court of competent jurisdiction by the party to whom payments are due hereunder in the amount set forth herein, minus any amount reimbursed by the Lawyers' Fund for Client Protection of the State of New York or by the Lawyers' Fund for Client Protection of the State of New York where it has been subrogated to the rights of such party; and it is further,

Ordered that if the respondent, Elizabeth Diane Brody, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency, and she shall certify to the same in her affidavit of compliance pursuant to 22 NYCRR 1240.15 (f).

[242 NYS3d 115]

In the Matter of KEVIN THOMAS MULHEARN, an Attorney, Respondent. GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Petitioner.

Second Department, September 24, 2025

PROCEDURAL SUMMARY

JOINT MOTION pursuant to 22 NYCRR 1240.8 (a) (5) by the Grievance Committee for the Ninth Judicial District and respondent for discipline by consent. Respondent was admitted to the bar on July 23, 1991, at a term of the Appellate Division of the Supreme Court in the Third Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Suspension

Respondent attorney was suspended from the practice of law for a period of one year based upon findings that he neglected a legal matter entrusted to him, failed to keep his client reasonably informed about the status of the matter, failed to promptly comply with his client's reasonable requests for information, engaged in conduct prejudicial to the administration of justice and engaged in conduct adversely reflecting on his fitness as a lawyer (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.3 [b]; 1.4 [a] [3], [4]; 8.4 [d], [h]). The one-year suspension—requested by consent of the parties pursuant to 22 NYCRR 1240.8 (a) (5)—was warranted in view of respondent's admitted misconduct as well as the mitigating factors presented, including respondent's cooperation with the Attorney Grievance Committee, acknowledgment of his mistakes, and remorse, as well as the nature of respondent's practice which involved representing vulnerable individuals, and, as an aggravating factor, respondent's prior disciplinary history, which consisted of five admonitions, two letters of advisement, and two letters of caution, many of which were for similar conduct.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 58, 66, 68–69.

CARMODY-WAIT 2d Officers of Court §§ 3:276–3:277, 3:325, 3:329–3:330, 3:333–3:334.

22 NYCRR 1200.0, rules 1.3 (b); 1.4 (a) (3), (4); 8.4 (d), (h); 1240.8 (a) (5).

NY JUR 2d Attorneys at Law §§ 402, 405, 505, 511, 518, 524–525, 527.

ANNOTATION REFERENCES

Failure to communicate with client as basis for disciplinary action against attorney. 80 ALR3d 1240.

Negligence, inattention, or professional incompetence of attorney in handling client's affairs in bankruptcy matters as ground for disciplinary action—modern cases. 70 ALR4th 786.

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APPEARANCES OF COUNSEL

Courtney Osterling, White Plains (*Anthony R. Wynne* of counsel), for petitioner.

Richard E. Grayson, White Plains, for respondent.

OPINION OF THE COURT

Per Curiam.

The Grievance Committee for the Ninth Judicial District commenced a disciplinary proceeding on October 30, 2023, by serving on the respondent, and filing with the Court, a notice of petition and verified petition, both dated October 26, 2023, containing four charges of professional misconduct. The respondent served and filed a verified answer dated November 29, 2023. By decision and order on application dated February 2, 2024, the Court, pursuant to 22 NYCRR 1240.8 (b) (1), referred the matter to Norma Giffords, as Special Referee, to hear and report.

The Grievance Committee and the respondent now jointly move pursuant to 22 NYCRR 1240.8 (a) (5) for discipline by consent and request the imposition of public discipline within the range of a public censure to a one-year suspension for the misconduct outlined in the petition. Pursuant to 22 NYCRR 1240.8 (a) (5) (i), the parties submitted a joint affirmation in support of the motion. In addition, the respondent has submitted an affidavit sworn to on November 8, 2024. Based on the stipulation of facts presented with the joint affirmation, the parties have agreed that the following factual specifications are not in dispute.

On or about December 4, 2019, Gaston D. Veintimilla filed a voluntary Chapter 7 bankruptcy petition in a proceeding entitled “*In re Gaston D. Veintimilla*,” case No.19-24102 SHL

(hereinafter the bankruptcy proceeding), in the United States Bankruptcy Court, Southern District of New York (hereinafter the bankruptcy court).

On or about March 12, 2021, Mark S. Tulis, the Chapter 7 Trustee appointed as part of the bankruptcy proceeding (hereinafter the Trustee), filed an application in the bankruptcy court seeking authorization to retain the respondent as special counsel for the Trustee to pursue a potential personal injury claim on behalf of Veintimilla. By order dated April 19, 2021, the bankruptcy court granted the Trustee's application (hereinafter the retention order).

On or about August 6, 2021, the respondent filed a summons and complaint in the Supreme Court, Rockland County, on behalf of the Trustee with respect to Veintimilla's personal injury claim in an action entitled "*Veintimilla v Weber-Stephen Product, LLC*," index No. 34733/21. On or about October 12, 2022, the court posted a court notice to New York State Courts Electronic Filing directing the parties to appear for a preliminary conference on November 21, 2022. On November 21, 2022, the respondent failed to appear at the preliminary conference and did not request an adjournment of the scheduled preliminary conference or otherwise communicate with the court about his nonappearance. By order dated November 21, 2022, the court directed dismissal of the action without prejudice pursuant to Uniform Rules for Trial Courts (22 NYCRR) § 202.27 (c) based upon the respondent's failure to appear at the preliminary conference.

Among other things, the retention order provided that the respondent "shall make a written report to the Trustee as to the status of the possible litigation claim and any litigation thereof every three (3) months, with a copy to the United States Trustee." Notwithstanding this directive, for approximately 1½ years following the entry of the retention order, the respondent failed to provide written status updates to the Trustee, despite repeated requests by the Trustee for the respondent to do so, and failed to file copies of same with the United States Trustee.

On or about October 6, 2022, the Trustee filed a motion in the bankruptcy court pursuant to 11 USC § 327 of the Bankruptcy Code to authorize and approve the termination of the respondent as special counsel for the Trustee based upon the respondent's failure to provide written status updates as required. The respondent never filed an answer to the motion, never communicated with the Trustee about the motion, and

never appeared or otherwise advised the bankruptcy court of his nonappearance on the motion. By order dated December 1, 2022, the bankruptcy court granted the Trustee's motion and the respondent was removed as special counsel and denied any compensation for his services or for reimbursement of his expenses pursuant to 11 USC §§ 330 or 331.

As required by 22 NYCRR 1240.8 (a) (5) (iii), the respondent has submitted an affidavit with this motion in which he conditionally admits the foregoing facts and that those facts establish that he (1) neglected a legal matter entrusted to him in violation of rule 1.3 (b) of the Rules of Professional Conduct (22 NYCRR 1200.0), (2) failed to keep his client reasonably informed about the status of the matter in violation of rule 1.4 (a) (3) of the Rules of Professional Conduct, (3) failed to promptly comply with his client's reasonable requests for information in violation of rule 1.4 (a) (4) of the Rules of Professional Conduct, (4) engaged in conduct prejudicial to the administration of justice in violation of rule 8.4 (d) of the Rules of Professional Conduct, and (5) engaged in conduct adversely reflecting on his fitness as a lawyer in violation of rule 8.4 (h) of the Rules of Professional Conduct.

The respondent consents to the agreed-upon public discipline within the range of a public censure to a one-year suspension, which consent is given fully and voluntarily without coercion or duress. The respondent states that he is fully aware of the consequences of consenting to such discipline.

The parties submit that the Court should consider, in aggravation, the respondent's prior disciplinary history, which consists of five admonitions, one personally delivered, two letters of advisement, and two letters of caution, many of which are for similar conduct as occurred here.

In mitigation, the parties submit that the Court should consider the respondent's cooperation with the Grievance Committee, the respondent's acknowledgment of his mistakes, and his remorse. Moreover, the respondent asserts that this Court should consider that the nature of his practice involves representing vulnerable individuals, which will put their cases at risk if he is suspended for an extended period of time.

As to the appropriate sanction, the parties contend that public discipline within the range of a public censure to a one-year suspension is in accord with this Court's precedent under similar circumstances.

Based on the foregoing, we find that the joint motion for discipline by consent pursuant to 22 NYCRR 1240.8 (a) (5) should be granted and that a one-year suspension is warranted in view of the totality of the circumstances, including the respondent's admitted misconduct as well as the aggravating and mitigating factors presented herein (*see Matter of Gabay*, 185 AD3d 5 [2d Dept 2020]).

LA SALLE, P.J., DILLON, DUFFY, BARROS and WOOTEN, JJ., concur.

Ordered that the joint motion pursuant to 22 NYCRR 1240.8 (a) (5) for discipline by consent is granted; and it is further,

Ordered that the respondent, Kevin Thomas Mulhearn, is suspended from the practice of law for a period of one year, commencing October 24, 2025, and continuing until further order of this Court. The respondent shall not apply for reinstatement earlier than July 24, 2026. In such application (*see id.* § 1240.16), the respondent shall furnish satisfactory proof that, during the period of suspension, he: (1) refrained from practicing or attempting to practice law, (2) fully complied with this opinion and order and with the terms and provisions of the rules governing the conduct of disbarred or suspended attorneys (*see id.* § 1240.15), (3) complied with the applicable continuing legal education requirements of 22 NYCRR 691.11 (a), and (4) otherwise properly conducted himself; and it is further,

Ordered that the respondent, Kevin Thomas Mulhearn, shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see id.*); and it is further,

Ordered that pursuant to Judiciary Law § 90, during the period of suspension and until further order of this Court, the respondent, Kevin Thomas Mulhearn, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that if the respondent, Kevin Thomas Mulhearn, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency,

and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 1240.15 (f).

[243 NYS3d 18]

In the Matter of C.C., an Infant. CATHOLIC GUARDIAN SERVICES,
Respondent; D.C., Appellant, et al., Respondent.

First Department, September 18, 2025

PROCEDURAL SUMMARY

APPEAL from an order of disposition of the Family Court of New York County (Clark V. Richardson, J.), entered on or about May 31, 2023. The order terminated respondent's parental rights to the child based upon a finding that he was a notice-only father and committed the custody and guardianship of the child to petitioner agency for purposes of adoption.

HEADNOTE

Parent, Child and Family — Termination of Parental Rights — Non-marital Parent's Consent for Adoption of Child in Foster Care — Retroactivity of Statutory Amendment

The amendment of Domestic Relations Law § 111 to require consent for adoption by any nonmarital parent who has executed an unrevoked acknowledgment of parentage or filed an unrevoked notice of intent to claim parentage of a child in foster care should be given retroactive effect. Accordingly, in a proceeding seeking to terminate respondent nonmarital father's parental rights in which the fact-finding and disposition were still being litigated at the time the amendment went into effect, respondent's failure to provide financial support after the child entered foster care could not constitute grounds for finding that he was only entitled to notice of the proceeding and precluded from being heard on the permanent neglect petition as it pertained to him. The amendment did away with the necessity for some parents with children in foster care to establish that in addition to having visited or regularly communicated with the child that they made payments to the foster care agency caring for the child. The legislature acknowledged that this requirement resulted in noncompliant or unknowing parents permanently losing their parental rights by being relegated to receiving only notice of the termination proceedings. The express purpose of the amendment was to correct how the law applied to nonmarital parents and was "effective immediately," indicating a sense of urgency that should be effectuated through retroactive application.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Adoption §§ 65, 67, 71, 72, 76; AM JUR 2d Parent and Child § 16; AM JUR 2d Statutes §§ 227, 233.

CARMODY-WAIT 2d Adoption, Assisted Reproduction, and Surrogate Parenting §§ 111:98, 111:100; CARMODY-WAIT 2d Proceedings Involving Abused and Neglected Children, Destitute Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:643, 119A:647.

McKINNEY'S, Domestic Relations Law § 111.
NEW YORK FAMILY COURT PRACTICE (2d ed) §§ 4:17–4:18,
4:43, 5:1, 5:6–5:7.
NY JUR 2d Domestic Relations: Family Court Proceedings
§§ 86, 102, 107, 115, 170; NY JUR 2d Domestic Relations:
Family Relationships §§ 589, 618–619, 622; NY JUR 2d
Public Welfare and Elder Assistance §§ 29, 206, 244; NY
JUR 2d Statutes §§ 227, 233.

ANNOTATION REFERENCES

Necessity of securing consent of parents of illegitimate child to its adoption. 51 ALR2d 497.

Rights of unwed father to obstruct adoption of his child by withholding consent. 61 ALR5th 151.

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APPEARANCES OF COUNSEL

Law Office of Bryan Greenberg, LLC, New York City (*Bryan Greenberg* of counsel), for appellant.

Catholic Guardian Services, Bronx (*Ana Torres* of counsel), for respondent.

Dawne A. Mitchell, *The Legal Aid Society*, New York City (*Claire V. Merkin* of counsel), Attorney for the Child.

OPINION OF THE COURT

O'NEILL LEVY, J.

Respondent D.C. appeals Family Court's termination of his parental rights to the subject child based upon a finding that he is a notice-only father, and committing the custody and guardianship of the child to petitioner agency for purposes of adoption.

In June 2016, the New York City Administration for Children's Services brought Family Court Act article 10 neglect petitions against both parents of the child, and the child was placed in foster care. Respondent and the child's mother were never married; however respondent had previously filed an acknowledgement of paternity. Following a fact-finding hearing, neglect findings were entered against both parents, and after a dispositional hearing in April 2017, both parents were ordered to comply with drug treatment.

During this time the child remained in foster care and in April 2018, the agency filed a petition for the termination of parental rights against both parents. The fact-finding hearing concluded in July 2019, with Family Court finding that the mother permanently neglected the child. At the time of the hearing, Domestic Relations Law § 111 (1) (d) provided that a father's consent to the adoption of a child would be required:

“only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) The payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so . . . or . . . (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child.”

Respondent argued that he should be considered a parent whose consent was required for the child's adoption. Family Court noted that “the statute and the case law are unforgivingly severe” in that nonpayment of support precluded respondent from being designated a consent father. The court indicated that as a notice father, respondent did not have a right to be heard at the fact-finding stage in his own right but that he would be permitted to give limited testimony as to the notice/consent issue only. Respondent testified that as of June 2016, when the child entered foster care, he had lived with the child for approximately 1½ years and during that time had provided “everything” to her. He further testified that after the child went into foster care, he visited regularly, both at the agency and at his mother's home upstate, and although he provided no financial support to the agency, the agency had never told him to do so. However, he stated, he helped his mother with food, clothes, and toy shopping for the child and gave the child numerous gifts. Following respondent's limited testimony, Family Court again concluded that he was a “notice-only father” pursuant to Domestic Relations Law § 111. No written fact-finding order is in the record.

A dispositional hearing on the termination of parental rights was held in November and December 2019. Respondent asked the court to dismiss the termination petition so that he and the child could continue to spend time together and to reunify in the future; respondent also argued that the child had relationships with other paternal relatives and that it was not in the

child's best interests to be freed for adoption. Counsel for respondent, however acknowledged that at that time, respondent was not in a position to reunify with the child. On the record at the conclusion of the dispositional hearing, Family Court determined that it was in the child's best interest to be freed for adoption and committed her to the care and custody of the agency. No written order was issued at that time. In January 2020, the agency requested that the fact-finding hearing be reopened to present a termination of parental rights case as to the husband of the child's mother who was alleged to have abandoned the child. The agency served an amended petition which appears to have been granted on May 13, 2021.

In December 2020, respondent moved for leave to renew pursuant to CPLR 2221 (e). He argued that he was a father whose consent was required for the child's adoption based on new case law—specifically, *Matter of Amanda N. (Ping N.)* (178 AD3d 565 [1st Dept 2019]) in which this Court concluded that Family Court improperly restricted consideration of the unwed father's support to the time when the child was in foster care, even though the child had lived with the father since birth and was financially supported by him prior to the foster care placement at age five (*id.* at 565-566). Thus, respondent argued that the fact-finding hearing should be reopened to allow him to introduce evidence of his relationship with and financial support of the child prior to her placement in foster care. Though the record is not clear, it appears that the court denied the motion to renew on or about March 3, 2021.

Subsequently, the child's maternal grandmother commenced a custody proceeding and the paternal grandmother filed a visitation petition. Family Court reopened the hearing for the purpose of determining the three petitions.

On May 31, 2023, Family Court issued its decision and order on disposition, concluding, among other things, that it was in the best interest of the child that custody and guardianship be committed to the agency for the purposes of adoption or any other long-term permanency goal as appropriate, and denied the grandmothers' petitions. Family Court terminated parental rights, finding that the parents failed to address the issues that brought the child into foster care and provided no plan for the return of the child to their care and had absented themselves from the agency for many months. Domestic Relations Law § 111 was amended, effective December 30, 2022. Pursuant to section 111 (1) (e) (iv), and subject to certain criteria, it

now requires consent for adoption by any nonmarital parent who has executed an unrevoked acknowledgement of parentage or filed an unrevoked notice of intent to claim parentage of a child. The amendment did away with the necessity for some parents with children in foster care to establish that in addition to having visited or regularly communicated with the child that they made payments to the foster care agency caring for the child. The legislature acknowledged that this requirement resulted in noncompliant or unknowing parents permanently losing their parental rights by being relegated to receiving only notice of the termination proceedings (*see* Senate Introducer's Mem in Support, Bill Jacket, L 2022, ch 828 at 6-7). This amendment went into effect three years after Family Court's July 2019 determination that respondent father was solely entitled to notice that the agency was seeking to terminate parental rights to free the child for adoption but before the May 2023 dispositional order was issued.

Respondent argues that Family Court erred in not applying the amended version of Domestic Relations Law § 111 while the fact-finding and disposition were still being litigated. He contends that the amendment was remedial and thus should have been given retroactive effect to effectuate its beneficial purpose.

Generally, a statute “will not be given retroactive construction unless an intention to make it so can be deduced from its wording” (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]). A legislative directive that a law shall “take effect immediately,” coupled with the remedial nature of the amendment, indicates a “‘sense of urgency’” that should be effectuated through retroactive application (*Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122 [2001]). The purpose of remedial statutes is to correct imperfections in prior law by giving relief to an aggrieved party (*see Matter of Mia S. [Michelle C.]*, 212 AD3d 17, 22 [2d Dept 2022], *lv dismissed* 39 NY3d 1118 [2023]; *see also Matter of Asman v Ambach*, 64 NY2d 989, 991 [1985]), to the extent that they do not impair vested rights or bestow additional rights (*see Matter of Marino S.*, 100 NY2d 361, 371 [2003]). As the express purpose of the amendment at issue was to correct how the law applied to nonmarital parents and was “effective immediately,” we find that it should be given retroactive effect. Accordingly, we do not consider respondent's failure to provide financial support after the child entered foster care as grounds for finding that he is a

notice-only father precluded from being heard on the permanent neglect petition as it pertains to him (*see Matter of Mia S.*, 212 AD3d at 24-25).

Because Family Court had determined that the respondent was a “notice-only” father, it did not make a determination at the conclusion of the fact-finding hearing as to whether respondent had permanently neglected the child, which must be supported by clear and convincing evidence. As no full fact-finding hearing occurred as to respondent, the provisions of the order terminating his parental rights should be vacated and this matter remanded to Family Court for further proceedings consistent with this decision.

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

MOULTON, J.P., FRIEDMAN, KAPNICK and SHULMAN, JJ., concur.

Order of disposition, Family Court, New York County, entered on or about May 31, 2023, modified, on the law, without costs, to the extent of vacating the provisions of the order terminating respondent D.C.’s parental rights, and the matter remanded for further proceedings consistent with this decision.

[243 NYS3d 110]

CHANOCH KROHN, Respondent, v SCHULTZ FORD LINCOLN, INC.,
et al., Appellants.

Second Department, September 24, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Supreme Court, Rockland County (Thomas P. Zugibe, J.), dated September 15, 2022. The order, in effect, granted those branches of plaintiff's motion which were pursuant to CPLR 4404 (a) to set aside so much of the jury verdict as, upon finding that defendants were negligent, found that such negligence was not a substantial factor in causing injury to plaintiff and for judgment as a matter of law on the issue of liability.

Krohn v Schultz Ford Lincoln, Inc., 2022 NY Slip Op 35027(U), reversed.

HEADNOTES

Trial — Verdict — Setting Verdict Aside — Negligence and Proximate Cause Not Inextricably Intertwined

1. In an action in which plaintiff alleged that his van impacted a concrete barrier on an expressway because defendants' negligent installation of the van's pitman arm caused the loss of steering, the issues of negligence and proximate cause were not inextricably intertwined as a result of there being a rational view of the evidence that plaintiff's accident did not occur as claimed. Accordingly, Supreme Court erred by, in effect, granting those branches of plaintiff's motion which were pursuant to CPLR 4404 (a) to set aside so much of the jury verdict as, upon finding that defendants were negligent, found that such negligence was not a substantial factor in causing injury to plaintiff and for judgment as a matter of law on the issue of liability. There was a valid line of reasoning and permissible inferences upon which the jury could have parsed the alleged negligent repair from the alleged proximate cause and determine that while defendants were negligent, they were not a proximate cause of plaintiff's claimed accident. Plaintiff failed to produce his passenger or any other witness to testify about the alleged collision or its aftermath. Plaintiff did not call the police to the heavily trafficked scene, and therefore, there was no police report corroborating the accident after-the-fact. He did not produce any tow invoices. The photographs of plaintiff's van revealed damages, which a rational jury could have concluded were not consistent with the nature of the described vehicular impact.

Trial — Instructions — Response to Jury Note — Whether Alleged Accident Occurred

2. In a personal injury action where there are questions of fact about whether the alleged injury-producing event actually occurred as claimed by the plaintiff, it is not error for the court to respond to a jury note by instructing that the jury could consider whether the alleged accident occurred. Where

trial evidence raises the issue of whether negligence and proximate cause are inextricably intertwined, versus whether the negligent event may not have occurred as claimed, the jury verdict sheet should not be drafted or construed as to take away from the jury the determination of the latter issue. However, there are cases where the happening of an accident may itself be contested. Here, where plaintiff alleged that his van took “a massive hit” when it “heavily” impacted a concrete barrier “a couple of times” while traveling approximately 50 miles per hour because defendants’ negligent installation of the van’s pitman arm caused the loss of steering, but failed to call police to the heavily trafficked scene or to produce any other witnesses or tow truck invoices at trial and offered photographs that did not depict the far greater damage as would have been expected, Supreme Court did not err in instructing the jury that it could consider whether plaintiff’s accident had occurred.

RESEARCH REFERENCES

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AM JUR 2d Automobiles and Highway Traffic § 1061; AM JUR 2d Negligence §§ 397, 400, 405; AM JUR 2d Trial §§ 893–894, 1282–1283, 1571.
 CARMODY-WAIT 2d Charge to Jury § 57:59; CARMODY-WAIT 2d Post-Trial Motion for New Trial or Judgment Notwithstanding Verdict §§ 62:5, 62:8.
 DOBBS LAW OF TORTS (2d ed) §§ 163–164, 200.
 MCKINNEY’S, CPLR 4404 (a).
 NY JUR 2d Automobiles and Other Vehicles §§ 990, 992, 1025, 1143; NY JUR 2d Negligence §§ 62–63, 234; NY JUR 2d Trial §§ 418, 443–444.
 NEW YORK LAW OF TORTS §§ 8:12, 20:36.
 NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL, PJI 2:70, 2:85.
 SIEGEL, NY PRAC (6th ed) §§ 405–406.

ANNOTATION REFERENCE

Negligence in repairing or servicing automobile as proximate cause of subsequent injury or damage. 118 ALR 1129.

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APPEARANCES OF COUNSEL

Quintairos, Prieto, Wood & Boyer, P.A., New York City (*Kathleen M. Mulholland* of counsel), for appellants.

Certain & Zilberg, PLLC, New York City (*K. Douglas Herring* of counsel), for respondent.

OPINION OF THE COURT

DILLON, J.P.

The narrow question we must address to determine this appeal is whether the Supreme Court properly, in effect, granted those branches of the plaintiff's motion which were pursuant to CPLR 4404 (a) to set aside so much of the jury verdict as, upon finding that the defendants were negligent, found that such negligence was not a substantial factor in causing injury to the plaintiff and for judgment as a matter of law on the issue of liability. We answer this question in the negative, holding that the court erred by, in effect, granting those branches of the plaintiff's motion where, as here, issues of negligence and proximate cause are not inextricably intertwined as a result of there being a rational view of the evidence that the plaintiff's accident did not occur as claimed. Additionally, this appeal provides the opportunity to state our view that, in a personal injury action where there were questions about whether the alleged injury-producing event actually occurred as claimed by the plaintiff here, it was not error for the court to respond to a jury note by instructing that the jury could consider whether the alleged accident occurred.

Relevant Facts

In February 2014, the plaintiff brought his van, which he had purchased used a few days earlier, to the defendants' business for the defendants to perform service and repair work on it. The plaintiff supposedly told the defendants, among other things, that the steering and the alignment "felt off." He later authorized the repairs that the defendants suggested. In early March 2014, the plaintiff picked up the van from the defendants after the work was completed and paid them more than \$4,000.

On Sunday, May 25, 2014, the plaintiff, a professional musician, was scheduled to perform music at a bar mitzvah taking place in Far Rockaway. That morning, he left his home in Rockland County and drove the van toward the venue. He was accompanied in the van by his friend, Simcha Brodsky. Each person wore a seat belt. The van also contained musical instruments and equipment to be used for the event.

The plaintiff, testifying at trial subsequently, said that as the van exited from the Whitestone Bridge and merged onto

the southbound direction of the Van Wyck Expressway, he heard a “metal clank sound.” According to the plaintiff, the van “immediately . . . started veering off to the right, and it wasn’t responding to any of my steering efforts.” He started to apply the brake “but there really wasn’t any time because the van just went crashing into the barrier on the right side of the Van Wyck.” The van was traveling at approximately 50 miles per hour as it exited from the Whitestone Bridge. The plaintiff was unable to fully apply the brake before impact. He did not notice any appreciable decrease in his speed before impact. The impact with the concrete barrier was “definitely heavy.” The main impact was on the passenger side of the van. The van “crashed into the side of the barrier, and then it kind of bashed off and kept on going forward and was crashing again, and it happened a couple of times until eventually it did come to a stop.” This crashing into the barrier happened more than five times. During the crash, a subwoofer among the musical equipment became loose and crashed into and smashed one of the van’s windows. The air bags did not deploy, and the van was not equipped with side air bags. Once the van came to a stop, the plaintiff made sure Brodsky was okay. The plaintiff described that “[w]e had just taken a massive hit. I was shaking. I was shaking. It was really a terrifying experience.”

The plaintiff and Brodsky exited the van and called for a tow truck. The plaintiff could see that the side of the van had dents and scratches, that the big metal step along the van was bent, and that a window was smashed. The operator of the first tow truck to arrive indicated that he was unable to tow the van due to damage under the front part of the van. A second tow truck, this one a flatbed, arrived and, after a struggle, the tow truck operators were able to load the van onto the flatbed tow truck. The plaintiff explained that “it was difficult to get the van dragged off the side barrier, and that was because once they were able to pull it a little bit, I was able to see that one wheel is one direction, another wheel is in another direction, and the steering wheel wasn’t connected to anything.” The police were not called to the scene.

At the plaintiff’s request, the operator of the second tow truck drove the plaintiff, Brodsky, and the van to the event venue, which was approximately 20 miles away. While in the tow truck, the plaintiff, realizing they were running late to the event, called a musician friend of his, Gershon Veroba, explained the situation, and asked Veroba to go to the venue to

join the plaintiff's brother in performing music at the start of the event. After eventually arriving by tow truck, the plaintiff performed at the event. His family arranged for the van to be transported to a vehicle repair shop located closer to the plaintiff's home.

In 2017, the plaintiff commenced this action to recover damages for personal injuries, alleging that the defendants' negligent performance of repairs resulted in the collision and injuries to the plaintiff. The matter proceeded to a bifurcated jury trial held in May 2022. The plaintiff's trial evidence included, among other evidence, his testimony and the testimony of Victor Serby. Serby, an engineer and an attorney who had been retained by the plaintiff's lawyers as an engineer on some cases and who had worked with them as cocounsel on other cases, inspected the van on September 23, 2014, approximately four months after the alleged accident. Serby's opinion was to the effect that a part of the van's steering mechanism, the pitman arm, became detached from the steering box due to not being attached with the requisite force, causing the van's steering to fail to function. Serby opined, in part, that the pitman arm "was never properly torqued onto the vehicle with the specified 200 foot pounds in the Ford shop manual."

During summation, defense counsel discussed evidence that the plaintiff did not present, including the trial testimonies of the passenger in the van, Brodsky, the friend, Veroba, and the tow truck operators, and raised the issue of whether the accident happened with the query, "Did the accident happen? That's for you to decide. I'm not even necessarily suggesting nothing happened. I can't tell you. I don't know."

The Supreme Court instructed the jury and provided it with a verdict sheet, which asked two questions. The first question asked, "[w]ere the defendants negligent?" The second question, which was only to be reached in the event the jury answered affirmatively on the first question, asked, "[w]as that negligence a substantial factor in causing plaintiff's accident?" The jury sheet did not include a special verdict question about whether the accident occurred.

The jury sent a note to the Supreme Court during its deliberations. That note read, "[t]he second question presumes there was an accident. . . . Are we to assume that there was an accident, or is that part of our deliberation?" After reading the note to and conferring with counsel, the court answered the question by, *inter alia*, summarizing the plaintiff's

testimony regarding the collision. The court instructed the jury, in part, “[i]f you believe that testimony, then you could reasonably conclude that there was an accident. If you don’t believe that testimony, you can conclude that there is no accident. That’s your determination. So you heard testimony, and you are to consider the weight, if any, to give to that.” Not long after, the jury returned its verdict, finding that the defendants were negligent but that the negligence was not a substantial factor in causing the collision.

The plaintiff moved, among other things, pursuant to CPLR 4404 (a) to set aside so much of the jury verdict as, upon finding that the defendants were negligent, found that such negligence was not a substantial factor in causing injury to the plaintiff and for judgment as a matter of law on the issue of liability. The defendants opposed the motion.

In the order appealed from, dated September 15, 2022 (2022 NY Slip Op 35027[U] [Sup Ct, Rockland County 2022]), the Supreme Court, in effect, granted those branches of the plaintiff’s motion which were pursuant to CPLR 4404 (a) to set aside so much of the verdict as, upon finding that the defendants were negligent, found that such negligence was not a substantial factor in causing injury to the plaintiff and for judgment as a matter of law on the issue of liability. The court properly noted that motions to set aside verdicts for the insufficiency of evidence and motions to set aside verdicts as contrary to the weight of the evidence are governed by two different legal standards. As between the two standards, the court concluded that there was no valid line of reasoning or permissible inferences that could allow the jury to rationally reach its conclusion. The court, in effect, set aside the jury’s verdict that the accident did not proximately occur on the ground that there was insufficient evidence to sustain that verdict, ordered that a judgment be entered in favor of the plaintiff on the issue of liability, and directed the scheduling of a future trial on the issue of damages. We do not treat the order appealed from as setting aside the verdict as contrary to the weight of the evidence.* The defendants appeal.

* Three times in the decision and order appealed from, the Supreme Court used the language of weight of the evidence, stating “[t]he Court determines that such a [liability] finding was against the weight of the evidence presented at trial”; that where negligence and proximate cause are inextricably interwoven as here, the jury’s finding was “inherently contrary to the weight

(n. cont’d)

I. Weight of the Evidence Versus Insufficiency of the Evidence

The Supreme Court, in the order appealed from, and the parties, in their briefs, have confused or used interchangeably the legal insufficiency and weight of the evidence standards under CPLR 4404 (a).

CPLR 4404 (a) permits the court to set aside the jury's verdict, upon motion of any party or at its own initiative, if, inter alia, a party is entitled to judgment as a matter of law, or it may order a new trial if the jury's verdict is contrary to the weight of the evidence. The statutory reference to "judgment as a matter of law" regards the insufficiency of the evidence (*id.*). The bench and bar are reminded that insufficiency and weight are distinct concepts that should not be confused with one another. Insufficiency looks at whether the jury could legally, logically, and objectively reach its verdict based on the evidence presented. Its precise legal standard is whether there is a valid line of reasoning and permissible inferences by which a rational trier of fact could find in favor of the party (*see Killon v Parrotta*, 28 NY3d 101, 107-108 [2016]; *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Nicastro v Park*, 113 AD2d 129, 132 [2d Dept 1985]). Insufficiency is a question of law. When a verdict is set aside for the legal insufficiency of evidence, it is replaced with a judgment of the court in favor of another party

of the evidence"; and that the court "grants Plaintiff's motion to set aside the verdict as against the weight of the evidence" (2022 NY Slip Op 35027[U], *7-8). Nevertheless, we treat the decision and order as, in effect, setting aside the jury's verdict on the insufficiency of the evidence rather than its weight. In its meaningful analysis of the evidence, the court applied the legal standard that governs the legal insufficiency of evidence and noted that verdicts that are set aside as contrary to the weight of the evidence receive a new trial, whereas verdicts that are set aside for insufficiency do not. Elsewhere, the court stated there was "no valid line of reasoning and permissible inferences which could possibly lead rational [individuals] to the conclusion . . . that was reached by this jury," which is the language of insufficiency rather than weight (*id.* at *6). In one decretal paragraph, the court expressly directed that a judgment be entered on the issue of liability in favor of the plaintiff (meaning, that there was to be no new liability trial), and in another decretal paragraph, directed a conference for the scheduling of a damages-only trial. The consistent portions of the decision and the order are that of the insufficiency of the evidence. In *Charalabidis v Elnagar* (188 AD3d 44, 48 [2d Dept 2020]), we noted that where there are inconsistencies between a decision and an order, the decision is to control. Here, the decision is itself internally inconsistent in rendering conclusions based on the insufficiency of the evidence and at other times based on weight of the evidence, but the clearest indicator of the court's ultimate intent is the ordered decretal paragraphs, which are consistent with the insufficiency portions of the court's decision.

to the action, and no new trial is held (*see* CPLR 4404 [a]; *Killon v Parrotta*, 28 NY3d at 108; *Cohen v Hallmark Cards*, 45 NY2d at 500). While “sufficiency of the evidence” is the phraseology that is most often used in the reported literature, the more precise terminology is that of the “insufficiency of the evidence,” as courts may only set aside verdicts under CPLR 4404 upon a finding that the evidence is insufficient to support the jury’s verdict.

By contrast, weight of the evidence is a more malleable, qualitative, fact-based review of the verdict. The court looks at whether the evidence so preponderates in favor of a party that a contrary verdict could not have been reached on any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Thompson v Northwell Health, Inc.*, 234 AD3d 1006, 1007 [2d Dept 2025]). If a verdict is set aside on the basis of the weight of the evidence, a new trial is held (*see* CPLR 4404 [a]; *Killon v Parrotta*, 28 NY3d at 107-108; *Cohen v Hallmark Cards*, 45 NY2d at 498). The differences between insufficiency and weight are significant not only to the legal standards that are applied in deciding their respective applications but also to whether the court’s determination is conclusive or subject to a new trial.

Courts and counsel are reminded that they should approach motions pursuant to CPLR 4404 (a) by assessing whether the arguments for or against the setting aside of a jury’s verdict are law-based insufficiency grounds regarding the elements and defenses to causes of action and the evidence presented (or not presented) to either or, alternatively, the more fact-based assessment of the *quantum* of evidence presented to establish a claim or defense.

II. The Setting Aside of the Verdict

The parties dispute whether the Supreme Court properly, in effect, granted that branch of the plaintiff’s motion which was to set aside so much of the jury verdict as found that the defendants’ negligence was not a substantial factor in causing injury to the plaintiff and directed judgment as a matter of law on the issue of liability in the plaintiff’s favor. As noted above, CPLR 4404 (a) permits a court to set aside a verdict or any judgment entered thereon and direct that a judgment be entered in favor of a party entitled to judgment as a matter of law.

“To sustain a determination that a jury verdict is

not supported by sufficient evidence as a matter of law, there must be ‘no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial’ ” (*Nicastro v Park*, 113 AD2d at 132, quoting *Cohen v Hallmark Cards*, 45 NY2d at 499).

“When it can be said that ‘it would not be utterly irrational for a jury to reach the result it . . . determined . . . , the court may not conclude that the verdict is as a matter of law not supported by the evidence’ ” (*Campbell v City of Elmira*, 84 NY2d 505, 510 [1994] [emphasis omitted], quoting *Cohen v Hallmark Cards*, 45 NY2d at 499). “The test is a harsh one because a finding that a jury verdict is not supported by sufficient evidence leads to a directed verdict terminating the action without resubmission of the case to a jury” (*Nicastro v Park*, 113 AD2d at 132).

In considering such a motion, “the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant” (*Szczepiak v Pilat*, 90 NY2d 553, 556 [1997]). Where there is a reasonable view of the evidence under which it is logically possible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view (see *Cruz-Rivera v National Grid Energy Mgt., LLC*, 190 AD3d 687, 688 [2d Dept 2021]; *Wilson v Philie*, 107 AD3d 700, 702 [2d Dept 2013]).

The Supreme Court by, in effect, setting aside the jury’s liability verdict in this instance, did so on the basis of what was essentially a two-tiered factual and legal analysis. As to the first tier, the court viewed the action as being one where the issues of negligence and proximate cause were so inextricably interwoven that there could not be one without the other. More specifically, the court noted unrefuted evidence of the defendants’ earlier defective repair to the vehicle’s steering mechanism. As to the second tier of analysis, the court noted that the plaintiff’s evidence about the accident “was generally uncontroverted,” as there were no alternate theories of negligence in the trial record, making it impossible to conclude anything other than that the negligently-repaired steering mechanism was the proximate cause of the plaintiff’s accident (2022 NY Slip Op 35027[U], *7).

This appeal provides us with an opportunity to discuss two issues—the concept of negligence and proximate cause being inextricably intertwined, and the nature of the jury’s charge and verdict sheet on negligence and proximate cause.

III. Inextricably Intertwined

Negligence and proximate cause are two necessary parts to any finding of liability. When there is a line of demarcation between negligence and proximate cause, a jury’s verdict finding the first but not the second does not warrant the setting aside of a verdict under CPLR 4404 (a) (see *Cruz-Rivera v National Grid Energy Mgt., LLC*, 190 AD3d at 688-689; *Correa v Abel-Bey*, 188 AD3d 641, 642-643 [2d Dept 2020]; *McKenzie v Southside Hosp.*, 163 AD3d 952, 953 [2d Dept 2018]; *McGloin v Austin*, 89 AD2d 583, 583-584 [2d Dept 1982]). Conversely, where issues of negligence and proximate cause are inextricably intertwined, courts may set aside a verdict where negligence is found but proximate cause is not (see *Evans v New York City Tr. Auth.*, 179 AD3d 105, 113 [2d Dept 2019]; *Alexander v City of New York*, 21 AD3d 389, 390 [2d Dept 2005]). A recent example of where negligence and proximate cause were found to be inextricably intertwined as to require the setting aside of the verdict where the jury found one but not another, is the case of *Brewer v Ross* (188 AD3d 780 [2d Dept 2020]). In *Brewer*, the plaintiff was working upon a scaffold that allegedly was struck by a Bobcat machine operated by another person, and the plaintiff sustained an alleged injury as a result. On the issue of common-law negligence, this Court concluded that the issues of negligence in the operation of the Bobcat and its proximate cause to the occurrence were not logically severable as they were inextricably intertwined (see *id.* at 783). Examples of the same concept may be found in the realm of medical malpractice actions, such as in *Swavelly v Zhou* (86 AD3d 947 [4th Dept 2011]), where a physician’s negligence in puncturing a decedent’s heart during surgery, which caused death, was inextricably interwoven with its causality as to make it impossible for the jury to have found a departure from the medical standard of care without also finding proximate cause.

[1] If, as the Supreme Court concluded in this instance, the jury’s deliberation involved an uncomplicated determination of whether the defendants had negligently installed the pitman arm of the plaintiff’s van, which, in turn, resulted in the plaintiff’s loss of steering and the accident as described, then

the jury's finding of negligence without a finding of proximate cause would be inconsistent. But the trial evidence was not so uncomplicated as to be subject to only one view of the events. Here, viewing the evidence in the light most favorable to the defendants, as we must in these instances, there was a valid line of reasoning and permissible inferences upon which the jury could parse the alleged negligent repair from the alleged proximate cause and determine that while the defendants were negligent, they were not a proximate cause of the plaintiff's claimed accident (see *Cohen v Hallmark Cards*, 45 NY2d at 499; *Rubino v Scherrer*, 68 AD3d 1090, 1092 [2d Dept 2009]).

More specifically, the plaintiff's trial testimony was to the effect that his van, which had been traveling at a speed of approximately 50 miles per hour on an expressway, impacted a concrete barrier at least five times. He described the impact with the barrier as "definitely heavy." Despite having "just taken a massive hit" and enduring "a terrifying experience," the plaintiff arranged to be taken to the event venue where he proceeded to perform music. The plaintiff did not produce the van's passenger, Brodsky, the friend, Veroba, the plaintiff's brother, or any other witness, such as either tow truck operator, to testify about the alleged collision or its aftermath. The plaintiff also did not call the police to the heavily trafficked scene at the southbound direction of the Van Wyck Expressway, and therefore, there was no police report corroborating the accident after-the-fact. The plaintiff testified that he made arrangements for a post-collision tow of the vehicle to an initial location and, thereafter, to Rockland County, but no record or invoice of either tow was proffered into evidence. Although the plaintiff offered photographs marked as trial exhibit D purporting to show damage to the van, those photos, perhaps most significantly, do not depict the sort of far greater damage as would be expected when the side of a vehicle, initially traveling at approximately 50 miles per hour, experiences "heavy" impacts with a concrete barrier at least five or more times.

The foregoing necessarily led the jury to consider whether the alleged accident happened at all. That is evidenced by the jury's sole note to the Supreme Court inquiring if its deliberations included consideration of whether the accident occurred. The jury wrote that the verdict sheet's "second question presumes there was an accident. Are we to assume that there was an accident, or is that part of our deliberation?" In response, the court instructed the jury, among other things, that

“[i]f you don’t believe that testimony, you can conclude that there is no accident.” The jury rendered its verdict shortly thereafter, answering “no” to the question on proximate cause.

Under the circumstances of this case, it was not irrational for the jury to conclude that although the defendants negligently performed work on the plaintiff’s van, the negligent work was not a substantial factor in causing the alleged accident as claimed by the plaintiff. The jury all but said as much through its deliberative question to the Supreme Court and the verdict that followed. Its doing so was consistent with the jury’s obligation to review the trial evidence, assess its credibility, draw reasonable inferences from the photographic and other evidence, apply the plaintiff’s burden of proof, and render a verdict accordingly. As argued by the defense in summation, the plaintiff failed to produce for testimony Brodsky, Veroba, the plaintiff’s own brother, or either tow truck operator. He did not produce any tow invoices. The photographs of the plaintiff’s van revealed damages, which a rational jury could conclude were not consistent with the nature of the described vehicular impact. The line of reasoning outlined here does not amount to impermissible speculation but instead addresses whether, in the jury’s view, the plaintiff met his burden of proof as to all necessary elements of his cause of action (*see Kirwan v New York City Tr. Auth.*, 199 AD3d 907 [2d Dept 2021]). We therefore conclude that the Supreme Court erred by, in effect, granting those branches of the plaintiff’s motion which were to set aside so much of the jury verdict as found that the defendants’ negligence was not a substantial factor in causing injury to the plaintiff and for judgment as a matter of law on the issue of liability.

IV. The Jury Instructions

[2] Where trial evidence raises the issue of whether negligence and proximate cause are inextricably intertwined, versus whether the negligent event may not have occurred as claimed, the jury verdict sheet should not be drafted or construed as to take away from the jury the determination of the latter issue. Contrary to the plaintiff’s contention, the Supreme Court did not err in instructing the jury in response to its note that it could consider whether the plaintiff’s accident had occurred (*see Duran v Temple Beth Sholom, Inc.*, 155 AD3d 690, 693-694 [2d Dept 2017] [“Supreme Court erred in denying the plaintiffs’ request to ask the jury to determine not only whether the

temple violated Labor Law § 240 (1), but also to determine whether Duran fell off the beam. Under the particular circumstances of this case, this constituted a fundamental error warranting a new trial because the court's instructions failed to explain to the jury that, in light of arguably inconsistent accounts of how the accident occurred, the jury was entitled to find that Duran did not fall from the beam or, alternatively, that he did fall from the beam but no safety device was required under Labor Law § 240 (1)" (citations omitted)).

A trial court must weigh competing principles when considering whether to ask the jury to determine if the alleged injury-producing event occurred as claimed by the plaintiff. On the one hand, there are trials where the question of whether the injury-producing event occurred as claimed by the plaintiff presents no factual dispute (*see e.g. Canale v L & M Assoc. of N.Y., Inc.*, 155 AD3d 675, 677 [2d Dept 2017]; *Donohue v Chaudhry*, 63 AD3d 876, 877 [2d Dept 2009]). There are other cases where the happening of an accident may itself be contested (*see e.g. Duran v Temple Beth Sholom, Inc.*, 155 AD3d 690 [2d Dept 2017]; *Casella v City of New York*, 69 AD3d 549 [2d Dept 2010]).

V. Miscellaneous

Even if this Court were to review the appeal under a weight of the evidence analysis, our conclusion would be the same. The plaintiff failed to establish that the evidence so preponderated in his favor that a contrary verdict could not have been reached on any fair interpretation of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d at 746; *Thompson v Northwell Health, Inc.*, 234 AD3d at 1007), taking into account the plaintiff's burden of proof at trial, determinations of credibility, the absence of certain forms of corroborative evidence, and an assessment of the evidence, including particularly the photographs in evidence.

As to weight, this case is distinguishable from *Annunziata v City of New York* (175 AD3d 438 [2d Dept 2019]), where a verdict was set aside on appeal as contrary to the weight of the evidence, where the jury's conclusion that the accident was from some other cause or fabricated was wholly and impermissibly speculative. Here, for reasons discussed above, there was a fair interpretation of the evidence in support of the jury's verdict.

The plaintiff's remaining contentions are without merit.

Accordingly, the order is reversed insofar as appealed from, those branches of the plaintiff's motion which were pursuant

to CPLR 4404 (a) to set aside so much of the jury verdict as, upon finding that the defendants were negligent, found that such negligence was not a substantial factor in causing injury to the plaintiff and for judgment as a matter of law on the issue liability are denied, so much of the jury verdict as found that the defendants' negligence was not a substantial factor in causing injury to the plaintiff is reinstated, and the matter is remitted to the Supreme Court, Rockland County, for the entry of an appropriate judgment.

CONNOLLY, CHRISTOPHER and WARHIT, JJ., concur.

Ordered that the order is reversed, on the law, with costs, those branches of the plaintiff's motion which were pursuant to CPLR 4404 (a) to set aside so much of the jury verdict as, upon finding that the defendants were negligent, found that such negligence was not a substantial factor in causing injury to the plaintiff and for judgment as a matter of law on the issue of liability are denied, so much of the jury verdict as found that the defendants' negligence was not a substantial factor in causing injury to the plaintiff is reinstated, and the matter is remitted to the Supreme Court, Rockland County, for the entry of an appropriate judgment.

[243 NYS3d 622]

ANKIT PATEL, Appellant, v MAYBANK KIM ENG SECURITIES USA
INC., Respondent.

First Department, September 30, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Supreme Court, New York County (Louis L. Nock, J.), entered on or about May 15, 2024. The order granted defendant's motion to dismiss the amended complaint's second cause of action under Labor Law §§ 193 and 198 for unpaid severance pay.

Patel v Maybank Kim Eng. Sec. USA Inc., 2024 NY Slip Op 31652(U), reversed.

HEADNOTE**Labor — Hours and Wages — Executives' Right to Pursue Employer's Civil Liability under Labor Law Article 6**

The No Wage Theft Loophole Act (L 2021, ch 397) made it clear that there is no exception to an employer's civil liability under Labor Law §§ 193 and 198 for the unauthorized withholding of wages, benefits or wage supplements. Accordingly, in plaintiff executive's action against his former employer seeking attorneys' fees, costs, and liquidated damages for unpaid severance pay, Supreme Court erred in dismissing the cause of action under sections 193 and 198 based on Labor Law § 198-c (3)'s exclusion of certain executives from seeking criminal penalties against employers who fail to pay earned benefits or wage supplements. Supreme Court's decision was contrary to the Legislature's expressed intent to amend these rights-affirming statutes to impose civil liability for wage theft completely and without exception. Additionally, it directly conflicted with Labor Law § 198 (3)'s command that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages." Sections 193 and 198 do not expressly exclude executives from the definition of employees.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Employment Relationship §§ 63, 67.

MCKINNEY'S, Labor Law §§ 193, 198, 198-c.

NY JUR 2d Employment Relations §§ 136, 145, 158, 804.

ANNOTATION REFERENCES

Construction and application of statute providing for attorney's fee in action to recover for wages. 115 ALR 250.

Validity, construction, and effect of state laws requiring payment of wages on discharge of employee immediately or within specified period. 18 ALR5th 577.

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APPEARANCES OF COUNSEL

Bronster LLP, New York City (*Don Abraham* of counsel), for appellant.

Kauff McGuire & Margolis LLP, New York City (*Michele A. Coyne* of counsel), for respondent.

OPINION OF THE COURT

MICHAEL, J.

Plaintiff seeks relief against his former employer under Labor Law §§ 193 and 198 for unpaid severance pay. Supreme Court dismissed plaintiff’s claim upon finding that section 198-c barred plaintiff, an executive earning above the statutory threshold, from seeking such relief. However, nothing in the Labor Law impedes plaintiff from seeking civil liability for unpaid severance pay under sections 193 and 198 as a high earning executive. Indeed, the plain language of the statutes provides that “there is no exception to liability” for the “unauthorized failure to pay wages, benefits or wage supplements” (Labor Law §§ 193 [5]; 198 [3]). Accordingly, we reverse Supreme Court’s dismissal of plaintiff’s second cause of action under sections 193 and 198 and reinstate his claim.

I.

Defendant Maybank Kim Eng Securities USA Inc. hired plaintiff Ankit Patel in 2019 to serve under the title “Executive Director, Asian equities.” Defendant is in the business of securities, and plaintiff’s role was to market Asian equities to US, Canadian, and other international institutional investors. Plaintiff was paid a base compensation of \$250,000 annually, which eventually increased to \$252,492 annually or \$21,041 per month.

In September 2022, defendant terminated plaintiff’s employment. Pursuant to the parties’ separation agreement executed on November 11, 2022, defendant agreed to pay plaintiff a lump sum of five months of his base salary as severance. On January 3, 2023, plaintiff received \$63,123, only three months’ salary. Plaintiff alleges defendant has refused to pay the balance.

Plaintiff raised two causes of action in his amended complaint. As relevant here, the second cause of action seeks attorneys' fees, costs and liquidated damages under Labor Law §§ 193 and 198. Defendant moved under CPLR 3211 (a) (1) and (7) to dismiss the second cause of action. Defendant argued that plaintiff's claim was barred under Labor Law § 198-c because plaintiff was an executive.

Supreme Court granted defendant's motion and dismissed the second cause of action, reasoning that severance pay is considered a wage supplement under the Labor Law, and "[c]laims for such supplements may not be made under the Labor Law by 'any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of one thousand three hundred dollars a week'" (2024 NY Slip Op 31652[U], *2 [Sup Ct, NY County 2024], quoting Labor Law § 198-c [3]). The court noted that plaintiff served as an executive director for defendant and that at the time of his termination, he was earning a yearly salary of \$252,492, "well in excess of the statutory bar" (2024 NY Slip Op 31652[U], *3). It rejected plaintiff's argument that the 2021 amendments to Labor Law §§ 193 and 198 provide that all employees, without exception, who successfully bring an action to collect unpaid wages or wage supplements, including severance pay, are entitled to recover attorneys' fees, costs and liquidated damages. The court found that "none of the amendments mention section 198-c's bar on claims for wage supplements by executives, or alter the definition of wage supplements to exclude severance pay" (2024 NY Slip Op 31652[U], *3).

As discussed below, we agree with plaintiff that the 2021 amendments to sections 193 and 198 of the Labor Law made it clear that there is no exception to liability under those sections for the unauthorized withholding of wages, benefits or wage supplements.

II.

New York Labor Law article 6 (§§ 190 to 199-a) provides a means of legal redress for employees whose employers have wrongfully withheld earned wages. It was enacted to "strengthen and clarify the rights of employees to the payment of wages" (*Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 223 [2000]).

Under Labor Law § 193 (1), "No employer shall make any deduction from the wages of an employee" except as required by law or as expressly authorized in writing by and for the em-

ployee's benefit (*see Matter of Angello v Labor Ready, Inc.*, 7 NY3d 579, 584 [2006]). As relevant here, Labor Law § 190 (1) defines "wages" to include "benefits or wage supplements as defined in [Labor Law § 198-c]." Section 198-c (2) defines "benefits or wage supplements" to include, among other things, separation pay. An "employee" under section 190 (2) is defined as "any person employed for hire by an employer in any employment." This definition "plainly embraces executives" (*Pachter v Bernard Hodes Group, Inc.*, 10 NY3d 609, 614 [2008]).

Labor Law § 198 provides *civil* remedies, including liquidated damages and attorney's fees, for "an employee who prevails under a substantive provision of Labor Law article 6" (*Frances v Klein*, 231 AD3d 535, 536 [1st Dept 2024]). It further provides that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages" (Labor Law § 198 [3] [emphasis added]).

Labor Law § 198-c, on the other hand, authorizes *criminal* penalties against employers who fail to pay earned benefits or wage supplements, but provides that "[t]his section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earnings are in excess of [\$1,300] a week" (Labor Law § 198-c [3]). This "limitation appears to apply only to that particular section" (*Pachter v Bernard Hodes Group, Inc.*, 505 F3d 129, 132 & n 3 [2d Cir 2007], *certified question answered*, 10 NY3d 609 [2008]).

In 2021, the Legislature enacted the No Wage Theft Loop-hole Act (L 2021, ch 397) (the Act). The Act amended the Labor Law to provide that "[t]here is no exception to liability" under sections 193 and 198 "for the unauthorized failure to pay wages, benefits or wage supplements" (L 2021, ch 397, §§ 2-3; Labor Law §§ 193 [5]; 198 [3]). The purpose of the Act was to clarify "that Article 6 of New York's Labor Law completely and without exception prohibits lack of distribution of earned wages" (Senate Introducer's Mem in Support, Bill Jacket, L 2021, ch 397 at 5). The Senate sponsor memo stated that the "broad-ranging statute allows prevailing plaintiffs to recover unpaid wages, attorney's fees, and in many cases liquidated damages" and lamented that "[t]o the detriment of employees everywhere . . . the statute is often interpreted extremely narrowly by courts who misconstrue or overlook its rights-affirming language" (*id.*). The memo further stated that New York's Labor Law "finds itself watered down by judicially cre-

ated loophole[s]” (*id.* at 6). Although the Act was largely intended to counteract judicial rulings finding that a “deduction” did not encompass a wholesale withholding of wages, the Legislature was emphatic in its intention “to clarify for the courts once and for all that wage theft remains completely and without exception in violation of statute and *all employees* are entitled to full wages, benefits and wage supplements earned” (2021 NY Senate Bill S858, enacted as L 2021, ch 397, § 1 [emphasis added]).

In relying on section 198-c’s criminal liability exception to shelter defendant from civil liability under sections 193 and 198, Supreme Court’s decision is contrary to the Legislature’s expressed intent to amend these rights-affirming statutes to impose liability for wage theft “completely and without exception” (*id.*) Additionally, it directly conflicts with Labor Law § 198 (3)’s command that “[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages” (*see* Scott A. Lucas, *Labor Law Article 6: A Misunderstood Law That Fully Protects All Employees’ Wages*, 80 Alb L Rev 1355, 1374-1379 [2017]; National Employment Lawyers Association of New York’s (NELA/NY) Memo in Support at 5 n 2, Bill Jacket, L 2021, ch 397 [“There is no conflict between section 198 (3)’s rights-affirming language and section 198-c (3)’s limited exception to *criminal* liability because section 198 (3) deals exclusively with *civil* liability”]). Supreme Court cites to *Pachter* in support of its decision but *Pachter* does not support the court’s wider application of section 198-c (3)’s exception.*

In *Pachter* (10 NY3d at 616), the Court of Appeals held that executives, like plaintiff here, are “employees” within the meaning of Labor Law article 6 “except where expressly excluded.” It noted that there are “several provisions in article 6 [which] make specific reference to the exclusion of executives. For example, section 192 (2) removes executives . . . from the requirement that wages be paid in cash to ‘any employee’ and section 198-c (3) contains a similar exclusion relating to

* We note that in *Naderi v North Shore-Long Is. Jewish Health Sys.* (135 AD3d 619 [1st Dept 2016]) and *Riggi v Charlie Rose Inc.* (212 AD3d 486 [1st Dept 2023]), this Court held that section 198-c barred the plaintiffs from seeking benefits or wage supplements under the Labor Law. However, the causes of action in both cases arose prior to the August 2021 effective date of the No Wage Theft Loophole Act and “the Act does not apply retroactively” (*Frances*, 231 AD3d at 536).

benefits and wage supplements” (*id.* at 615). Further, the Court held:

“If, as [defendant] claims, executives are not employees in the first instance, these two unambiguous exclusions would be wholly superfluous; there would be no need to eliminate executives from the enumerated subcategories of employees if they were not within the ambit of the general definition of ‘employee’ in subdivision (2) of section 190 (*see e.g. Matter of Amorosi v South Colonie Ind. Cent. School Dist.*, 9 NY3d 367, 373 [2007]). In addition, under the interpretation of ‘employee’ proposed by [defendant], Labor Law § 194 would not prohibit employers from paying similarly situated executives at different rates of compensation solely on account of their gender—an absurd proposition that the Legislature surely did not intend” (*id.*).

Sections 193 and 198 do not “expressly” exclude executives from the definition of employees. Thus, “all employees” under section 198 means just that—*all*. By narrowing this provision, Supreme Court’s decision fails to follow “*Pachter*’s core message—that one section’s exclusions do not apply to other sections unless expressly stated” (Lucas, *Labor Law Article 6*, 80 Alb L Rev at 1379).

Here, plaintiff, an executive director earning more than \$250,000 annually at the time defendant terminated his employment, falls under the exception in section 198-c (3). However, he is not seeking criminal liability against his employer for wrongfully withholding severance pay under section 198-c. He is instead properly seeking attorneys’ fees, costs, and liquidated damages for unpaid severance pay under the broadly worded Labor Law §§ 193 and 198. Plaintiff sufficiently alleges that pursuant to the parties’ November 2022 separation agreement, defendant agreed to pay him five months of his base salary as severance, but he was only paid three months’ salary. As “all employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages” (Labor Law § 198 [3]) without exception, plaintiff is permitted to pursue civil liability against defendant for withholding severance pay.

Accordingly, the order of the Supreme Court, New York County (Louis L. Nock, J.), entered on or about May 15, 2024, which granted defendant’s motion to dismiss the amended

complaint's second cause of action under Labor Law §§ 193 and 198 for unpaid severance pay, should be reversed, on the law, without costs, and the motion denied.

RENWICK, P.J., KAPNICK, MENDEZ and PITT-BURKE, JJ., concur.

Order, Supreme Court, New York County, entered on or about May 15, 2024, should be reversed, on the law, without costs, and the motion denied.

[243 NYS3d 543]

EVELYN O'BRIEN et al., on Behalf of Themselves and All Others
Similarly Situated, Respondents, v SAGBOLT LLC et al.,
Appellants.

Third Department, October 2, 2025

PROCEDURAL SUMMARY

APPEAL from an order of the Supreme Court, Warren County (Martin Auffredou, J.), entered March 25, 2024. The order granted plaintiffs' motion to, among other things, enforce a class action settlement.

O'Brien v Sagbolt LLC, 2024 NY Slip Op 34986(U), modified.

HEADNOTES

Actions — Class Actions — Distribution of Funds Pursuant to Settlement Agreement

1. In a class action alleging violations of the Labor Law for unpaid tips, defendants did not breach the parties' settlement agreement when they deposited a sum of money with the claims administrator to distribute to class counsel and the named plaintiffs and provided the claims administrator with settlement checks to distribute to the authorized class members. Although the settlement agreement contained undefined terms, the express terms read together as a whole manifested an intent by the parties to create a settlement fund to be retained and controlled by the claims administrator. The agreement outlined certain obligations for the claims administrator relating to the payment of the "Final Settlement Amount" subject to the other terms of the agreement, including a paragraph which acknowledged that defendants had the option to distribute funds to the authorized class members. Even though this was also subject to the other terms of the agreement, as well as the preliminary and final approval orders, there were no provisions or language contained therein which prohibited this arrangement. By depositing a portion of the "Gross Settlement Sum" with the claims administrator to distribute to class counsel and the named plaintiffs, while also providing pre-written settlement checks to the authorized class members, defendants had given meaning to the terms of the agreement that authorized both the claims administrator and defendants to "distribute funds."

Actions — Class Actions — Distribution of Unclaimed Settlement Funds

2. In a class action alleging violations of the Labor Law for unpaid tips in which the parties' settlement agreement did not specifically address how to distribute unclaimed funds, Supreme Court did not abuse its discretion in directing the unclaimed funds be redistributed to authorized class members. The court's directive did not add to or modify the terms of the agreement, which expressly provided that the only entities to receive any compensation from the "Gross Settlement Sum" of \$1.2 million were class counsel, the named plaintiffs, the claims administrator and the authorized class members. In considering the intention of the parties to compensate the authorized class members by their pro rata share of the "Net Settlement Sum" based on the

number of hours they worked and the total amount of service charge collected by defendants during the years at issue, permitting reversion of the unclaimed funds to defendants would be equivalent to awarding them the benefit of their own wrongdoing. The underlying construction of the agreement evinced an intent for defendants to be disgorged of \$1.2 million, with the exception to only receive a partial refund should Supreme Court reduce the award to class counsel or the named plaintiffs.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Parties § 98.
 CARMODY-WAIT 2d Parties § 19:349.
 NEW YORK CONTRACT LAW (2d ed) §§ 26:2, 26:7.
 NY JUR 2d Parties §§ 244, 305.
 SIEGEL, NY PRAC (6th ed) § 139.

ANNOTATION REFERENCE

See ALR Index under Class Actions; Compromise and Settlement.

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APPEARANCES OF COUNSEL

Greenberg Traurig, LLP, Albany (*Henry M. Greenberg* of counsel), for appellants.

Chaudhuri Law, PLLC, New York City (*Ananda N. Chaudhuri* of counsel) and *Fleischman Bonner & Rocco LLP*, White Plains (*Keith M. Fleischman* of counsel) and *Law Office of Joseph T. Moen*, Saratoga Springs (*Joseph T. Moen* of counsel), for respondents.

OPINION OF THE COURT

FISHER, J.

Appeal from an order of the Supreme Court (Martin Aufredou, J.), entered March 25, 2024, in Warren County, which granted plaintiffs' motion to, among other things, enforce a class action settlement.

In 2018, plaintiffs commenced a class action alleging violations of the Labor Law for unpaid tips since 2012, on behalf of all hourly waitstaff employees who worked catered events at The Sagamore, a resort and hotel owned and operated by de-

fendants in the Town of Bolton, Warren County. Following certification of the class and four years of disclosure, the parties entered into a settlement agreement whereby defendants agreed “to make a total financial obligation” of \$1.2 million toward class counsel’s fees and costs, service payments to the named plaintiffs, expenses to the claims administrator and settlement payments to authorized class members. Supreme Court granted plaintiffs’ motion for preliminary approval of the settlement and, after holding a fair hearing, granted plaintiffs’ motion for final approval (*see* CPLR 908).

Thereafter, a dispute arose between the parties regarding who was supposed to prepare the various settlement checks and how to handle the unclaimed funds from uncashed checks sent to the authorized class members. This prompted plaintiffs to move to enforce the settlement agreement and require defendants to pay into a settlement fund allegedly contemplated by the approved agreement, so that the claims administrator could redistribute the remaining money from uncashed checks back to the authorized class members. Defendants submitted opposition, contending that the settlement agreement did not require them to establish a settlement fund, but even if it did, they complied with the terms of the agreement by placing money into a settlement fund for the claims administrator to distribute payments to class counsel and the named plaintiffs, and then separately provided settlement checks for the claims administrator to send to authorized class members. Defendants further contended that the agreement did not provide for a redistribution, therefore any unclaimed funds should revert to them. Supreme Court found that the settlement agreement required defendants to deliver the \$1.2 million into a settlement fund and, although the agreement was silent regarding how to handle the unclaimed funds, that redistribution was consistent with the terms of the agreement requiring a pro rata distribution of remaining settlement funds to the authorized class members. As a result, Supreme Court determined that defendants breached the contract and their covenant of good faith and fair dealing, and granted plaintiffs’ motion. Defendants appeal.

Class action settlement agreements and “releases are contracts to be interpreted in accordance with principles of contract law,” and therefore carry “a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties” (*Marcella v*

Glowacki, 233 AD3d 1137, 1139-1140 [3d Dept 2024] [internal quotation marks and citations omitted]). In interpreting “a contract, particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby” (*Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013] [internal quotation marks, brackets and citation omitted]). Reviewing “courts must compare the competing interpretations advanced by the parties to the contractual language, which represents the best evidence of the parties’ intent” (*Hogan v Bullock*, 233 AD3d 1321, 1324 [3d Dept 2024] [internal quotation marks and citations omitted]). In doing so, “a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect” (*Ali-Hasan v St. Peter’s Health Partners Med. Assoc., P.C.*, 226 AD3d 1199, 1202 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 42 NY3d 906 [2024]). Unless there is an ambiguity, extrinsic evidence beyond “the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing” (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Such an ambiguity is not created by a contract’s silence on an issue, nor does one “arise[] out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful” (*Donohue v Cuomo*, 38 NY3d 1, 13 [2022] [internal quotation marks and citations omitted]). Therefore, a settlement agreement “that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Ampower-US, LLC v WEG Transformers USA, LLC*, 214 AD3d 1129, 1131 [3d Dept 2023] [internal quotation marks and citations omitted]).

As relevant here, the parties agreed to resolve the litigation for a “Gross Settlement Sum” (hereinafter GSS) of \$1.2 million, representing the “maximum” amount that defendants would fund under the settlement agreement. Payments made to class counsel for fees and costs, the claims administrator and the named plaintiffs would be deducted from the GSS. The remaining balance became the “Net Settlement Sum” (hereinafter NSS), and each authorized class member would receive a pro rata share of the NSS based on a specified formula using their hours worked during the relevant period. Notably, given the nature of a class action (*see* CPLR 908), the payments to class counsel and the named plaintiffs contemplated by the settle-

ment agreement out of the GSS had to be approved by Supreme Court. However, if the court awarded less than the amount agreed to by the parties, such “corresponding reduction shall serve to reduce the Qualified Settlement Fund, and in no event will be added to the portion of the Qualified Settlement Fund to be remitted to” authorized class members.¹ The agreement defined the “Qualified Settlement Fund” (hereinafter QSF) as “the account established and controlled by the [c]laims [a]dministrator for the purposes of retaining and distributing the Final Settlement Amount in accordance with” the agreement. The term “Final Settlement Amount” is not defined by the contract. Upon the effective date of the agreement, the claims administrator “shall distribute” the payments to class counsel, the named plaintiffs and the authorized class members. Defendants also had the option to distribute funds to the same individuals, including the authorized class members. Each party was responsible for their own tax consequences, and the agreement specified that the “[e]mployer payroll taxes shall be paid by [d]efendants in addition to any claimed amount in the [GSS].”

Here, both parties acknowledge deficiencies in the terms of the settlement agreement, notably undefined terms. Nonetheless, defendants contend that they complied with the terms of the settlement agreement because they were not required to establish a settlement fund. Although we can agree with defendants that the agreement is unclear as to the extent of what is included in the QSF due to the undefined term of “Final Settlement Amount,” adopting defendants’ interpretation would render significant portions of the agreement meaningless and ignore the fact that they *did* pay into a settlement fund for certain awards as part of this class action settlement. In our view, this undefined term simply corresponds with the total amount that defendants are obligated to contribute toward resolving this class action *after* preliminary and final approval by Supreme Court. We reach this conclusion by recognizing that, although the parties agreed to a GSS of \$1.2 million, all settlements in a class action must be approved by a court (*see* CPLR 908), which is obligated to approve the notice to the class (*see* CPLR 904) and payments to class counsel and the

1. This provision is contained in two separate subsections of paragraph 50, with the clause at issue containing identical language except that subsection 50 (c) used the term “Settlement Fund” and subsection 50 (e) used the term “Qualified Settlement Fund.”

named plaintiffs (*see* CPLR 909). Although defendants agreed to not contest these awards on plaintiffs' motion for preliminary and final approval, what Supreme Court would do during the approval process created a variable that could alter the final settlement amount that the parties agreed would resolve this class action. The parties recognized this, and created clauses stating that any reduction by Supreme Court to the payment earmarked for class counsel or the named plaintiffs would reduce the QSF and shall not be added to the portion of the QSF which was to be remitted to authorized class members. Had there been no intention by the parties to form a settlement fund, the parties would have had no need to create such a provision reducing the QSF that was to be retained and controlled by the claims administrator, but rather they would have created a provision reducing the GSS—which was inclusive of all payments to be made by defendants. To hold otherwise would equate the QSF and GSS as the same, rendering one of those terms meaningless (*see Ali-Hasan v St. Peter's Health Partners Med. Assoc., P.C.*, 226 AD3d at 1202), which the balance of the agreement simply does not do.

Defendants counter that the interpretation requiring them to deposit the \$1.2 million into a settlement fund controlled by the claims administrator would create two tax problems. First, defendants contend that the agreement provides that any settlement payment claimed by an authorized class member would result in defendants issuing such recipient an IRS Form W-2, but that defendants could not do so if they were not the entity issuing the settlement payments. As Supreme Court found, defendants have offered no statutory or regulatory provision to support this contention, and our research has only revealed the contrary (*see* 26 USC § 3504 [permitting third-party agents to pay wages of employees and perform other acts required of employers, who remain able and liable to do such acts on their own accord]; 26 CFR 31.3504-1 [a]; *see also* U.S. Internal Revenue Service Internal Revenue Manuals, part 5, § 5.1.24.4.4.1 [updated Mar. 24, 2025], available at https://www.irs.gov/irm/part5/irm_05-001-024r#idm140254540831552 [acknowledging, where a third-party agent paid wages to employees on behalf of an employer, such agent may also furnish IRS Form W-2s to such employees on behalf of the employer]). Further to this point, it is not unnoticed that defendants have not claimed a similar hurdle in issuing the IRS Form 1099s to the named plaintiffs for their services awards—despite the fact

that defendants did not issue these payments to them, but rather deposited a sum of money for the claims administrator to split and disburse. Second, defendants contend that, for the claims administrator to issue checks directly to the authorized class members, defendants were required to fund an extra \$87,000 to account for the employer's share of taxes, for a total of \$1,287,000. Although it is true that the settlement agreement provided that defendants agreed to make a "total financial obligation in the maximum amount" of \$1.2 million toward the GSS, that is a misnomer, as the agreement also clearly provided that defendants were responsible for employer payroll taxes in *addition* to the GSS.² Based on the foregoing and our review of the balance of those terms, although the settlement agreement may be less than perfect due to undefined terms, we are satisfied that the express terms of the agreement read together as a whole manifest an intent by the parties to create a settlement fund to be retained and controlled by the claims administrator (*see Hogan v Bullock*, 233 AD3d at 1327; *Erie Blvd. Hydropower, L.P. v State of New York*, 113 AD3d 906, 908 [3d Dept 2014]).

[1] That does not, however, end our inquiry. Defendants also contend that, if they were required to pay into a settlement fund, they nevertheless complied with the terms of the agreement when they (1) deposited a sum of money with the claims administrator to distribute to class counsel and the named plaintiffs, and (2) provided the claims administrator with settlement checks to distribute to the authorized class members. We find such contention to have merit. Although the settlement agreement carefully defines the QSF and outlines certain obligations for the claims administrator relating to the payment of the "Final Settlement Amount," it does so subject to the other terms of the agreement. This would include the terms of paragraph 81, which acknowledges that defendants have the option to distribute funds to the authorized class members. Even though this is also subject to the other terms of the agreement, as well as the preliminary and final approval orders, there are no provisions or language contained therein which prohibit this arrangement. Plaintiffs' contention that paragraph 81 is merely a recitation of the representations by counsel, and therefore does not confer any authority to defend-

2. During oral argument, defendants' counsel acknowledged that the employment taxes of approximately \$87,000 were in addition to the \$1.2 million.

ants to distribute funds to the authorized class members, does not support their position either. Rather, it recognizes that the parties acknowledge and plaintiffs' counsel "warrant and represent" that the settlement agreement—which is less than perfect and contains undefined terms—does permit defendants the ability to distribute funds in this manner. Thus, adopting plaintiffs' interpretation would render their affirmative representations under paragraph 81 meaningless—if not outright false. In contrast, by depositing a portion of the GSS with the claims administrator to distribute to class counsel and the named plaintiffs, while also providing pre-written settlement checks to the authorized class members, defendants have given meaning to the terms of the agreement that authorized both the claims administrator and defendants to "distribute funds." As such, we cannot say that defendants breached terms of the settlement agreement when they did so, and therefore Supreme Court erred when it made such determination.

Next, we turn to the issue of unclaimed funds. In addition to the principles of contract, we must recognize the underlying reason why CPLR 908 requires the court to approve any settlement of a class action. Indeed, such necessity reflects the equitable origins of class actions (*see Friar v Vanguard Holding Corp.*, 125 AD2d 444, 446 [2d Dept 1986]), whereby "trial court[s] must act as the protector of the rights of the absent class members" (*Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63, 70 [2d Dept 2006] [internal quotation marks and citation omitted]). In enacting article 9 of the CPLR, which was modeled on Federal Rules of Civil Procedure rule 23 (*see Governor's Approval Mem at 1, Bill Jacket, L 1975, ch 207*), the Legislature expressly recognized that courts maintain a "special role and responsibilit[y] in class actions" (Assembly Mem in Support at 3, Bill Jacket, L 1975, ch 207), and conferred broad and flexible powers to courts to "make appropriate orders" carrying out such a supervisory role (CPLR 907); state courts have turned to federal case law for guidance in carrying out these functions (*see Desrosiers v Perry Ellis Menswear, LLC*, 30 NY3d 488, 495 [2017]; *Matter of Colt Indus. Shareholder Litig.*, 155 AD2d 154, 160 [1st Dept 1990], *mod on other grounds* 77 NY2d 185 [1991]; *Avena v Ford Motor Co.*, 85 AD2d 149, 151-152 [1st Dept 1982]).

As it specifically relates to unclaimed funds, courts have broad discretionary powers in shaping equitable decrees for distributing unclaimed class action funds (*see Van Gemert v*

Boeing Co., 739 F2d 730, 737 [2d Cir 1984]). Such supervisory powers extend beyond the consummation of a settlement agreement, where federal and state courts still possess a duty to exercise their broad powers over the administration of class action settlements, including to reallocate settlement proceeds amongst class members to ensure a more equitable allocation (see *Beecher v Able*, 575 F2d 1010, 1016 [2d Cir 1978]), or to control a distribution not provided for in an agreement (see *Friar v Vanguard Holding Corp.*, 125 AD2d at 446 [rejecting notion of reverting unclaimed funds to a defendant]). In considering a procedure for distributing unclaimed settlement funds, a court's alternatives will generally include (1) reversion to the defendant, (2) pro rata redistribution to the class members who filed/accepted claims, (3) escheat to a government entity, or (4) a cy pres or fluid distribution, usually to a charity whose goals are consistent with the underlying causes of action (see 4 Newberg & Rubenstein on Class Actions § 12:28 [6th ed, June 2025 update]; see also *Arkansas Teacher Retirement Sys. v State St. Corp.*, 25 F4th 55, 61 n1 [1st Cir 2022]; *Six [6] Mexican Workers v Arizona Citrus Growers*, 904 F2d 1301, 1307 [9th Cir 1990]). In doing so, mindful of the principles of contract still interwoven in this context, courts overseeing a class action cannot rewrite a settlement agreement or impose additional terms after judicial approval, but rather must construe the agreement in accordance with the parties' intent, gleaned from the terms of the agreement and through the lens of equity imbued within the inherent nature of class actions (see *Matter of TCR Sports Broadcasting Holding, LLP v WN Partner, LLC*, 40 NY3d 71, 84 [2023]; *Friar v Vanguard Holding Corp.*, 125 AD2d at 446; see also *Beecher v Able*, 575 F2d at 1016).

[2] Here, it is undisputed that the settlement agreement does not specifically address how to distribute the unclaimed funds. Nonetheless, for the reasons that follow, we cannot say that Supreme Court abused its discretion in directing the unclaimed funds be redistributed to authorized class members. Such directive is not adding to or modifying the terms of the agreement, which expressly provided that the only entities to receive any compensation from the GSS were class counsel, the named plaintiffs, the claims administrator and the authorized class members; there was no provision affording return of funds to defendants. The other terms of the agreement provided that the authorized class members would receive their pro rata

share of the NSS, which was defined as the remaining amount of money after deducting the awards to class counsel, the named plaintiffs and the claims administrator. In considering the intention of the parties to compensate the authorized class members by their pro rata share of the NSS based on the number of hours they worked “and the total amount of service charge collected by [defendants]” during the years at issue, “permitting reversion of the unclaimed funds to th[ese] defendant[s] would be equivalent to awarding [them] the benefit of [their] own wrongdoing, a result which should not be sanctioned” (*Friar v Vanguard Holding Corp.*, 125 AD2d at 446; see *Klier v Elf Atochem N. Am., Inc.*, 658 F3d 468, 479-480 [5th Cir 2011] [finding redistribution of unclaimed funds to the class members warranted under a settlement agreement that authorized the initial distributions pursuant to a pro rata formula]). When further considering other sections of the agreement, including that the provision for class counsel fees were based on one-third (33%) of the total amount to be paid by defendants—and not based on the total amount of claims made by class members³—the underlying construction of the agreement evinces an intent for defendants to be disgorged of \$1.2 million, with the exception to only receive a partial refund should Supreme Court reduce the award to class counsel or the named plaintiffs (see 4 Newberg & Rubenstein on Class Actions § 13:7; see also *Masters v Wilhelmina Model Agency, Inc.*, 473 F3d 423, 437 [2d Cir 2007]; see generally *Gascho v Global Fitness Holdings, LLC*, 822 F3d 269, 282 [6th Cir 2016], *certs denied* 580 US 1114, 580 US 1114 [2017]). Accordingly, we perceive no basis to disturb the determination of Supreme Court ordering redistribution of the unclaimed funds to the authorized class members (see *Friar v Vanguard Holding Corp.*, 125 AD2d at 446; *Six [6] Mexican Workers v Arizona Citrus Growers*, 904 F2d at 1309; *Van Gemert v Boeing Co.*, 739 F2d at 738; see generally *Beecher v Able*, 575 F2d at 1016-1017).

Lastly, we are mindful that Supreme Court found defendants to have breached their covenant of good faith and fair dealing by contesting redistribution of the unclaimed funds, but we need not—and do not—find defendants’ contentions premised

3. We recognize that there is an important significance to the type of class action settlement, namely being a “common fund settlement” as opposed to a “claims-made settlement,” which often dictates the disposition of the remaining settlement fund (including unclaimed funds) after the claims window has closed (4 Newberg & Rubenstein on Class Actions §§ 13:7, 15:70).

on bad faith (*see Trump on the Ocean, LLC v State of New York*, 79 AD3d 1325, 1326 [3d Dept 2010], *lv dismissed & denied* 17 NY3d 770 [2011]; *Descovetro Glaze of Schenectady v Mechanical Constr. Corp.*, 159 AD2d 760, 763 [3d Dept 1990]). We have examined the remaining contentions of the parties and have found them to be without merit or rendered academic.

LYNCH, J.P., CERESIA, POWERS and MACKAY, JJ., concur.

Ordered that the order is modified, on the law, without costs, by reversing so much thereof as determined that defendants breached the settlement agreement and the covenant of good faith and fair dealing; motion denied to said extent; and, as so modified, affirmed.

[242 NYS3d 609]

In the Matter of BRIAN M. DRATCH, an Attorney, Respondent.
ATTORNEY GRIEVANCE COMMITTEE FOR THE FIRST JUDICIAL
DEPARTMENT, Petitioner.

First Department, October 7, 2025

PROCEDURAL SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on March 5, 2001, at a term of the Appellate Division of the Supreme Court in the First Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Public Censure

Pursuant to the reciprocal disciplinary provision of 22 NYCRR 1240.13, respondent was publicly censured based upon similar discipline imposed by the Supreme Court of New Jersey stemming from respondent's representation of a client in a personal injury lawsuit against the State of New Jersey. Respondent failed to inform his client that he had filed a claim against that State; respond to a letter from the client requesting an update; seek to withdraw as counsel despite advising the client that he was not certain that the client had much of a case any longer; fulfill the State's request for medical records; depose the client's treating physician; and either follow up with the client regarding the State's summary judgment motion or file opposition. Public censure was the appropriate discipline as it was commensurate with the Appellate Division, First Department's precedent, balanced the seriousness of the misconduct against respondent's unblemished disciplinary record, and reflected respondent's failure to inform the Court or Attorney Grievance Committee about his New Jersey discipline.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 35, 38, 54, 58, 66.
CARMODY-WAIT 2d Officers of Court §§ 3:260, 3:276–3:277,
3:325, 3:330.
22 NYCRR 1240.13.
NY JUR 2d Attorneys at Law §§ 369, 402, 405–406, 511–
512, 518, 525.

ANNOTATION REFERENCE

Reciprocal Discipline of Attorneys—Noncriminal Misconduct Towards Clients Not Involving Client Funds. 44 ALR6th 75.

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APPEARANCES OF COUNSEL

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York City (*Gina Patterson* of counsel), for petitioner.

Brian M. Dratch, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent Brian M. Dratch was admitted to the practice of law in the State of New York by the First Judicial Department on March 5, 2001. Respondent was also admitted to the practice of law in the State of New Jersey on November 14, 2000.

By December 11, 2024 order, the Supreme Court of New Jersey (NJ Court) issued a public reprimand. Respondent did not report this public reprimand as required by Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.13 (d).

The misconduct which formed the basis for the public reprimand stemmed from respondent's representation of P.B. in a personal injury lawsuit against the State of New Jersey (the State) based on the State's alleged failure to properly treat P.B.'s medical conditions while he was incarcerated. Among other things, respondent failed to: (1) inform P.B. that he had filed a claim against the State; (2) respond to a letter from P.B. requesting an update; (3) seek to withdraw as P.B.'s counsel despite advising P.B. that respondent "was not certain that [P.B.] [has] much of a case any longer"; (4) fulfill the State's request for medical records; (5) depose P.B.'s treating physician at the prison where P.B. was incarcerated; and (6) either follow up with P.B. regarding the State's summary judgment motion or file opposition.

On March 9, 2020, the New Jersey Court of Claims granted the State's summary judgment motion and dismissed P.B.'s claim. Respondent did not contact P.B. until April 15, 2020—six days after the deadline to appeal had passed—when he sent a letter enclosing the dismissal order. Although respondent informed P.B. that he did not believe there was a basis to appeal the order, he advised P.B. that if he wished to file an appeal he must do so within 30 days of the date of the decision

(which had already elapsed). On December 6, 2021, P.B. sent respondent a letter requesting a status update. In response, respondent informed P.B. that his claim was dismissed due to the lack of an expert who could opine that the discontinuation of pain medication deviated from the standard of care. By this date, however, the time to file an appeal had expired approximately 18 months prior. P.B. wrote respondent a letter in reply alleging that he has unaware that his case had been dismissed and requesting a copy of his file. Respondent did not comply with P.B.'s request.

On July 15, 2024, the Supreme Court of New Jersey District Ethics Committee filed a motion for discipline by consent against respondent. Thereafter, on July 24, 2024, respondent signed an affidavit of consent in support of motion for discipline by consent in which he admitted to violating various rules including 1.1 (a); 1.3, 1.4 (b) and 1.16 (d).^{*} On December 3, 2024, the Disciplinary Review Board granted the motion for discipline by consent and imposed a public reprimand, which the NJ Court issued on December 11, 2024.

By motion dated August 4, 2025, the Attorney Grievance Committee (AGC) seeks an order, under 22 NYCRR 1240.13 and the doctrine of reciprocal discipline, finding that respondent has been disciplined by a foreign jurisdiction, directing him to demonstrate why discipline should not be imposed in New York for the misconduct underlying his discipline in New Jersey, and imposing a public censure, or issuing such discipline as the Court deems just and proper. Respondent has not appeared in this proceeding.

In a proceeding seeking reciprocal discipline pursuant to 22 NYCRR 1240.13, respondent may raise the following defenses: (1) lack of notice or opportunity to be heard in the foreign jurisdiction constituting a deprivation of due process; (2) an infirmity of proof establishing the misconduct; or (3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this state (*see Matter of Milara*, 194 AD3d 108, 110 [1st Dept 2021]).

None of the enumerated defenses to reciprocal discipline are applicable here. First, respondent received notice of the allegations against him. Second, respondent appeared in the New

^{*} Respondent also stipulated that he failed to cooperate with the New Jersey disciplinary investigation and failed to cooperate with requests for information, in violation of New Jersey Court Rules rule 1:20-3 (g) (3) and (4).

Jersey proceeding and signed the consent to discipline wherein he admitted his misconduct based on the stipulated facts. Third, respondent's misconduct in New Jersey also constitutes misconduct in New York in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.1 (a) (“[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”); 1.4 (a) (2)-(3) (lawyers shall “reasonably consult with the client about the means by which the client’s objectives are to be accomplished” and “keep the client reasonably informed about the status of the matter”); 1.4 (b) (lawyers “shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”); and 1.16 (e) (“[e]ven when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules”).

Regarding the sanction, this Court generally defers to the sanction imposed by the jurisdiction in which the charges were originally brought (*see Matter of Milara*, 194 AD3d at 111; *Matter of Tabacco*, 171 AD3d 163, 165 [1st Dept 2019]). Here, public censure is the appropriate discipline as it is commensurate with this Court’s precedent (*see e.g. Matter of Gluck*, 153 AD3d 301 [1st Dept 2017]; *Matter of Violet*, 120 AD3d 91 [1st Dept 2014]), balances the seriousness of the misconduct against respondent’s unblemished disciplinary record, and reflects respondent’s failure to inform the Court or AGC about his New Jersey discipline.

Accordingly, the AGC’s motion should be granted, and public censure should be imposed.

SCARPULLA, J.P., GESMER, ROSADO, O’NEILL LEVY and MICHAEL, JJ., concur.

Wherefore, it is ordered that the motion by the Attorney Grievance Committee for the First Judicial Department for reciprocal discipline, pursuant to 22 NYCRR 1240.13, is granted, and respondent, Brian M. Dratch, is publicly censured.

[244 NYS3d 84]

In the Matter of MICHAEL J. BINIAKEWITZ, an Attorney, Respondent. ATTORNEY GRIEVANCE COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, October 23, 2025

PROCEDURAL SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on September 17, 2003, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Interim Suspension

Respondent was immediately suspended from the practice of law on an interim basis until further order of the Court based upon his failure to comply with the lawful investigative demands of the Attorney Grievance Committee, as well as the delinquency in his attorney registration (22 NYCRR 1240.9 [a] [3]; Judiciary Law § 468-a).

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 53, 107.
 CARMODY-WAIT 2d Officers of Court §§ 3:253, 3:320, 3:322.
 MCKINNEY'S, Judiciary Law § 468-a.
 22 NYCRR 1240.9 (a) (3).
 NY JUR 2d Attorneys at Law §§ 380–381, 499–500.

ANNOTATION REFERENCE

Validity and construction of procedures to temporarily suspend attorney from practice, or place attorney on inactive status, pending investigation of, and action upon, disciplinary charges. 80 ALR4th 136.

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APPEARANCES OF COUNSEL

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York City (*Gillian C. Gamberdell* of counsel), for petitioner.
Michael J. Biniakewitz, respondent pro se.

OPINION OF THE COURT

Per Curiam.

Respondent Michael J. Biniakewitz was admitted to the practice of law in the State of New York by the Second Judicial Department on September 17, 2003. Respondent's last registered business address was in the First Judicial Department.

In January 2025, the Attorney Grievance Committee (the AGC) moved, pursuant to Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.9 (a) (3) and Judiciary Law § 468-a, for respondent's immediate suspension from the practice of law until further order of this Court based on, inter alia, his failure to answer nine complaints and failure to file an attorney registration statement and pay the required fee for the 2023-2024 biennial period for which Office of Court Administration records showed him as delinquent. The AGC later moved to withdraw the motion without prejudice as respondent had taken steps to cooperate with its investigation including answering the complaints. By May 2, 2025 unpublished order, the Court deemed the motion withdrawn in accordance with the AGC's affirmation.

Now, by motion dated July 24, 2025, the AGC, pursuant to 22 NYCRR 1240.9 (a) (3), renews its motion for respondent's immediate suspension based on his alleged failure to comply with the AGC's requests for additional documents and information concerning the complaints under investigation. As additional grounds for immediate suspension, the AGC cites respondent's continued failure to cure his delinquent attorney registration in contravention of Judiciary Law § 468-a. In accordance with the December 9, 2024 unpublished order of this Court permitting substituted service pursuant to Judiciary Law § 90 (6), the AGC served the motion by first-class and certified mail to respondent's registered business address and by email and text message to his registered email address and telephone number. To date, respondent has not submitted a response.

22 NYCRR 1240.9 (a) provides for an interim suspension "upon a finding by the Court that the respondent has engaged

in conduct immediately threatening the public interest. Such a finding may be based upon . . . (3) the respondent's failure to comply with a lawful demand of . . . a Committee in an investigation . . . under [these Rules]."

After respondent answered the nine complaints, by May 29, 2025 email, the AGC directed him to provide certain documents and information concerning five of the complaints by July 7, 2025; or, if he was unable to provide any of the requested material, that he contact AGC Staff Counsel and explain why before June 23, 2025. The AGC advised respondent that if he did not respond by July 7, it likely would renew its motion for his interim suspension. Respondent did not provide the requested documents and information. By July 8, 2025 email, Staff Counsel directed respondent to provide a full response and all documents requested by July 14, 2025, and warned that failure to do so would result in the AGC renewing the motion for interim suspension for failure to cooperate with its investigative demands.

In a July 14, 2025 email to Staff Counsel, respondent advised that while he has been engaged, he retained I.M., who handled his office's data mining and IT matters, to assist. Respondent advised that I.M. informed him that he would retrieve any materials respondent had saved through numerous electronic accounts and storage systems. Respondent stated that he was starting a trial and that I.M. advised him to request enough time for I.M. to take his computer and all accounts. Respondent requested until on or about July 28, 2025, to furnish the items, affidavits, or other response. Respondent also advised that he had reached out to L.M., an individual who had assisted him with legal writing and other work in his solo practice, and was awaiting her response as to what extent, if any, she handled any of the matters under review.

Staff Counsel responded by email the same day asking respondent to provide documentation of the date he retained I.M. and reached out to L.M. The AGC reports that respondent did not provide the requested documents and information.

As the record in toto evinces a pattern of noncooperation by respondent, the AGC has met its burden and respondent should be immediately suspended pursuant to 22 NYCRR 1240.9 (a) (3) until further order of this Court. Specifically, for approximately two years prior to the AGC's filing of the first motion to suspend, respondent disregarded repeated written and oral requests that he answer the complaints against him,

notwithstanding multiple warnings that his continued failure to comply could result in an interim suspension. It was not until he was served with the prior motion that he complied with his obligation to answer the complaints.

Now, after answering the complaints and the withdrawal of the prior motion, respondent has failed to fully comply with the AGC's lawful investigative demands for additional documents and information. Such conduct warrants granting the renewed motion for an interim suspension pursuant to 22 NYCRR 1240.9 (a) (3) (*see e.g. Matter of Espinoza*, 200 AD3d 21 [1st Dept 2021] [interim suspension where attorney partially cooperated by, inter alia, appearing for a deposition but then failed to produce supplemental documents and information as directed by judicial subpoena]; *Matter of Fox*, 197 AD3d 36 [1st Dept 2021] [interim suspension where attorney partially cooperated by producing some of his bookkeeping records and appearing for deposition but then failed to produce additional records as directed by judicial subpoena and repeatedly requested by the AGC]; *Matter of Miller*, 170 AD3d 1 [1st Dept 2019] [interim suspension where attorney partially cooperated by appearing for deposition but failed to produce, inter alia, requested bank records]; *Matter of Moreno*, 149 AD3d 65 [1st Dept 2017] [interim suspension where attorney partially cooperated by appearing for deposition and producing some documents but failed to comply with the AGC's lawful demands for tax returns]).

Respondent's continued failure to cure his delinquent attorney registration, notwithstanding his prior representation to the AGC that he would remedy it, is an additional basis for his immediate suspension (*see e.g. Matter of McCrea*, 211 AD3d 167 [1st Dept 2022] [attorney immediately suspended pursuant to 22 NYCRR 1240.9 (a) (3) and Judiciary Law § 468-a based on failure to comply with the AGC's lawful investigative demands and delinquent registration]; *Matter of Vinnitsky*, 204 AD3d 134 [1st Dept 2022] [same]).

Accordingly, the AGC's motion should be granted, and respondent is suspended from the practice of law, effective immediately, and until further order of this Court.

MOULTON, J.P., GESMER, GONZÁLEZ, PITT-BURKE and O'NEILL LEVY, JJ., concur.

Wherefore, it is ordered that the motion by the Attorney Grievance Committee for the First Judicial Department to immediately suspend, pursuant to Judiciary Law § 468-a and 22

NYCRR 1240.9 (a) (3), is granted, and respondent, Michael J. Biniakewitz, is suspended from the practice of law, effective immediately, and until further order of the Court; and

It is further ordered that, pursuant to Judiciary Law § 90, during the period of suspension, respondent, Michael J. Biniakewitz, is commanded to desist and refrain from (1) the practice of law in any form, either as principal or agent, clerk or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and

It is further ordered that, during the period of suspension, respondent, Michael J. Biniakewitz, shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see* 22 NYCRR 1240.15), which are made part hereof; and

It is further ordered that if respondent, Michael J. Biniakewitz, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith.

[242 NYS3d 411]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v AARON VV., Appellant.

Third Department, September 18, 2025

PROCEDURAL SUMMARY

APPEAL from a judgment of the Rensselaer County Court (Youth Part) (Jennifer Sober, J.), rendered October 6, 2022. The judgment convicted defendant, upon a plea of guilty, of burglary in the third degree.

HEADNOTES

Appeal — Waiver of Right to Appeal — Jurisdiction of Youth Part

1. The appeal waiver executed by defendant when he pleaded guilty to burglary in the third degree did not waive his argument that County Court (Youth Part) erred in granting the People's motion to prevent removal of the matter to Family Court. Pursuant to CPL 722.10, which created the Youth Part of superior court, the removal provisions set forth in CPL 722.22 and, applicable here, 722.23 divest Youth Part of jurisdiction and transfer jurisdiction to Family Court in those proceedings which meet specified criteria. Accordingly, the waiver of the right to appeal did not impact defendant's argument inasmuch as it presented a challenge to whether County Court lacked jurisdiction over the proceeding and, as the court made clear in its oral colloquy, defendant did not waive his right to challenge the jurisdiction of the court.

Infants — Adolescent Offenders — Removal to Family Court — Extraordinary Circumstances

2. In a prosecution arising from allegations that defendant participated in a burglary when he was 17 years old, the People failed to demonstrate extraordinary circumstances existed as required to retain the matter in County Court (Youth Part) under CPL 722.23 (1) (d). The Legislature intended for adolescent offenders to be prosecuted in criminal court only in the most exceptional cases. As alleged in the criminal complaint, defendant and his codefendant stood accused of entering the dwelling of a relative and stealing unsecured firearms, which they then sold. The relative was not home at the time and they did not forcibly enter the home. Rather, the codefendant—who was a willing and able participant—utilized the garage door code he had been entrusted with and they entered the home together, without causing damage to or destruction of property. Defendant also did not go on to use the firearms in the commission of some other crime nor were the firearms used by another in the commission of a crime. Instead, the firearms were sold, and then located by law enforcement not long after the sales. These facts did not present one of the extremely rare and exceptional cases as was contemplated by the Legislature in enacting the governing legislation.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Criminal Law §§ 642, 644; AM JUR 2d Juvenile Courts and Delinquent and Dependent Children § 43.

CARMODY-WAIT 2d Juvenile, Adolescent, and Youthful Offenders §§ 206:35–206:37, 206:44, 206:69.30, 206:69.45, 206:69.60, 206:69.90.

LAFAVE, ET AL., CRIMINAL PROCEDURE (4th ed) § 21.6.

McKINNEY'S, CPL §§ 722.10, 722.22, 722.23 (1) (d).

NEW YORK FAMILY COURT PRACTICE (2d ed) § 10:3.

NY JUR 2d Criminal Law: Procedure §§ 48.75, 48.90, 1109, 1530–1531, 1857, 1862, 3582.

ANNOTATION REFERENCE

Validity and effect of criminal defendant's express waiver of right to appeal as part of negotiated plea agreement. 89 ALR3d 864.

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APPEARANCES OF COUNSEL

Kelly L. Egan, Rensselaer, for appellant.

Mary Pat Donnelly, District Attorney, Troy (*Timothy D. Feenan* of counsel), for respondent.

OPINION OF THE COURT

POWERS, J.

Appeal from a judgment of the County Court (Youth Part) of Rensselaer County (Jennifer Sober, J.), rendered October 6, 2022, convicting defendant upon his plea of guilty of the crime of burglary in the third degree.

In December 2021, defendant was charged by felony complaints with criminal possession of a weapon in the second degree and burglary in the second degree, as well as by a misdemeanor information with criminal possession of a weapon in the fourth degree. These charges were based upon allegations that defendant—who, at the time, was 17 years old—entered the dwelling of a family member (hereinafter the relative) without authorization and, together with the codefendant (hereinafter the brother), stole loaded firearms as well as a certain amount of cash.

Defendant was thereafter arraigned by an accessible magistrate in Troy City Court (Youth Part) (Maier, J.) and, the

following day, was brought before County Court (Young, J.) for a violent felony hearing as required by CPL 722.23 (2) (c). During that hearing, the People conceded that they would be unable to meet the requirements of that subdivision, which would have prevented removal of the matter to Family Court. Consequently, the People moved to prevent removal pursuant to CPL 722.23 (1) (d) on the basis that the facts of the offense in combination with defendant's juvenile history established extraordinary circumstances to retain the matter in County Court. The court (Sober, J.) granted the motion and the matter proceeded in County Court.

In August 2022, defendant waived indictment, agreed to be prosecuted by superior court information and pleaded guilty to burglary in the third degree, in full satisfaction of the charged crimes. Defendant purported to waive his right to appeal as a condition of this agreement and, in exchange, the People were to recommend a term of incarceration of 1 $\frac{1}{3}$ to 4 years and the payment of \$750 in restitution. Defendant was subsequently denied youthful offender status and sentenced in accord with this agreement. Notably, his term of incarceration was to be carried out at an Office of Children and Family Services detention facility but subject to transfer to a Department of Corrections and Community Supervision facility upon reaching 21 years of age. Defendant appeals.¹

Defendant argues, among other things, that County Court erred in granting the People's motion to prevent removal of the matter to Family Court. We agree and, for this reason, reverse.

[1] Initially, regardless of its validity, we find that the appeal waiver executed by defendant did not waive his present argument. In relevant part, CPL 722.10, which created the Youth Part of superior court, specifies that "[t]he [Y]outh [P]art shall have exclusive jurisdiction in all proceedings in relation to juvenile offenders and adolescent offenders, *except* as provided in [CPL articles 722 or 725]" (CPL 722.10 [1] [emphasis added]). Therefore, the removal provisions set forth in CPL 722.22 and, applicable here, 722.23 divest Youth Part of jurisdiction and transfer jurisdiction to Family Court in those proceedings which meet specified criteria. Accordingly, the waiver of the right to appeal does not impact defendant's argument inasmuch as it presents a challenge to whether County Court lacked ju-

1. This Court has been apprised that defendant has been released to parole supervision.

risdiction over this proceeding and, as the court made clear in its oral colloquy, defendant did not waive his right to challenge the jurisdiction of the court (*see People v Barton*, 113 AD3d 927, 928 [3d Dept 2014]; *see generally People v Howard*, 231 AD3d 1202, 1204-1205 [3d Dept 2024]).

Regarding the merits of defendant’s challenge, commencing October 1, 2019,

“[u]pon the arraignment of a defendant charged with a crime committed when he or she was . . . [17] years of age on . . . a violent felony [as] defined in [Penal Law § 70.02], the court shall schedule an appearance no later than six calendar days from such arraignment for the purpose of reviewing the accusatory instrument” in conjunction with “any other relevant facts” to determine whether “[t]he court shall order the action to proceed in accordance with [CPL 722.23 (1)]” (CPL 722.23 [2] [a]-[c]; *see People v Howard*, 231 AD3d at 1203-1204; *Matter of Clark v Boyle*, 210 AD3d 463, 463 [1st Dept 2022], *lv denied* 39 NY3d 974 [2023]).

In undertaking such review, the court must determine, in writing, whether the People established by a preponderance of the evidence that, as is relevant here, “the defendant displayed a firearm, shotgun, rifle or deadly weapon as defined in the [P]enal [L]aw in furtherance of such offense” (CPL 722.23 [2] [c] [ii]).² If the People fail to establish this, the matter must then proceed in accordance with CPL 722.23 (1).

Pursuant to that subdivision,

“[f]ollowing the arraignment of a defendant charged with a crime committed when he or she was . . . [17] years of age, . . . the court shall order the removal of the action to the family court in accordance with the applicable provisions of [CPL article 725] unless, within [30] calendar days of such arraignment, the [People move] to prevent removal of the action” (CPL 722.23 [1] [a]; *see People v Guerrero*, 235 AD3d 1276, 1277 [4th Dept 2025]).

2. While not relevant to the facts presented here, the People may also seek to establish by a preponderance of the evidence that “the defendant caused significant physical injury to a person other than a participant in the offense” or that “the defendant unlawfully engaged in vaginal sexual contact, oral sexual contact, anal sexual contact, or sexual contact as defined in [Penal Law § 130.00]” (CPL 722.23 [2] [c] [i], [iii]; *see generally People v Howard*, 231 AD3d at 1204).

If the People elect not to move, “the court shall . . . order transfer of [the] action against an adolescent offender to the family court” (CPL 722.21 [4]). However, if the People so move, the motion must be in writing and “contain allegations of sworn fact based upon personal knowledge of the affiant” (CPL 722.23 [1] [b]) setting forth “that extraordinary circumstances exist that should prevent the transfer of the action to family court” (CPL 722.23 [1] [d]; see *People v Lloyd F.*, 245 AD3d 69, 72 [2d Dept 2025]). As the presumption is with removal, the court is required to remove the matter to Family Court if the People fail to establish extraordinary circumstances (see CPL 722.23 [1] [d]).

“While the words of the statute are the best evidence of the Legislature’s intent, legislative history may also be relevant as an aid to construction of the meaning of words” (*People v Abe-love*, 179 AD3d 39, 42 [3d Dept 2019] [internal quotation marks and citations omitted], *lv denied* 35 NY3d 1025 [2020]; see *People v Duggins*, 192 AD3d 191, 193 [3d Dept 2021], *lv denied* 36 NY3d 1096 [2021]). Thus, because the Legislature did not define what was specifically meant by “extraordinary circumstances,” the Assembly debate regarding the bill provides us with necessary context (see *People v Lloyd F.*, 245 AD3d at 72-73; *People v Guerrero*, 235 AD3d at 1277).

Assembly Member Joseph Lentol, one of the drafters speaking in favor of the bill, described that the presumption was that the “overwhelming bulk of the cases” would be removed to Family Court, that those cases retained in criminal court would be “one in 1,000” and reserved to “extremely rare and exceptional cases” (NY Assembly Debate on 2017 NY Assembly Bill A3009C, Apr. 8, 2017 at 37-38, 102). He further characterized that only those cases which present “highly unusual and heinous facts” demonstrating “that the young person is not amenable or would not benefit in any way from the heightened services in the family court” should not be removed (NY Assembly Debate on 2017 NY Assembly Bill A3009C, Apr. 8, 2017 at 39). Though opining that providing examples of what may constitute extraordinary circumstances is difficult and that the court must “look at all the circumstances of the case,” Lentol described that such may be satisfied where the defendant has committed “a series of serious crimes . . . over the course of many days,” where the “defendant act[ed] in an especially cruel and heinous manner” or where “the defendant [was] a ring-leader who threatened and coerced reluctant youths to partici-

pate in the crimes” (NY Assembly Debate on 2017 NY Assembly Bill A3009C, Apr. 8, 2017 at 39-40). Taken collectively, these statements illustrate the Legislature’s intent to create a sweeping presumption in favor of removing these cases to Family Court and that the People’s burden is exceedingly high on a motion to prevent removal. In sum, we agree with the Second Department’s conclusion that the Legislature intended for adolescent offenders to be prosecuted in criminal court “only in the most exceptional cases” (*People v Lloyd F.*, 245 AD3d at 76).

Following defendant’s arraignment here, the People conceded that they would be unable to demonstrate that defendant had displayed a firearm in furtherance of the offense and, therefore, failed to meet the requirements of CPL 722.23 (2) (c) (ii). As a result, the People requested 30 days to file a motion to retain the matter in County Court as presenting “extraordinary circumstances” under CPL 722.23 (1) (d). The People so moved, arguing that the circumstances of the case in conjunction with defendant’s past juvenile delinquency adjudication presented extraordinary circumstances to retain the matter in County Court. Specifically, the People asserted that defendant had arranged and then carried out a plan to steal firearms from the relative’s home and then sell those firearms for cash. In support of the motion, the People provided proof as to defendant’s juvenile delinquency history along with, relevant to the crime at issue, signed statements from, among others, defendant, the brother and the relative as well as a search warrant executed in connection with the case and an affidavit in support thereof.

As County Court correctly found, the People improperly submitted proof related to defendant’s juvenile delinquency history in support of the motion (*see* Family Ct Act § 381.2; *Green v Montgomery*, 95 NY2d 693, 697 [2001]). Thus, this proof could not be relied upon in deciding the motion. Additionally, as stated more fully above, a motion to retain a matter in County Court must be supported by “allegations of sworn fact based upon personal knowledge of the affiant” (CPL 722.23 [1] [b]). Thus, the Assistant District Attorney’s unsworn statements that defendant had been involved in a fight at his high school—made on the record at an appearance after the People had already moved to retain the matter in County Court—could similarly not be relied upon in deciding the motion. Consequently, the only proper basis of the People’s motion was limited to the specific circumstances presented by the crime at issue.

[2] As alleged in the criminal complaint, defendant and the brother stood accused of entering the dwelling of the relative and stealing unsecured firearms, which they then sold. Markedly, the relative was not home at the time and they did not forcibly enter the home. Rather, defendant's brother—who was a willing and able participant—utilized the garage door code he had been entrusted with and they entered the home together, without causing damage to or destruction of property. Defendant also did not go on to use the firearms in the commission of some other crime nor were the firearms used by another in the commission of a crime. Instead, the firearms were sold, and then located by law enforcement not long after the sales.

These facts do not present one of the “extremely rare and exceptional cases” as was contemplated by the Legislature in enacting this legislation. In view of the foregoing, the People failed to demonstrate extraordinary circumstances existed as required to retain the matter in County Court (Youth Part) under CPL 722.23 (1) (d) (*see People v Lloyd F.*, 245 AD3d at 80-81; *People v Yahmir T.D.*, 241 AD3d 576, 577-578 [2d Dept 2025]; *compare People v Guerrero*, 235 AD3d at 1278). It follows that County Court erred in granting the People's motion to prevent removal and the matter should have been removed to Family Court. Defendant's remaining contentions have been rendered academic by this determination.

LYNCH, J.P., CERESIA, FISHER and MACKEY, JJ., concur.

Ordered that the judgment is reversed, on the law, motion denied and matter remitted to the County Court (Youth Part) of Rensselaer County for the entry of an order removing the action to the Family Court of Rensselaer County.

[Next page is 401.]

MEMORANDA

OF

DECISIONS RENDERED DURING THIS PERIOD EMBRACED IN THIS VOLUME

FIRST DEPARTMENT, FEBRUARY, 2026

(February 3, 2026)

1 64 West 10th Street LLC, Appellant, v L-Ray LLC, Doing Business as Alta, et al., Respondents, et al., Defendants. [251 NYS3d 48]—

Suretyship and Guarantee—Scope of Guarantee—Default on Obligations under Lease—Continued Tenancy after Prior Lease’s Expiration
Suretyship and Guarantee—Counsel Fees—Lease Provided for Fees Arising from Action to Enforce Terms

Order, Supreme Court, New York County (Louis L. Nock, J.), entered March 29, 2024, which, to the extent appealed from, denied plaintiff’s motion for summary judgment against defendants on their fourth, sixth, and seventh causes of action, and granted defendants’ cross-motion for summary judgment dismissing the complaint as against Christopher Chestnutt, unanimously reversed, on the law, without costs, and plaintiff’s motion for summary judgment granted.

Supreme Court erred in finding defendant Christopher Chestnutt not liable under the guaranty he executed in 2001. When a creditor seeks summary judgment on a guaranty, “the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guarantee” (*Kensington House Co. v Oram*, 293 AD2d 304, 305 [1st Dept 2002]; *see also Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch v Navarro*, 25 NY3d 485, 492 [2015]); thereafter, the burden shifts to the defendant/guarantor to establish, by admissible evidence, “the existence of a triable issue with respect to a bona fide defense” (*Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., “Rabobank Intl.,” N.Y. Branch*, 25 NY3d at 492). “A guaranty of a tenant’s obligations under a lease must be strictly interpreted in order to assure its consistency with the lease terms to which the guarantor actually consented”

(*404 Park Partners, L.P. v Lerner*, 75 AD3d 481, 482 [1st Dept 2010]). Nevertheless, “fundamental principles of contract law are applicable and the guarantee contract should thus be interpreted to reflect the intentions of the parties” (*CIT Group / Credit Fin. v Weinstein*, 261 AD2d 203, 204 [1st Dept 1999]).

Here, plaintiff 64 West 10th Street LLC established a prima facie case for enforcement of the guaranty by submitting evidence that defendant Christopher Chestnutt, who owned a membership interest in defendant-tenant L-Ray LLC, executed a guaranty of L-Ray’s rental obligations under a commercial lease, and that L-Ray defaulted on those obligations (*see Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). While the guaranty was executed by Chestnutt in 2001 pursuant to a prior lease that expired in March 2018, Chestnutt guaranteed L-Ray’s obligations under the lease “until delivery of vacant possession of the demised premises to Landlord,” which did not occur until June 27, 2024 (*see 300 Park Ave., Inc. v Café 49, Inc.*, 89 AD3d 634, 634-635 [1st Dept 2011]). Moreover, upon expiration of the prior lease, Chestnutt signed a new lease agreement with 64 West in order for L-Ray to continue its tenancy (*see 35th St. Assoc. v Sasson*, 220 AD3d 559, 559 [1st Dept 2023]; *cf. Lo-Ho LLC v Batista*, 62 AD3d 558, 560 [1st Dept 2009]). For these reasons, Chestnutt’s attempts to raise a triable issue of fact as to the enforceability of the guaranty are unavailing.

The court also erred in denying 64 West attorneys’ fees. The new lease executed in 2018 specifically stated that the “covenants and conditions” of the original lease “shall remain the same.” The original lease expressly provided for recovery of costs and fees arising from an action to enforce the lease terms, including payment of rent (*see Atlantis Mgt. Group II LLC v Nabe*, 177 AD3d 542, 543 [1st Dept 2019] [awarding costs and attorneys’ fees pursuant to operating agreements]; *Matter of Toussie v Coastal Dev., LLC*, 161 AD3d 533, 533 [1st Dept 2018]). Accordingly, 64 West is entitled to summary judgment on its claim for attorneys’ fees. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

2 In the Matter of Jason Borrero, Appellant, v New York City Department of Social Services Freedom of Information Law Office et al., Respondents. [250 NYS3d 55]—

Records—Freedom of Information Law—Constructive Denial—Mailed Response within Five Days

Records—Freedom of Information Law—Disclosure Exemptions—Family Court—Records Related to Pregnancy

Judgment (denominated an order), Supreme Court, New York

County (Verna L. Saunders, J.), entered on or about January 27, 2025, which denied the petition to annul the June 26, 2024 determination of respondent Department of Social Services (DSS) denying petitioner's administrative appeal from DSS's denial of his Freedom of Information Law (FOIL) request, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

We find that DSS did not constructively deny the FOIL request, since it mailed its response within five days of its receipt of the request and notified petitioner by email that same day that it had mailed the response (*see* Public Officers Law § 89 [3] [a]). We further find that petitioner exhausted his administrative remedies. Indeed, petitioner commenced the appeal within 30 days as required (*see* Public Officers Law § 89 [4] [a]). DSS's denial, which was postmarked April 1, 2024, advised that petitioner had 30 days from receipt of the letter to appeal. Since the postal service first attempted to deliver the denial letter on April 9, 2024, and petitioner mailed his appeal on May 8, 29 days later, the administrative appeal was timely.

However, we affirm Supreme Court because the partial denial of the FOIL request was not affected by an error of law (CPLR 7803 [3]; *see Matter of Barry v O'Neill*, 185 AD3d 503, 505 [1st Dept 2020]). As DSS initially found and restated in its appeal denial, any records related to the pregnancy of the woman who claimed in Family Court that petitioner is the father of her child are exempted from FOIL disclosure by statute, namely Social Services Law § 111-v (1), which requires that DSS maintain information "in the automated child support enforcement system . . . in a confidential manner designed to protect the privacy rights of the parties" and bars disclosure "except for the purpose of, and to the extent necessary to, establish paternity, or establish, modify or enforce an order of support" (*see* Public Officers Law § 87 [2] [a]). Disclosure of records regarding the mother's pregnancy are also exempted by Public Officers Law § 87 (2) (b) as "constitut[ing] an unwarranted invasion of personal privacy" (*see also* Public Officers Law § 89 [2] [b] [i]). DSS further established that the remaining documents sought "cannot be found after diligent search" (Public Officers Law § 89 [3] [a]). An agency is not required to "prepare any record not possessed or maintained by such entity" (*id.*).

We have considered petitioner's remaining contentions and find them unavailing. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

3 Nelson Guadalupe Coronel, Respondent, v Marcal Contract Co., LLC, et al., Appellants-Respondents. Marcal Contract

Co., LLC, et al., Third-Party Plaintiffs-Appellants-Respondents, v Capital Concrete NY, Inc., Third-Party Defendant-Respondent-Appellant. [250 NYS3d 57]—

Labor—Safe Place to Work—Failure of Elevation-Related Safety Device—Concrete Form Fell on Carpenter

Labor—Safe Place to Work—Proximate Cause—Prior Treatment for Dizziness

Labor—Safe Place to Work—Contractual Right to Control Work—General Responsibility for Site Safety

Order, Supreme Court, Bronx County (Myrna M. Socorro, J.), entered on or about February 20, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on liability on his Labor Law § 240 (1) cause of action, denied third-party defendant Capital Concrete NY, Inc.'s (Capital), cross-motion for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action insofar as predicated on Industrial Code (12 NYCRR) § 23-2.1 (a) (2), and denied defendants Marcal Contracting Co., LLC (Marcal) and AW Pelham, LP's motion for summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action as against Marcal and for judgment in their favor on their cause of action for contractual indemnification against Capital, unanimously modified, on the law, to grant defendants' motion insofar as it sought summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action as against defendant Marcal and insofar as it sought summary judgment on the cause of action for contractual indemnification as against Capital, and otherwise affirmed, without costs.

Supreme Court properly concluded that plaintiff, who worked as a carpenter for Capital, established prima facie entitlement to summary judgment on liability on his Labor Law § 240 (1) cause of action based on his un rebutted testimony that a concrete form came off the wall and fell on top of him from a height of approximately 15 feet. This testimony demonstrated that "an elevation-related safety device failed, or no device was placed and operated so as to provide him with adequate protection" (*Viruet v Purvis Holdings LLC*, 198 AD3d 587, 587-588 [1st Dept 2021]). In opposition, defendants failed to raise a material issue of fact (*id.* at 588). Defendants' proximate cause defense, based on plaintiff's prior medical treatment for dizziness or his purported recalcitrance in using a ladder when allegedly instructed by his supervisor, fails to establish that plaintiff was the sole proximate cause of his accident, as the record establishes that defendant's statutory violation was a proximate cause of the injury (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

In light of our determination on the section 240 claim, review of plaintiff's Labor Law § 241 (6) claim is academic (*see Malan v FSJ Realty Group II LLC*, 213 AD3d 541, 542 [1st Dept 2023]).

However, Supreme Court should have dismissed the common-law negligence and section 200 causes of action as against Marcal, the general contractor. That Marcal may have had a contractual right to control the work was insufficient to raise an issue of fact as to whether it exercised actual control over the work (*see Brown v New York City Economic Dev. Corp.*, 234 AD2d 33, 33 [1st Dept 1996]). The record shows that Marcal's general responsibility for site safety fell short of the degree of control necessary to impose liability under the common law or Labor Law § 200 (*see Mendriski v New York City Hous. Auth.*, 189 AD3d 410, 411 [1st Dept 2020]). Plaintiff testified that he received all work instructions from his foreman and had no substantive communications with Marcal's employees. He further testified that Capital provided ladders and waist chains, that he and his coworker tied off the harness he wore while using a ladder, and that other Capital workers installed the concrete form that fell on him. Further, according to the testimony of plaintiff's supervisor, Capital ensured that plaintiff was assigned safe tasks in light of his being treated for dizziness. Marcal's superintendent also testified that Capital's safety manager held weekly safety meetings for Capital workers, and that Marcal did not direct the means and methods of any subcontractor's work.

Because defendants were not negligent at common law or liable under Labor Law § 200, they are entitled to contractual indemnification under the broad indemnity provision requiring Capital to indemnify defendants to the fullest extent permitted by law, with limitations not applicable here, for personal injury claims arising from Capital's work. The record does not support Capital's contention that defendants failed to establish their freedom from negligence, as there are no issues of fact as to whether the accident occurred and whether it arose from Capital's work. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

4 In the Matter of E.G. and Another, Children Alleged to be Abused and/or Neglected. Administration for Children's Services, Respondent; D.E., Appellant, et al., Respondent. [251 NYS3d 43]—

Parent, Child and Family—Abused or Neglected Child—Sexual Abuse and Derivative Neglect—Corroboration of Child's Testimony

Parent, Child and Family—Abused or Neglected Child—Sexual Abuse—Nega-

tive Inference

Parent, Child and Family—Abused or Neglected Child—Derivative Neglect—Other Child at Home during Incident of Abuse

Order of disposition, Family Court, Bronx County (Karen M.C. Cortes, J.), entered on or about August 6, 2024, to the extent it brings up for review a fact-finding order, same court and Judge, which found that respondent D.E. sexually abused the subject child, a child for whom he was legally responsible, and derivatively neglected his biological child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence supports Family Court’s determination that respondent, a person legally responsible for the subject child, sexually abused the subject child, and that he derivatively neglected his biological child (*see* Family Ct Act §§ 1012 [e] [iii] [A]; 1046 [b] [i]; *Matter of J.L. [J.A.L.]*, 228 AD3d 474, 474 [1st Dept 2024]). Although the subject child’s sworn testimony did not need to be corroborated, it was nevertheless corroborated by the subject child and the biological child’s out-of-court statements as testified to by petitioner’s child protective specialist (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439, 440 [1st Dept 2017]; *Matter of Alijah S. [Daniel S.]*, 133 AD3d 555, 556 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]).

The court properly drew a negative inference against respondent as to whether his actions were for the purpose of gratifying his sexual desire. Sexual gratification may be inferred from a totality of the circumstances and respondent failed to testify and offer an innocent explanation for his actions (*see Matter of Maria S. [Angel A.]*, 185 AD3d 437 [1st Dept 2020]; *Matter of Jani Faith B. [Craig S.]*, 104 AD3d 508, 509 [1st Dept 2013]). There is no basis for disturbing Family Court’s credibility determinations, including its evaluation of the police reports entered into evidence and the testimony of the witnesses, which are accorded deference on appeal (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]).

Family Court’s finding that respondent sexually abused the subject child in violation of Penal Law § 130.52 by forcibly touching the subject child, was supported by a preponderance of the evidence (*see Matter of Diana C. [Felipe J.]*, 129 AD3d 487, 488 [1st Dept 2015]). The subject child testified that on or about January 17, 2022, at about 5:00 a.m., the child awoke and found respondent “crouching down next to [the] bed with

his phone out and moving . . . the crotch area of [the child's] panties to the side with his index finger" while pointing the flash of his phone into the subject child's private parts (see *People v Bartlett*, 89 AD3d 1453, 1454 [4th Dept 2011], *lv denied* 18 NY3d 881 [2012]). The subject child's testimony of feeling him touch "the crotch area" of the subject child's panties established that respondent applied some level of pressure to a sexual or intimate part of the child (see *People v Zaragoza*, 195 AD3d 522, 523 [1st Dept 2021]).

A preponderance of the evidence also supported Family Court's finding that respondent's actions constituted the family offenses of sexual abuse in the second and third degrees (Penal Law §§ 130.60, 130.55). The subject child's testimony that the child awoke because the child felt respondent touching "the crotch area" of the child's panties was also sufficient to support such a finding because it established that respondent had touched the child on an intimate part when the child was incapable of consenting to sexual contact (see *People v Sene*, 66 AD3d 427, 428 [1st Dept 2009], *lv denied* 13 NY3d 941 [2010]).

The finding of derivative neglect against respondent as to his biological child was appropriate. The finding that respondent sexually abused the subject child demonstrated a fundamental defect in his understanding of the responsibilities of parenthood and placed his biological child, who was in the home during the incident of the abuse, at imminent risk of neglect (see *Matter of Xzandria B. [Nasheen B.]*, 183 AD3d 408, 408-409 [1st Dept 2020]). The subject child's testimony and the biological child's out-of-court statements as testified to by the child protective specialist established that the biological child was sleeping in the biological child's bedroom when respondent sexually abused the subject child, and that the biological child awoke after hearing the subject child's screams. Respondent's argument that his biological child is not similarly situated as the subject child is meritless and does not prevent a finding of derivative neglect based on his impaired level of parental judgment (see *Matter of Krystal N. [Juan R.]*, 193 AD3d 602, 602 [1st Dept 2021], *lv denied* 37 NY3d 906 [2021]; *Matter of Lesli R. [Luis R.]*, 138 AD3d 488, 489 [1st Dept 2016]). Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

5 Michael Gad, Respondent, v CCC NFP, Inc., Doing Business as Classic Car Club, Appellant, et al., Defendants. [247 NYS3d 375]—

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered June 13, 2024, which granted plaintiff's motion for summary judgment on his breach of contract cause of action, unanimously affirmed, with costs.

Plaintiff alleges that defendant failed to provide a private event space for his son's bar mitzvah in accordance with a contract the parties entered into on December 18, 2019, to reserve the space for May 17, 2020. Plaintiff paid a nonrefundable deposit of \$27,218.75 in the form of a check and separately tendered \$25,000 in cash for the venue.

Plaintiff established *prima facie* that the purpose of the contract was frustrated by the COVID-19 pandemic and the executive orders issued in response to the pandemic, which prohibited "[n]on-essential gatherings of individuals of any size for any reason" and was eventually extended through May 28, 2020 (Executive Order [A. Cuomo] Nos. 202.10, 202.31 [9 NYCRR 8.202.10, 8.202.31]). Because the bargained-for exchange between the parties was intended to secure the timing of the event, the purpose of the contract was entirely frustrated by the COVID-19 pandemic and subsequent executive orders, and plaintiff was completely deprived of the benefit of his bargain (*see Kay v Heavenly Events & Catering Corp.*, 241 AD3d 1305, 1306 [2d Dept 2025]). Moreover, although the doctrine of frustration of purpose is not available when the event that prevented performance was foreseeable, the COVID-19 pandemic and eventual prohibition on social gatherings were unforeseeable at the time the parties entered into the contract on December 18, 2019 (*id.* at 1308). In opposition, defendant failed to raise an issue of fact concerning its performance under the contract or plaintiff's payment.

Although this Court has, in prior decisions, rejected the COVID-19 pandemic as grounds for a finding of frustration of purpose or impossibility, our holdings in those decisions arose from the fact that the agreement's purpose was not totally defeated, but was only partially defeated (*see e.g. Pentagon Fed. Credit Union v Popovic*, 217 AD3d 480, 481 [1st Dept 2023]). Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

6 Regina Goss-Lawson, Appellant, v Matco Service Corporation et al., Respondents. [247 NYS3d 380]—

Motor Vehicles—Collision—Rear-End Collision

Order, Supreme Court, Bronx County (Raymond P. Fernandez, J.), entered June 5, 2025, which denied plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, without cost, and the motion granted.

Plaintiff established prima face entitlement to summary judgment on the issue of liability through her affidavit in which she averred that she was in a line of traffic entering the highway and that the vehicle in front of her came to a complete stop. Plaintiff then slowed her vehicle down to a complete stop and it was then that her car was rear-ended by defendant's vehicle. A "rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle," and shifts the burden to defendants "to come forward with an adequate nonnegligent explanation for the accident" (*Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]; see *Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dept 2017]; *Cruz v Lise*, 123 AD3d 514, 514 [1st Dept 2014]). Defendant driver's affidavit asserting that plaintiff's car had come to an "abrupt and unexpected stop for no apparent reason," standing alone, was insufficient to rebut the presumption of negligence (see *Giap v Hathi Son Pham*, 159 AD3d 484, 485 [1st Dept 2018]; *Cruz*, 123 AD3d at 514; see also *Renteria v Simakov*, 109 AD3d 749, 750 [1st Dept 2013]; *Diller v City of N.Y. Police Dept.*, 269 AD2d 143, 144 [1st Dept 2000]; Vehicle and Traffic Law § 1129 [a]). Indeed, a "driver's failure to anticipate and react to the slow and cautious movement of plaintiff's vehicle is not an adequate, non-negligent explanation for the accident" (*Diller*, 269 AD2d at 144 [internal quotation marks omitted], quoting *Galante v BMW Fin. Servs. N. Am.*, 223 AD2d 421, 421 [1st Dept 1996]).

Moreover, plaintiff was not required to disprove comparative fault to prevail on her motion for summary judgment (see *Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]). Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

7 Lending Assets, LLC, Appellant, v Gabriel Gerbi, Esq., et al., Respondents. [247 NYS3d 376]—

Attorney and Client—Malpractice—Negligence Element—Admission That Attributed Duty to Third Party

Order, Supreme Court, New York County (Judy H. Kim, J.), entered April 10, 2025, which, to the extent appealed as limited by the briefs, granted defendants' motion to dismiss the complaint in accordance with CPLR 3211 (a) (1), unanimously affirmed, without costs.

Supreme Court properly dismissed this action, as the documentary evidence submitted by defendants in support of their motion to dismiss utterly refutes an essential element of plaintiff's legal malpractice claims—specifically, that defend-

ants had a nondelegable duty to obtain valid title policies and ensure that certain mortgages were recorded in first lien positions (see *Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014]). Indeed, plaintiff admitted in a complaint in another action that it believed a third party had the duties that plaintiff ascribes to defendants in this complaint, that it relied on this belief to its detriment, and that this reliance led to damages. Thus, negligence, an essential element of a legal malpractice claim, has been “utterly refute[d]” because the allegations in the other complaint amount to a concession that the duties underlying plaintiff’s legal malpractice cause of action are not, in fact, attributable to defendants (CPLR 3211 [a] [1]; see *Excelsior Capitol LLC v K&L Gates LLP*, 138 AD3d 492, 492 [1st Dept 2016], *lv denied* 28 NY3d 906 [2016]; see also *Yassky v Meltzer, Lippe, Goldstein & Schlissel, P.C.*, 36 AD3d 420, 421 [1st Dept 2007]). Furthermore, these judicial admissions constitute admissible documentary evidence for purposes of defendants’ motion to dismiss (see *New Greenwich Litig. Trustee, LLC v Citco Fund Servs. [Europe] B.V.*, 145 AD3d 16, 25 [1st Dept 2016], *lv denied* 29 NY3d 917 [2017]).

We have considered plaintiff’s remaining arguments and find them unavailing. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

8 Arcadio Pena Padilla, Respondent, v 76 Eleventh Avenue Property Owner, LLC, et al., Appellants. (And Third-Party Actions.) [247 NYS3d 381]—

Labor—Safe Place to Work—Industrial Code Violation—Integral to Work Doctrine—Trip on Metal Debris

Order, Supreme Court, Bronx County (Shawn T. Kelly, J.), entered on or about April 18, 2025, which, to the extent appealed, as limited by the briefs, granted plaintiff’s cross-motion for summary judgment with respect to liability on his claim under Labor Law § 241 (6), premised upon a violation of 12 NYCRR 23-1.7 (e) (2), unanimously affirmed, without costs.

Supreme Court properly granted plaintiff’s motion for partial summary judgment on the basis that defendants violated 12 NYCRR 23-1.7 (e) (2), which requires owners and contractors to keep “[t]he parts of floors, platforms and similar areas where persons work or pass . . . free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.” Plaintiff established prima facie that he tripped on metal debris at the foot of the ladder on which he was working. Defendants rely on the “integral to the work” doctrine, which

“recognizes that certain work assignments are, by their nature, dangerous but still permissible, and the particular commands of the Industrial Code may not apply if they would make it impossible to conduct the work” (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 321 [2024]). Defendants claim that the debris plaintiff encountered was cut from metal sheeting plaintiff’s employer was using to frame walls and that the doctrine shields them from liability for its presence. However, “[t]he doctrine does not . . . absolve a defendant of liability for the use of an avoidable dangerous condition or for failure to mitigate the danger, including as specifically provided by the Industrial Code, if preventative measures would not make it impossible to complete the work” (*id.*). “[R]eliance on the ‘integral to the work’ doctrine is unpersuasive [when] appropriate preventative measures would not have made it impossible for plaintiff to do his work” (*Zyskowski v Chelsea-Warren Corp.*, 238 AD3d 498, 501 [1st Dept 2025]).

Defendants have failed to present any evidence that plaintiff could not have performed the work had the debris been removed. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

Motion for a stay of trial pending resolution of appeal, denied.

9 The People of the State of New York, Respondent, v Jalen Doctor, Appellant. [247 NYS3d 379]—

Crimes—Appeal—Invalid Waiver

Judgment, Supreme Court, New York County (Ellen N. Biben, J.), rendered September 3, 2020, convicting defendant, upon his plea of guilty, of rape in the first degree, and sentencing him to a term of seven years, to be followed by 10 years of postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed at sentencing, and otherwise affirmed.

Defendant’s appeal waiver was invalid because the court did not explain that defendant’s appellate rights were “separate and distinct” from the rights automatically forfeited by his guilty plea (*People v Lopez*, 6 NY3d 248, 256 [2006]); “inform defendant that he would normally have the right to appeal his case to this Court” (*People v Orenstein*, 230 AD3d 1068, 1069 [1st Dept 2024], *lv denied* 42 NY3d 1054 [2024]); or “explain that a waiver of the right to appeal is not an absolute bar to direct appeal and that some issues are nonwaivable” (*People v*

Cisse, 228 AD3d 440, 441 [1st Dept 2024], *lv denied* 42 NY3d 1079 [2025]). In addition, the court’s remarks implied that defendant could appeal only if he was convicted after trial, and “defendant, [who] had no prior . . . convictions, might not understand that the right to appeal is not limited to review of trial errors” (*People v Colon*, 219 AD3d 1256, 1256 [1st Dept 2023]). “The detailed written waiver that defendant executed with counsel cannot save the numerous errors in the court’s oral colloquy, as a written waiver is not a complete substitute for an on-the-record explanation” (*People v Bonilla*, 211 AD3d 614, 615 [1st Dept 2022] [internal quotation marks omitted]).

We perceive no basis for reducing the sentence. However, based on our own interest of justice powers, we vacate the surcharge and fees imposed on defendant at sentencing (*see People v Chirinos*, 190 AD3d 434, 435 [1st Dept 2021]). We note that the People do not oppose this relief. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

10 The People of the State of New York, Respondent, v Jonathan Rodriguez, Appellant. [247 NYS3d 379]—

Crimes—Sentence—Presentence Investigation and Report
Crimes—Plea of Guilty—Condition to Return to Court

Judgment, Supreme Court, New York County (Robert M. Mandelbaun, J.), rendered May 31, 2023, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, two counts of criminal possession of a controlled substance in the third degree, two counts of criminal possession of a weapon in the second degree, and criminal possession of marijuana in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

Notwithstanding that defendant was not interviewed for the pre-sentence report and that the report relied to a degree on a pre-sentence report regarding a crime defendant was convicted of seven years prior, the report was not deficient “because a presentence interview is not a legal requirement,” defendant’s sentence was the result of a negotiated plea, and the sentencing court had ample information regarding many aspects of defendant’s history (*see People v Lashley*, 192 AD3d 434, 434-435 [1st Dept 2021], *lv denied* 37 NY3d 958 [2021]).

Defendant’s repeated and serious disruptive behavior established a breach of the “return to court” condition of his guilty plea (*see Illinois v Allen*, 397 US 337, 343 [1970]) and justified the court’s determination that defendant forfeited his right to be present and its imposition of a three-year sentence enhancement beyond the originally agreed-upon sentence.

We perceive no basis for reducing his sentence. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

11 The People of the State of New York, Respondent, v Joseph Campbell, Appellant. [247 NYS3d 378]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Connie Morales, J.), rendered July 24, 2024, and 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. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

12 The People of the State of New York, Respondent, v Latrese Carr, Appellant. [247 NYS3d 375]—

Crimes—Plea Bargaining—Enforcement of Agreement—Vacating of Plea Following Satisfaction of Conditions

Judgment, Supreme Court, Bronx County (Guy H. Mitchell, J.), rendered December 18, 2024, convicting defendant, upon his plea of guilty, of attempted reckless endangerment in the first degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating defendant's plea to reckless endangerment in the first degree, and otherwise affirmed.

Defendant entered into a conditional plea agreement, requiring that he initially plead guilty to both first-degree reckless endangerment and attempted first-degree reckless endangerment, with the understanding that if he successfully returned to court on the date of sentencing, without incurring any additional arrests, his plea to first-degree reckless endangerment would be vacated, and he would be sentenced only on his plea to attempted first-degree reckless endangerment to a term of 1½ to 3 years. It is undisputed that defendant satisfied the conditions of this agreement, and the court imposed the promised sentence, consistent with that agreement. However, the court neglected to orally announce that it was vacating defendant's plea of guilty to first-degree reckless endangerment. Notably, the court's action sheet on that date reflects the court's belief that it did vacate that portion of the plea, consistent with the agreement. Accordingly, in light of defendant's compliance with the plea agreement, we vacate defendant's plea of guilty to reckless endangerment in the first degree (*see generally People v Brown*, 161 AD3d 417 [1st Dept 2018]; *People v Anonymous*, 97 AD3d 1, 7 [1st Dept 2012]). We note that the

People do not oppose this relief. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

13 The People of the State of New York, Respondent, v Mitchell Thompson, Appellant. [247 NYS3d 374]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham L. Clott, J.), rendered January 23, 2024, 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. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

14 The People of the State of New York, Respondent, v Omari Brown, Appellant. [247 NYS3d 374]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laurie Peterson, J.), rendered July 28, 2022, 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. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

15 Alex Shanklin et al., Individually and as Class Representatives, Respondents, v Wilhelmina Models, Inc., et al., Appellants, et al., Defendants. [251 NYS3d 40]—

Motions and Orders—Submission of Order for Signature—No Directive from Court—Good Cause for Delay

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about March 5, 2025, which insofar as appealed from, denied the separate motions of defendants Next Management LLC, Wilhelmina Models, Inc., and Wilhelmina International Ltd. (collectively, defendants) to vacate the amended order, same court and Justice, entered January 30, 2025 and the corrected order, same court and Justice, entered January 31, 2025, granting plaintiffs class certification, unanimously affirmed, without costs.

A prior order, same court, different Justice, entered May 12, 2020, granted plaintiffs' motion for class certification as to two of the proposed classes—one with respect to Next and the other as to Wilhelmina—asserting Labor Law claims that accrued on or after October 24, 2007. The court directed plaintiffs' counsel to e-file a proposed order certifying classes as authorized after a meet and confer where the parties would attempt to agree

upon the form of the proposed order. The court did not check the boxes indicating “settle order” or “submit order” on the form.

Over the course of the next four years the parties engaged in mediation and merits discovery, conducted over 17 depositions, and plaintiffs filed a Fourth Amended Class Action Complaint. There is no dispute that during this time plaintiffs never submitted a proposed order certifying the classes.

In January 2025, plaintiffs requested a Commercial Division Rule 24 (Uniform Rules for Trial Cts [the Uniform Rules] [22 NYCRR] § 202.70) pre-motion conference for leave to file a motion for court approval of the form of class notice and for an order defining the classes. Supreme Court conducted an on-the-record pre-motion conference, after which it entered the class certification orders.

Section 202.48 of the Uniform Rules mandates vacatur of a class certification order only where the underlying decision directs a party to submit or settle an order (*see* 22 NYCRR 202.48; *see also Funk v Barry*, 89 NY2d 364, 367 [1996]; *WV Partners LLC v Hudson Private Corp.*, 236 AD3d 481, 482-483 [1st Dept 2025]). Here, the May 12, 2020 order contained no such directive and the boxes labeled “settle order” and “submit order” were not checked by the court.

In any event, Supreme Court providently exercised its discretion in determining that plaintiffs established good cause for their delay in submitting a proposed order certifying the classes and that there was clearly no intention to abandon the action based on the course of conduct by all parties in the litigation (*see Matter of Signal Perfection, Ltd. v Litespeed Elec., Inc.*, 150 AD3d 548, 548 [1st Dept 2017]). Over the more than four years since the May 2020 class certification order, the parties conducted mediation and merits discovery on class issues and defendants repeatedly acknowledged in pleadings and correspondence, including with the court, that the classes were certified. None of the parties believed that plaintiffs abandoned class action status based on their failure to submit a further proposed class certification order within 60 days of the notice of entry of the May 2020 order (*see Platt v Parklex Assoc.*, 234 AD2d 115, 115-116 [1st Dept 1996]). Moreover, defendants have cited no prejudice from the delay in filing the proposed class certification order.

Defendants’ argument that the court violated Rule 24 of the Commercial Division (22 NYCRR 202.70) by issuing the January 2025 orders is academic as the orders that are the subject of this appeal resolved defendants’ noticed motion (*see Levine v*

St. Luke's Hosp. Ctr., 109 AD2d 694, 695 [1st Dept 1985]). Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

16 Yadira Silva-Rios, Appellant, v New York Presbyterian Columbia Medical Center, Respondent. [250 NYS3d 53]—

Hospitals—Malpractice—Emergency or Disaster Treatment Protection Act—Pandemic-Related Departure from Standard of Care—Pressure Ulcers

Order, Supreme Court, Bronx County (Alicia Gerez, J.), entered on or about July 9, 2024, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff alleges that she developed pressure ulcers while she was being treated for Covid-19 at defendant hospital between March 26, 2020 and July 24, 2020, when she was 47 years old. It is undisputed that plaintiff was sedated and placed on a medical ventilator upon admission to the hospital, and that she spent most of her stay on a ventilator in the hospital's cardiac care unit.

This action was properly dismissed under the immunity provision of New York's Emergency or Disaster Treatment Protection Act (the EDTPA). Although plaintiff asserted in her pleadings that the EDTPA does not apply because defendant acted recklessly or with gross negligence, she has abandoned that argument on appeal (*see* Public Health Law § 3082 [2]). Plaintiff also does not dispute that two of the conditions necessary for application of the EDTPA are satisfied, challenging only defendant's showing that "the treatment of the individual [was] impacted by the health care facility's . . . decisions or activities in response to or as a result of the COVID-19 outbreak" (Public Health Law § 3082 [1] [a]-[c]).

The relevant issue at this stage is that to whatever extent defendant departed from the standard of care with respect to wound prevention and care in plaintiff's particular case, its reason for doing so was pandemic-related. Defendant's evidence included (1) plaintiff's medical records, (2) an affidavit from a registered nurse and certified wound ostomy and continence nurse employed by defendant, Lisa Cullinan, RN, WOCN, who personally attended to plaintiff's care, (3) an affidavit from defendant's Medical Director of Respiratory Care, Steven Miller, MD, and (4) an expert affirmation from a licensed physician, board-certified in internal and geriatric medicine, Gisele P. Wolf-Klein, MD, FACP. This evidence demonstrates that pandemic-related overcapacity, staffing, supply shortages, and guidelines with respect to personal protec-

tive equipment had a clear impact on wound prevention and treatment practices, including frequency of turning and repositioning at the hospital's cardiac care unit, and would have affected plaintiff.

Particularly, Nurse Cullinan averred that she personally attended to Covid-19 patients, including plaintiff, and that she was familiar with the treatment and prevention of pressure injuries at the hospital during this time. She explained that the hospital had an "unprecedented influx of acutely ill Covid-19 patients," almost all of whom were on ventilators, and that there were staff shortages that resulted in decreased time with individual patients, which impacted the nursing staff's ability to turn and reposition patients in accordance with the usual protocol. Dr. Wolf-Klein further opined that plaintiff's treatment for "severe COVID-19 . . . had a direct correlation with plaintiff's development of pressure ulcers," and that her state of deep sedation resulted in limited mobility and the deterioration of her skin. Dr. Wolf-Klein also explained that each change in position would increase the risk of dislodgement of plaintiff's ventilator tube, which potentially could result in brain damage or death.

Plaintiff's reliance on *Jackson v BronxCare Health Sys.* (236 AD3d 594, 595-596 [1st Dept 2025]) and *Holder v Jacob* (231 AD3d 78, 88-89 [1st Dept 2024]) is misplaced. Unlike in those cases, plaintiff sustained injuries and complications that were directly tied to her hospitalization for Covid-19, with her intubated state making it difficult to move her safely. This is therefore not a situation where plaintiff might be placed in the position of "having to accept [defendant's] word on potentially dispositive issues" (*Jackson*, 236 AD3d 594, 596). Based on these facts, the evidence submitted was sufficient to show that the care provided to plaintiff was performed in good faith and that defendant did not depart from the then-existing standards of practice.

In view of our disposition, we need not reach the parties' arguments with respect to the federal Public Readiness and Emergency Preparedness Act. Concur—Manzanet-Daniels, J.P., Kapnick, Michael, Hagler, JJ.

17 Gail Simeone, Respondent, v City of New York, Defendant, and 678 Ninth Avenue Associates, LLC, et al., Respondents. 678 Ninth Avenue Associates, LLC, et al., Third-Party Plaintiffs-Respondents, v Designer Fragrances and Cosmetics Company, Doing Business as Kiehl's, Third-Party Defendant-Appellant. [247 NYS3d 377]—

Indemnity—Contractual Indemnification—Sidewalk Defect—Clause in Lease

Covered Sidewalk

Order, Supreme Court, New York County (Jeanine R. Johnson, J.), entered August 1, 2024, which, to the extent appealed from as limited by the briefs, denied the motion of third-party defendant Designer Fragrances and Cosmetics Company, doing business as Kiehl's, for summary judgment dismissing the third-party complaint and for summary judgment on Kiehl's common-law indemnification counterclaim, unanimously affirmed, without costs.

Supreme Court correctly denied Kiehl's motion for summary judgment dismissing the contractual indemnification claim. Administrative Code of the City of New York § 7-210 placed the obligation on the owner defendants to keep the sidewalk in good repair. However, the lease agreement broadly requires Kiehl's to indemnify defendants from "all liabilities, suits, obligations, fines, damages, . . . asserted against Landlord by reason of . . . Any Tenants' use, non-use, possession, occupation . . . condition . . . of the demised premises occurring during the term of this Lease . . . of the demised premises or any part thereof, or of any sidewalk . . . or space comprising a part of the building or demised premises or adjacent thereto." The indemnification clause does not violate General Obligations Law § 5-321 because it does not purport to indemnify the owners for liability for their own negligence (*see Mahon v David Ellis Real Estate, L.P.*, 165 AD3d 600, 601 [1st Dept 2018]).

Supreme Court also correctly denied Kiehl's motion as to the common-law indemnification claim and counterclaim. Kiehl's did not meet its prima facie burden of establishing that it did not create the alleged sidewalk defect (*cf. Diop v Getty Sq. Realty LLC*, 199 AD3d 410, 410 [1st Dept 2021]).

Kiehl's has withdrawn its appeal from the part of the order regarding defendants' breach of contract for failure to procure insurance claim.

We have considered Kiehl's remaining contentions and find them unavailing. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

18 US Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSAB Mortgage-Backed Trust 2006-2, Respondent, v Shirley Brown et al., Defendants. Taheir Brown, Nonparty Appellant. [251 NYS3d 46]—

Motions and Orders—Reargument or Renewal—Motion to Vacate and Set Aside Foreclosure Sale—Interest in Foreclosed Property—Claim as Heir of Mortgagee

Mortgages—Foreclosure—Motion to Intervene

Order, Supreme Court, Bronx County (Naita A. Semaj, J.), entered on or about December 19, 2024, which, to the extent appealed from, denied nonparty appellant's motion for leave to renew his motion to vacate the auction sale, referee's deed, and all subsequent transfers of interest, and to intervene, unanimously affirmed, without costs. Appeal from aforementioned order, unanimously dismissed, without costs, to the extent it denied nonparty appellant's motion to reargue, as taken from a nonappealable order.

Nonparty appellant is the son of defendant borrowers Shirley Brown and Trevor Brown, both deceased, who owned property in the Bronx. Plaintiff commenced a foreclosure action on the property on March 14, 2012, and a judgment of foreclosure and sale was entered on February 27, 2020. By motion made several days after the foreclosure sale of the property on June 24, 2024, nonparty appellant pro se sought to vacate and set aside the sale, asserting that he had an ownership interest in the property. Nonparty appellant further asserted that the sale should have been cancelled and stayed because of the automatic stay that arose from his filing for personal bankruptcy on June 20, 2024. Supreme Court denied the motion, and nonparty appellant moved to renew and reargue.

Supreme Court providently exercised its discretion in denying nonparty appellant's motion insofar as it sought leave to renew. There was no evidence submitted on nonparty appellant's first motion establishing him as the borrowers' child or distributee; therefore, nothing established that he had an interest in or ownership of the foreclosed property. Although he asserted in the motion that he was Shirley Browns's heir and her appointed administrator, he attached Trevor Brown's death certificate and limited letters of appointment allowing him to act on behalf of Trevor Brown. However, nothing in the motion established that nonparty appellant was Trevor Brown's heir, such as a birth certificate, or even a statement that he was Trevor Brown's child—something that was certainly known to him at the time.

Therefore, nothing in the second motion shows that there were any new facts unknown to nonparty appellant at the time of the first motion, and he has offered no reasonable justification for failing to present the relevant facts on his original motion (CPLR 2221 [e]; see *William P. Pahl Equip. Corp. v Kassiss*, 182 AD2d 22, 27 [1st Dept 1992]). Although nonparty appellant argued in his second motion that Supreme Court should have acted to ascertain his ownership interest in the property, he did not advance that argument in the first motion.

We acknowledge that nonparty appellant proceeded pro se on his first motion, and that some latitude might therefore be warranted. Nevertheless, under the circumstances presented here, nonparty appellant has failed to establish good cause for leave to renew in the interest of justice. On the contrary, he waited over four years after Trevor Brown's death to object to the foreclosure proceedings, and when he finally did object, it was by filing a bankruptcy petition several days before the scheduled sale and moving for relief only after the sale (*see Ok Sun Chong v Scheelje*, 218 AD3d 691, 692 [2d Dept 2023]; *cf. Kaszar v Cho*, 160 AD3d 501, 502 [1st Dept 2018]).

To the extent the second motion can be read as one to reargue, the law is clear that no appeal lies from denial of a motion to reargue (*Slabakis v Poyiadjis*, 239 AD3d 554, 554 [1st Dept 2025]).

The court also properly denied nonparty appellant's belated motion to intervene in the foreclosure action, as he failed to include any proposed answer or other pleading to the foreclosure complaint. This omission is fatal to his motion (CPLR 1014; *U.S. Bank Trust N.A. v 21647 LLC*, 217 AD3d 429, 429 [1st Dept 2023]). Moreover, final judgment was entered before Trevor Brown's death and was neither appealed nor vacated, and nothing in nonparty appellant's submissions contains any defenses to the action or any basis to intervene months after the foreclosure sale and title to the property had passed to a new purchaser.

Finally, nonparty appellant has demonstrated no irregularities in the foreclosure sale sufficient to otherwise warrant its vacatur, nor has he demonstrated that his substantial rights have been prejudiced (*see U.S. Bank N.A. v Martinez*, 162 AD3d 528, 528-529 [1st Dept 2018]; *Bankers Trust Co. of Cal., N.A. v Wen Zhou*, 57 AD3d 294, 294 [1st Dept 2008]).

We have considered nonparty appellant's remaining arguments and find them unavailing. Concur—Webber, J.P., Kennedy, Mendez, Rodriguez, Michael, JJ.

(February 5, 2026)

1 A1 Specialized, Inc., Appellant, v James River Insurance Company et al., Respondents. [248 NYS3d 50]—

Insurance—Duty to Defend and Indemnify—Additional Insured Party—Unsigned Agreement

Orders, Supreme Court, New York County (Louis L. Nock,

J.), entered on or about August 20, 2024, which granted defendant James River Insurance Company's motion for summary judgment declaring that plaintiff is not an additional insured under the subject insurance policies and that it has no duty to defend or indemnify plaintiff in the underlying action, and dismissing the complaint against it, and denied plaintiff's motion for partial summary judgment declaring that James River has a duty to defend it in the underlying action and that it is an additional insured under the insurance policies, unanimously reversed, on the law, with costs, the declaration vacated, James River's motion denied, the complaint reinstated against it, plaintiff's motion granted, and it is so declared, and the matter remanded for further proceedings consistent with this decision.

James River issued insurance policies to defendant Arsenal Scaffold Inc. which provided additional insured coverage to entities, where required by written contract or "written agreement," for losses caused in whole or in part by Arsenal's acts or omissions in the performance of Arsenal's work for such additional insureds. Arsenal prepared a change order for plaintiff which specifically contemplated that Arsenal would name plaintiff as an additional insured, and that it would do so when the change order was signed. Arsenal then commenced work consistent with the terms of the change order and provided plaintiff a certificate of insurance indicating that plaintiff was an "additional insured in regards to general liability as per written contract or agreement," although the parties never signed the change order itself.

Supreme Court should have denied James River's motion for summary judgment. An unsigned document may qualify as a written agreement requiring a party to be named as an additional insured, provided that the additional insured provisions in the insurance policy itself do not explicitly require that the agreement be signed (*see Zurich Am. Ins. Co. v Endurance Am. Speciality Ins. Co.*, 145 AD3d 502 [1st Dept 2016]). If such agreement is unsigned, it may still be enforceable, "provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369 [2005]).

The record establishes that the change order, which required that Arsenal name plaintiff as an additional insured, was unsigned. However, James River's insurance policies do not require a signed writing, merely a written agreement, and the record establishes that plaintiff and Arsenal intended to enter into the agreement set forth in the change order. While the

agreement contains language specifying when Arsenal must name plaintiff as an additional insured, it does not contain language making the signing of the change order a condition precedent to Arsenal's obligation to name plaintiff as an additional insured (*see VXi Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 194-195 [1st Dept 2019]).

Since the change order qualifies as a written agreement requiring Arsenal to name plaintiff as an additional insured, Supreme Court should have granted plaintiff's motion for partial summary judgment and found that defendant insurer is required to provide plaintiff a defense in the underlying litigation, as the duty to defend was triggered (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]; *IBEX Constr., LLC v Utica Natl. Assur. Co.*, 57 AD3d 245 [1st Dept 2008]). The record indicates that the amended verified complaint filed in the underlying tort action contains allegations that are potentially within the scope of coverage provided by James River's policies, and suggest a reasonable possibility of coverage such that it has a duty to defend plaintiff in the underlying tort action. James River's remaining arguments concerning the duty to defend are unavailing.

To the extent plaintiff's motion and arguments on appeal request a hearing on its costs incurred in defending against the underlying action, the matter is remanded for Supreme Court to hold such hearing (*see Live Nation Mktg., Inc. v Greenwich Ins. Co.*, 188 AD3d 422, 423 [1st Dept 2020]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ.

2 Roberto Adago, Respondent, v Abdou Rahame Sy et al., Appellants. [251 NYS3d 605]—

Judgments—Entry—Electronic Filing System
Judgments—Default Judgment—Vacatur—Remittal

Judgment, Supreme Court, New York County (Suzanne J. Adams, J.), entered on January 25, 2024, in favor of plaintiff and against defendants in the amount of \$701,363.46, and bringing up for review an order, same court and Justice, entered on November 20, 2023, which insofar as appealed from as limited by the briefs, granted plaintiff's motion for a default judgment, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for further proceedings in accordance with this Court's decisions in *Adago v Sy* (205 AD3d 602 [1st Dept 2022] [*Adago I*]) and *Adago v Sy* (216 AD3d 402 [1st Dept 2023] [*Adago II*]). Appeal from order entered on November 20, 2023, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Upon remand for the second time to determine whether a memorandum of understanding was “permeated with fraud” so that its arbitration clause was void (*Adago I*, 205 AD3d at 602; *Adago II*, 216 AD3d at 403), Supreme Court granted plaintiff’s motion to enter a default judgment against defendants. This was in error as plaintiff never served *Adago I* with notice of entry and therefore defendants’ time to answer never started running (see CPLR 3211 [f]). Plaintiff’s reliance on rules about electronic filing is unavailing. This Court has previously determined that “the NYSCEF site’s transmission of notification of the entry to e-mail service addresses ‘shall not constitute service of notice of entry by any party’” (*Fazio v Costco Wholesale Corp.*, 85 AD3d 443, 443 [1st Dept 2011], quoting 22 NYCRR 202.5-b [h] [3]).

The court also erred in finding that Sy’s affidavit in opposition to plaintiff’s motion and in support of defendants’ cross-motion was inadmissible because it lacked a certificate of conformity required for affidavits sworn to outside of New York pursuant to former CPLR 2309 (c). Rather, the court should have allowed Sy to obtain such a certificate (see e.g. *Parra v Cardenas*, 183 AD3d 462, 463 [1st Dept 2020]), especially because plaintiff did not raise CPLR 2309 (c) in his motion papers.

Even if, arguendo, defendants were “technically in default by failing to timely answer” (*Hammond v Equinox Holdings LLC*, 197 AD3d 1039, 1040 [1st Dept 2021]), we exercise our discretion to deny plaintiff’s motion (see e.g. *Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities*, 70 NY2d 831, 833 [1987]). The remittitur in *Adago II* did not provide for a default judgment (see 216 AD3d at 402-403) and thus, it was “not proper for the supreme court, on the return of the remittitur, to add any new and independent direction” (*McGregor v Buell*, 33 How Prac 450, 454 [1864] [italics omitted]; see also *Wilkins v Earle*, 46 NY 358, 358 [1871]). Additionally, Sy “evinced his intent to litigate this case on the merits” (*Hammond*, 197 AD3d at 1040) by answering and submitting an affidavit, and there is a “strong public policy favoring the resolution of cases on the merits” (*id.*; see also e.g. *Rector v BDG Gotham Residential, LLC*, 209 AD3d 509, 509 [1st Dept 2022]; *Nedeltcheva v MTE Transp. Corp.*, 157 AD3d 423, 423 [1st Dept 2018]). Finally, defendants “advanced . . . potentially meritorious defense[s]” (*Rector*, 209 AD3d at 510 [internal quotation marks omitted]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O’Neill Levy, JJ.

3 AMK Capital Corp., Plaintiff, v Adam Plotch, Appellant, and Magdy Mikhail et al., Respondents, et al., Defendants. [253 NYS3d 568]—

Process—Service of Process—Traverse Hearing—Credibility of Process Server
 Trial—Adjournment—Diligence in Procuring Witness Testimony
 Trial—Reopening Case—Failure to Call Witness

Order, Supreme Court, Bronx County (Fidel E. Gomez, J.), entered on or about February 28, 2024, which, following a traverse hearing, denied defendant’s CPLR 5015 (a) (4) motion to vacate the judgment of foreclosure and sale, set aside the deeds following the foreclosure sale, and dismiss the complaint, unanimously affirmed, with costs. Order, same court and Justice, entered on or about July 3, 2024, which denied defendant’s CPLR 4404 (b) motion to make new findings of fact, unanimously dismissed, without costs. Order, same court and Justice, entered September 17, 2024, which, to the extent appealed from as limited by the briefs, denied defendant’s motion for leave to renew the order entered on or about July 3, 2024, denying his CPLR 4404 (b) motion, unanimously affirmed, with costs.

The court properly concluded that intervenors Magdy and Olga Mikhail met their burden of demonstrating proper service of process under CPLR 308 (2) by a preponderance of the evidence at the traverse hearing (*see Voulkoudis v Frantzeskakis*, 184 AD3d 516, 517 [1st Dept 2020]). The process server’s testimony and the documentary evidence were sufficient to establish that service of process was effectuated on defendant by delivery of the process “to a person of suitable age and discretion” at defendant’s residence (CPLR 308 [2]). Defendant did not object to the admission of the process server’s logbook, and although he initially objected to the work ticket’s admissibility he withdrew the objection. The court properly credited the process server’s testimony, and “there is no basis to disturb the court’s credibility determinations at the traverse hearing, which are entitled to deference” (*see e.g. Bertotti v Lief*, 237 AD3d 565, 566 [1st Dept 2025]).

The court also providently declined to grant the requested continuance (*see generally Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 52 [1st Dept 2008]). Defendant failed to establish that he acted diligently (*see Matter of State Farm Fire & Cas. Co. v Jackson*, 165 AD3d 518, 519 [1st Dept 2018]). While defendant knew that the Mikhails suspected that his mother was the individual served at his residence and sought to obtain her testimony, defendant’s mother failed to appear. Defendant’s mother was the individual in the best position to describe her own appearance and to contest service.

Finally, the court providently denied defendant's motion to renew his CPLR 4404 (b) motion (see *Matter of John Jay Coll. of Criminal Justice of the City Univ. of N.Y.*, 74 AD3d 460, 462 [1st Dept 2010], *lv dismissed and denied* 16 NY3d 889 [2011], *cert denied* 566 US 982 [2012]). The court's "discretion to reopen a case . . . should be sparingly exercised" (*id.*). Considering defendant's conduct surrounding his mother's failure to appear at the traverse hearing, the court was entitled to conclude that defendant's decision not to call his mother as a witness was tactical rather than based on an inability to procure her testimony.

No appeal lies from the court's July 3, 2024 order, which merely denied defendant's original CPLR 4404 (b) motion without prejudice solely because he failed to submit his papers in proper form (see *AMK Capital Corp. v CIFRE Realty Corp.*, 212 AD3d 402, 402 [1st Dept 2023]).

We have considered defendant's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

4 In the Matter of D.B. and Others, Children Alleged to be Abused and/or Neglected. N.B., Appellant; Administration for Children's Services, Respondent. [248 NYS3d 48]—

Parent, Child and Family—Abused or Neglected Child—Intentional Scalding of Child—Failure to Seek Immediate Medical Attention

Parent, Child and Family—Abused or Neglected Child—Motion to Vacate Abuse or Neglect Finding

Order, Family Court, Bronx County (E. Grace Park, J.), entered on or about October 23, 2024, insofar as it denied respondent mother's motion for an order modifying an order of disposition, entered on or about May 25, 2023, to provide for a suspended judgment and to vacate the orders finding that she abused the subject child, her then 11-year-old son, and derivatively neglected the other three subject children, entered on or about April 20, 2023, and to dismiss the petitions, unanimously affirmed, without costs.

In April 2023, on consent of all parties, Family Court entered a finding that the mother abused her then 11-year-old child when she intentionally dumped extremely hot water on him causing third-degree burns covering a significant portion of the left side of his torso, as well as his back. The mother failed to seek immediate medical attention for the child and waited three days before taking him to the hospital. The court also determined that the other three children had been derivatively neglected by the mother.

Family Court may modify a dispositional order and vacate an abuse or neglect finding for good cause shown, and any modified order must be consistent with the best interests of the children (*see Matter of Tsoede L. [Kinisha B.]*, 198 AD3d 509, 510 [1st Dept 2021]). Here, Family Court providently exercised its discretion in denying the mother's post-dispositional motion to modify its May 25, 2023 dispositional order and its April 20, 2023 order of fact-finding (*see id.*; *cf. Matter of Leenasia C. [Lamarria C.]*, 154 AD3d 1, 6-7 [1st Dept 2017]).

Family Court properly considered the serious nature of the incident, which resulted in the child sustaining third-degree burns, as well as the inadequacy of the mother's expressions of contrition, which failed to acknowledge the severity of her conduct and the resulting injuries. Although the mother has complied with services, the record demonstrates that she continues to lack insight into the seriousness of the child's injuries and has failed to show remorse for her actions. In fact, throughout the pendency of the Family Court Act article 10 proceeding, the court observed that the mother appeared to be annoyed and inconvenienced with the court's involvement with her family. The fact that the injuries resulted from a single incident does not diminish the seriousness of the mother's conduct. Under these circumstances, the mother failed to demonstrate good cause to modify the orders of fact-finding and disposition so as to grant her a suspended judgment and vacate the findings of abuse and neglect against her (*see Matter of Tsoede L.*, 198 AD3d at 510; Family Ct Act § 1061). Nor did the mother demonstrate that the requested relief was in the best interests of the children (*see Matter of Jensli C. [Orlenis C.]*, 182 AD3d 415, 416 [1st Dept 2020]). Furthermore, the mother never requested an evidentiary hearing, nor was one warranted (*see Matter of Leilany R. [Kicha C.]*, 172 AD3d 656, 657 [1st Dept 2019]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ.

5 Linda Berk, Appellant, v Riverbay Corporation et al., Respondents. [250 NYS3d 520]—

Disclosure—Material Exempt from Disclosure—Attorney-Client Privilege—Report Containing Legal Advice and Policy Recommendations

Disclosure—Material Exempt from Disclosure—Attorney-Client Privilege—Waiver of Privilege—Disclosure of Report during Closed Board Meeting

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered December 23, 2024, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to compel disclosure of an investigation report (the Report) prepared by general counsel of defendant Riverbay Corporation

(Riverbay), granted Riverbay's cross-motion for a protective order, and sealed the Report, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion by concluding, after reviewing a partial copy of the Report submitted by plaintiff, that the Report was privileged and immune from disclosure (CPLR 3101 [b], [c]; *see Smith v Ford Found.*, 231 AD2d 456, 456 [1st Dept 1996]). The Report was prepared by Riverbay's general counsel after an investigation into allegations made against plaintiff, who was the president of the Board of Directors at the time, and the Report contained legal advice intended to minimize Riverbay's potential liability as well as recommendations for policy changes to prevent similar issues arising in the future (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 379-380 [1991]; *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 [1st Dept 2005]). Although the Report included general counsel's factual findings, the "facts were selected and presented in the [Report] as the foundation for the law firm's legal advice, and . . . the communication was primarily and predominantly of a legal character" (*Spectrum*, 78 NY2d at 379).

Riverbay did not waive any privilege by disclosing the Report during a closed Executive Board meeting where the only individuals present were Riverbay Board members and attorneys representing general counsel and the copies of the Report were collected at the end of the meeting (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]). Plaintiff, as the former president of the Board, is not entitled to waive Riverbay's privilege (*see People v Greenberg*, 50 AD3d 195, 201-202 [1st Dept 2008], *lv dismissed* 10 NY3d 894 [2008]; *see also Barasch v Williams Real Estate Co., Inc.*, 104 AD3d 490, 492 [1st Dept 2013]). Moreover, Riverbay did not place the Report "at issue" in this litigation, as Riverbay has not raised any defense relying on the Report or on general counsel's advice, and application of the privilege does not deprive plaintiff of essential information (*see U.S. Bank N.A. v Lightstone Holdings LLC*, 196 AD3d 445, 447-448 [1st Dept 2021], *lv denied* 38 NY3d 913 [2022]; *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63-64 [1st Dept 2007]).

Under these circumstances, the court properly denied plaintiff's motion to compel disclosure, granted Riverbay's application for a protective order (*see generally* CPLR 3103; *Spectrum*, 78 NY2d at 374-375; *Matter of Peerenboom v Marvel*

Entertainment, LLC, 160 AD3d 439, 440 [1st Dept 2018]), and sealed the filed copy of the Report, “upon a written finding of good cause” (Uniform Rules for Trial Cts [22 NYCRR] § 216.1 [a]; see *Maxim Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O’Neill Levy, JJ.

6 Gabriella Borukhov, Appellant, v Roth & Khalife, LLP, et al., Respondents. [247 NYS3d 382]—

Attorney and Client—Malpractice—Proximate Cause—Failure to Research Personal Injury Verdicts

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered October 7, 2024, which granted defendants’ motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff failed to state a cause of action for legal malpractice, as she failed to adequately plead that but for counsel’s alleged malpractice, she would not have sustained some actual, ascertainable damages (CPLR 3211 [a] [7]; see *Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]). Plaintiff avers in the complaint that her counsel failed to properly research personal injury verdicts obtained in Florida, and that as a result, he failed to advise her that pursuing litigation in Florida could result in a far larger monetary award than the \$400,000 settlement she received after mediation in New York. These averments are not sufficiently specific to support a finding that but for counsel’s alleged negligence, plaintiff would have obtained a more favorable result (*cf. Federal Ins. Co. v Lester Schwab Katz & Dwyer, LLP*, 211 AD3d 527, 527 [1st Dept 2022]). Rather, they amount to purely speculative and conclusory allegations of damages, which cannot form the basis for a legal malpractice claim (see *Gopstein v Bellinson Law, LLC*, 227 AD3d 465, 466 [1st Dept 2024]; *Pellegrino*, 291 AD2d at 63).

We have considered plaintiff’s remaining arguments and find them unavailing. Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O’Neill Levy, JJ.

7 Rafael Brito, Respondent, v City of New York et al., Appellants. GTL Construction, LLC, Defendant/Third-Party Plaintiff-Appellant, v JLM Decorating, Inc., Third-Party Defendant-Appellant. [248 NYS3d 54]—

**Labor—Safe Place to Work—Elevation-Related Hazard—Fall from Ladder—Sudden Shift during Descent
Evidence—Hospital Records—Uncertified Record**

Order, Supreme Court, New York County (Lori S. Satler, J.),

entered on or about May 9, 2024, which, to the extent appealed, granted plaintiff partial summary judgment on his claim pursuant to Labor Law § 240 (1), unanimously affirmed, without costs.

Plaintiff made a prima facie showing of entitlement to summary judgment on his Labor Law § 240 (1) claim by presenting his uncontroverted testimony that a ladder he was using to paint a ceiling suddenly shifted to the right as he was descending from it, causing him to lose his balance and fall off the ladder to the left (*see Duran v ERY Retail Podium LLC*, 238 AD3d 665, 665 [1st Dept 2025]; *Suazo v 501 Madison-Sutton LLC*, 235 AD3d 513, 513 [1st Dept 2025]). That plaintiff may have inspected the ladder before he used it and found no problems with it is irrelevant to whether he is entitled to recover under the statute (*see Pinzon v Royal Charter Props., Inc.*, 211 AD3d 442, 443 [1st Dept 2022]).

Defendants failed to raise an issue of fact as to whether the ladder was adequate or whether plaintiff's own conduct was the sole proximate cause of the accident (*see Duran*, 238 AD3d at 665). Defendants' claim that plaintiff did not fall due to a wobbly ladder, but rather because he missed a step as he was climbing down, is supported only by a single-page computer printout from plaintiff's emergency room medical chart, which suffers from a number of evidentiary maladies. First, the record is uncertified (*see Ging v F.J. Sciame Constr. Co., Inc.*, 193 AD3d 415, 417 [1st Dept 2021]). Further, the medical record does not qualify for the business record exception to the hearsay rule because the cause of plaintiff's injury was not germane to his diagnosis or treatment (*see Quispe v Lemle & Wolff, Inc.*, 266 AD2d 95, 96 [1st Dept 1999]), and there is no indication that the statement, if it was in fact given by plaintiff, a non-English speaker, was accurately translated (*see Lourenco v City of New York*, 228 AD3d 577, 581-582 [1st Dept 2024]). Contrary to defendants' arguments, any inconsistencies in plaintiff's testimony regarding unrelated matters do not serve to bolster the medical record since the inconsistencies were minor, caused by plaintiff's misunderstanding of some of the questions and problems with the translation, and ultimately clarified.

To the extent defendants attempt to argue that plaintiff was the sole proximate cause of the accident because he did not search out a safety device better suited to the task, such as a baker scaffold, we note that his own foreman set up the ladder and that, in any event, there is no evidence that there were scaffolds available on the job site for his use, or that he knew

he should use them or where he could find them (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ.

8 In the Matter of K.C., a Child Alleged to be Permanently Neglected. Catholic Guardian Services, Respondent; K.M., Appellant. [251 NYS3d 50]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Default Judgment—Reasonable Excuse

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Diligent Efforts by Agency

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Failure to Plan for Child's Future

Order, Family Court, Bronx County (Alison M. Hamanjian, J.), entered on or about June 16, 2025, which denied respondent mother's motion to vacate an order of fact-finding and disposition, same court (Sarah P. Cooper, J.), entered on or about June 5, 2024, upon her default, which, upon a finding of permanent neglect after an inquest, terminated respondent's parental rights to the child, and committed his guardianship and custody to The Commissioner of the Administration of Children Services of the City of New York and petitioner Catholic Guardian Services (the agency) for the purpose of adoption, unanimously affirmed, without costs.

Family Court providently exercised its discretion in denying the mother's motion to vacate her default (*see Matter of Noah Martin Benjamin L. [Frajon B.]*, 139 AD3d 593, 593 [1st Dept 2016]). The mother did not explain why she failed to appear at the fact-finding hearing commenced on May 16, 2024 despite having notice of the hearing, and her explanation that she did not appear on June 3, 2024, because she "overslept" and was "extremely scared" of encountering the child's paternal great aunt was not a reasonable excuse for her default. Even accepting that she feared for her safety, the mother offered no evidence that she made any effort to apprise her counsel, the agency, the attorney for the child, or Family Court of her concerns before she defaulted (*see Matter of Octavia Loretta R. [Randy McN.—Keisha W.]*, 93 AD3d 537, 538 [1st Dept 2012]). Furthermore, the mother failed to explain why it took over two months to contact her attorney to attempt to vacate her default (*see Matter of Paul G.D.H. [Yvonne H.]*, 147 AD3d 699, 699 [1st Dept 2017]).

Because the mother failed to proffer a reasonable excuse for her default, this Court need not determine whether she has a meritorious defense (*see Matter of Serenity Victoria M. [Allison B.]*, 150 AD3d 486, 486 [1st Dept 2017]). In any event, clear

and convincing evidence supports the conclusion that the mother permanently neglected the child despite the agency's diligent efforts to assist her in reunifying with the child (*see* Social Services Law § 384-b [3] [g] [i]; [7] [a]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]). These efforts included encouraging the mother to maintain contact with the agency and regularly visit the child, scheduling regular visitation, repeatedly explaining the importance of complying with her service plan, and providing her with carfare to travel to and from her drug screenings (*see* Social Services Law § 384-b [7] [f]; *Matter of Essence T.W. [Destinee R.W.]*, 139 AD3d 403, 404 [1st Dept 2016]; *Matter of Shaianna Mae F. [Tsipora S.]*, 69 AD3d 437, 437 [1st Dept 2010]).

The mother failed to controvert the allegation of permanent neglect by showing that she complied with her service plan, consistently visited the child within the relevant one-year period, and was able to provide proper and adequate care for the child presently and in the foreseeable future (*see Matter of Christopher James A. [Anne Elizabeth Pierre L.]*, 90 AD3d 515, 515 [1st Dept 2011], *lv dismissed* 18 NY3d 918 [2012]). Notably, the mother refused to follow up on the agency's referrals to Safe Horizon when she reported the father's domestic violence.

The case planner's testimony that the mother visited the child twice out of the 52 scheduled visits between February 2022 and March 2023 was supported by the agency's progress notes and was sufficient to establish the mother's failure to regularly visit the child, thus failing to plan for the child's future (*see Matter of Christian D. [Marian R.]*, 157 AD3d 599, 599-600 [1st Dept 2018], *lv denied* 31 NY3d 904 [2018]). The court also properly drew a negative inference against the mother for failing to testify (*see Matter of Alaura C.N. [Iyonna P.]*, 214 AD3d 539, 540 [1st Dept 2023]).

A preponderance of the evidence supports the determination that it was in the child's best interest to terminate the mother's parental rights, as he was being well cared for in a preadoptive foster home where his special needs were being met (*see Matter of Michael P.*, 165 AD3d 497, 498 [1st Dept 2018], *lv dismissed* 32 NY3d 1135 [2019]). Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

9 CS Leveraged Loan Funding 2021 LLC et al., Plaintiffs/Counterclaim Defendants-Appellants, v Bank of America, N.A., Defendant/Counterclaim Plaintiff-Respondent. [250 NYS3d 60]—

Contracts—Breach or Performance of Contract—Loan Acquisition—Oral Agreement

Judgment, Supreme Court, New York County (Andrew Borrok, J.), entered June 16, 2025, awarding defendant/counterclaim plaintiff Bank of America (BoFA) the total amount of \$11,342,583.88, and bringing up for review an order, same court and Justice, entered April 17, 2017, which, to the extent appealed from as limited by the briefs, granted BoFA's motion for summary judgment on its counterclaim for breach of contract as against plaintiffs/counterclaim defendants Black Diamond Capital Management (BDCM) and CS Leveraged Loan Funding 2021 LLC (CSLL) and on its counterclaim for promissory estoppel as against BDCM, unanimously reversed, on the law, with costs, the judgment vacated, the counterclaims for breach of contract and promissory estoppel as against BDCM dismissed, and the matter remanded for further proceedings on the counterclaim for breach of contract as against plaintiff CSLL. Appeal from aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In September 2021, a representative of BDCM contacted a representative of BoFA to inquire about acquiring loans of a nonparty Crown Paper company on the secondary market on behalf of BDCM's managed funds. The two representatives discussed the parameters of the deal in two separate phone calls and ultimately reduced the basic terms of the deal in a September 29, 2021 online discussion via Bloomberg Chat. The trade was later allocated to CSLL, and a trade confirmation was issued in October 2021, with CSLL as buyer and principal and BoFA as seller and principal. However, it later developed that BDCM was on Crown's "disqualified institution" (DQ) list, thus disqualifying it from owning Crown's loans. Therefore, a question arose as to whether CSLL was also a disqualified institution as a result of its affiliation with BDCM. As a result, BoFA took the position that it was not permitted to settle the trade with CSLL. BoFA did not countersign the trade confirmation until September 2022, and soon afterwards, BoFA and the other company debtholders sold the Crown loans, which by that time had dramatically decreased in value, to a third party at approximately 35% of par.

Supreme Court erred in granting summary judgment to BoFA on its breach of contract and promissory estoppel causes of action. The record presents issues of fact regarding the terms of the oral agreement between BDCM and BoFA, as the testimony from BDCM and BoFA's representatives differ sharply about exactly what those parties agreed to as part of BDCM's loan purchase beyond the pricing and amount. For example, al-

though the representatives agreed in their testimony that BDCM had informed BofA that it might be on the DQ list, they dispute precisely what details were discussed and what was agreed to with respect to BDCM's inclusion on the list. Thus, the trade agreement on Bloomberg Chat contained essential ingredients of a binding agreement, but not all of them, and a factfinder must resolve which party's version of the agreement is more persuasive (see *Ostad v Nehmadi*, 167 AD3d 490, 491 [1st Dept 2018]; see also *Highland Capital Mgt., L.P. v Bank of Am., N.A.*, 698 F3d 202, 208 [5th Cir 2012] [interpreting New York law]).

Furthermore, plaintiffs have raised material issues of fact regarding whether BofA was truly unable to settle the trade as contemplated after it learned that BDCM was on the DQ list. The operative credit agreement specifically provides that to be disqualified, an affiliated entity had to be reasonably recognizable from its name as an affiliate of a company on the DQ list; there is no dispute that the CSLL name is not "reasonably recognizable" as BDCM, and in fact is entirely distinct from BDCM. The credit agreement makes no reference to understanding or knowledge of affiliation, but only to name recognition. Similarly, under the circumstances presented, the record presents material issues of fact regarding whether BofA sold the loans in a "mutually agreeable alternative structure or other arrangement that affords the buyer and the seller the economic equivalent of the of the agreed-upon trade," as required by the Loan Syndications and Trading Association's standard terms and conditions. The parties also dispute whether, given the nine-month delay in settlement, the trade was effected "as soon as practicable" as required by the standard terms and conditions, especially considering the decline in the value of the loans in the interim. These are matters that cannot be resolved on summary judgment.

Supreme Court also erred in denying BDCM's motion for summary judgment dismissing the counterclaims as against it. As to the counterclaim for breach of contract, the record shows that after the initial oral agreement was reached, it was modified on consent to substitute CSLL into the trade for BDCM, superseding and extinguishing any prior trade agreement that listed BDCM as the buyer (see *Northville Indus. Corp. v Fort Neck Oil Terms. Corp.*, 100 AD2d 865, 867 [2d Dept 1984], *affd* 64 NY2d 930 [1985]; see also *UBS AG v Highland Capital Mgt. L.P.*, 29 Misc 3d 1230[A], 2010 NY Slip Op 52098[U], *2-3 [Sup Ct, NY County 2010]). As to the counterclaim for promissory estoppel, there exists a potentially valid and enforceable

contract between CSLL and BofA governing the subject matter, thus precluding recovery under a promissory estoppel cause of action (*see Coleman v Kirby*, 201 AD3d 402, 403 [1st Dept 2022]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ.

10 Joel Fisher, Respondent, v Hudson Hall LLC, Doing Business as Mercado Little Spain, et al., Appellants. [247 NYS3d 384]—

**Labor—Hours and Wages—Unpaid Overtime—Sufficiency of Pleading
Labor—Hours and Wages—No Wage Theft Loophole Act—Retroactive Application**

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered April 22, 2025, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant the motion as to plaintiff's Labor Law § 193 claims, individual wage notice claim, and annual wage notice claim, and otherwise affirmed, without costs.

Supreme Court correctly found that plaintiff sufficiently stated a claim for unpaid overtime under the Labor Law. Plaintiff alleges that defendants automatically deducted time for lunch breaks that he was required to work through, engaged in time-shaving, and failed to compensate him for mandatory off-the-clock work and work-related activities. Although the complaint omitted specific Labor Law sections, the complaint's detailed allegations satisfied the pleading requirements of CPLR 3013 (*see Kirby v Carlo's Bakery 42nd & 8th LLC*, 212 AD3d 441, 442 [1st Dept 2023]; *see also Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448, 453 [2014]).

Prior to the enactment of the No Wage Theft Loophole Act, this Court held that "a wholesale withholding of payment is not a 'deduction' within the meaning of Labor Law § 193" (*Perella Weinberg Partners LLC v Kramer*, 153 AD3d 443, 449 [1st Dept 2017]). It is undisputed that plaintiff's claims arose before the enactment of the Act. Contrary to plaintiff's contention, the Act does not apply retroactively (*see Frances v Klein*, 231 AD3d 535, 536 [1st Dept 2024]). Plaintiff also has no separate cause of action under Labor Law § 198 (3) (*see id.*).

Plaintiff has abandoned his individual wage notice claim and annual wage notice claim (*see Spiegel v 226 Realty LLC*, 231 AD3d 562, 565 [1st Dept 2024]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ.

11 Flexjet LLC, Respondent, v Honeywell International Inc., Appellant. [248 NYS3d 50]—An appeal having been taken to this

Court by the above-named appellant from an order of the Supreme Court, New York County (Andrew Borrok, J.), entered on or about December 12, 2024, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 20, 2026, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Manzanet-Daniels, J.P., Gesmer, González, Shulman, O'Neill Levy, JJ.

12 Javon Gordon et al., Respondents, v Triumph Construction Corp., Appellant, et al., Defendants. [248 NYS3d 55]—

Administrative Law—Failure to Exhaust Administrative Remedies—Workers Employed Pursuant to Public Works Contracts

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on November 27, 2024, which denied defendant Triumph Construction Corp.'s motion pursuant to CPLR 3211 (a) (7) to dismiss plaintiffs' first cause of action for breach of contract, unanimously affirmed, with costs.

The motion court correctly denied Triumph's motion to dismiss. As workers employed pursuant to public works contracts, plaintiffs have both an administrative remedy under Labor Law § 220 (3) (a) and a third-party right to assert a breach of contract claim for underpayment against the general contractor (*see Wroble v Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C.*, 166 AD3d 520, 521 [1st Dept 2018]; *Santana v San Mateo Constr. Corp.*, 234 AD3d 562, 563 [1st Dept 2025]). Thus, exhaustion of administrative remedies is not required (*see also Nawrocki v Proto Constr. & Dev. Corp.*, 82 AD3d 534, 536 [1st Dept 2011]). *Van Osten v Huicatao Corp.* (2024 NY Slip Op 34728[U] [Sup Ct, Queens County 2024]) is nonbinding and does not warrant a different result (*see McMillan v Out-Look Safety LLC*, 241 AD3d 1162, 1162 [1st Dept 2025]; *see also Herman v Judlau Contr., Inc.*, 243 AD3d 441, 442 [1st Dept 2025]). Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

13 Shakhriyor Khusenov, Respondent, v Dilorom Tursunova, Appellant. [251 NYS3d 53]—

**Judgments—Vacatur of Judgment—Lack of Personal Jurisdiction—No Time Limit on Motion
Courts—Jurisdiction—No Proof of Personal Jurisdiction—Failure to Submit Affidavit of Service
Pleading—Affirmative Defense—Waiver—Personal Jurisdiction**

Supplemental order, Supreme Court, New York County (Mi-

chael L. Katz, J.), entered on or about October 11, 2024, which denied defendant wife's motion to vacate a 2014 judgment of divorce, unanimously reversed, on the law, without costs, the motion to vacate granted and the judgment of divorce vacated, and the matter remanded for further proceedings, including as related to the wife's application for attorneys' fees pursuant to 22 NYCRR 130-1.1.

Although not raised before Supreme Court, we may review the wife's argument that the purported judgment of divorce is void for lack of personal jurisdiction, since she does not allege new facts but rather raises a new legal argument, which appears upon the face of the record and could not have been avoided if brought to plaintiff husband's attention at the proper juncture (*see Augustin v Augustin*, 79 AD3d 651, 652 [1st Dept 2010]). Further, any argument that the wife waited too long to vacate the judgment for lack of personal jurisdiction is unavailing, as there is no time limitation on such a motion (*see Caba v Rai*, 63 AD3d 578, 580 [1st Dept 2009]).

The husband had the burden of demonstrating that the court acquired personal jurisdiction over the wife (*see Leili v Romanello*, 223 AD3d 621, 621 [1st Dept 2024]; *Wells Fargo Bank, N.A. v Decesare*, 154 AD3d 717, 717 [2d Dept 2017]). We conclude that he failed to satisfy this burden, rendering the purported judgment a nullity (*see Matter of John F.B. v Maria U.*, 244 AD3d 533 [1st Dept 2025]; *Shaw v Shaw*, 97 AD2d 403, 404 [2d Dept 1983]). The husband did not submit an affidavit of service, and the wife, whose testimony on the issue was credited by the motion court, testified that she was never served with any documents pertaining to the divorce action. Although the husband initially claimed that the wife was served by the paralegal he hired to prepare the divorce paperwork, he later stated that he did not understand what an affidavit of service was and confirmed that he never took any steps to have the wife served with the summons. The only document in the record alluding to service of the summons on the wife is an "affidavit" of the wife, purportedly filed in the divorce action, which the motion court found to have been forged. That the wife may have become aware of the divorce judgment several years after it was entered is irrelevant to the issue of jurisdiction since compliance with the statutorily prescribed methods of service of process is of paramount concern (*see Raschel v Rish*, 69 NY2d 694, 697 [1986]; *see also Matter of E.R. v S.C.*, 222 AD3d 452, 453 [1st Dept 2023]).

The husband's argument that the wife effectively ratified the judgment of divorce through a course of conduct is unavailing.

This Court has held that the proper approach for determining whether a defendant has waived a personal jurisdiction defense is to consider whether the defendant's conduct amounts to an intentional relinquishment of a known right and requires "some affirmative action evincing the intent to accept a judgment's validity" (*Esgro Capital Mgt., LLC v Banks*, 222 AD3d 433, 433 [1st Dept 2023]). Applying that standard, there is no evidence in the record that the wife acquiesced to the purported judgment of divorce. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

14 Ricky Medina, Respondent, v Delta Airlines, Inc., et al., Appellants. (And a Third-Party Action.) [247 NYS3d 386]—An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Shawn Timothy Kelly, J.), entered on or about January 28, 2025, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 29, 2026, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

15 In the Matter of New York City Transit Authority, Respondent, v Local 100, Transport Workers Union, Appellant. [248 NYS3d 59]—

Arbitration—Collective Bargaining Agreement—Award in Excess of Arbitrator's Powers—Implicit Addition of New Contract Term

Order, Supreme Court, New York County (Jeffrey H. Pearlman, J.), entered March 4, 2025, which granted the petition pursuant to CPLR article 75 to vacate an arbitration award and denied the grievance, unanimously affirmed, without costs.

Arbitrators exceed their power within the meaning of CPLR article 75 when they issue an award that "violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*American Intl. Specialty Lines Ins. Co. v Allied Capital Corp.*, 35 NY3d 64, 70 [2020]; see also *Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO [New York State Dept. of Corr. & Community Supervision]*, 200 AD3d 1454, 1455 [3d Dept 2021]).

Supreme Court correctly determined that the arbitrator exceeded his authority by rewriting the parties' collective bargaining agreement when he implicitly added a new term, one that was expressly prohibited by the terms of the contract

(see *Matter of City of New York v District Council 37*, 161 AD3d 435, 435-436 [1st Dept 2018]; see also *Matter of Civil Serv. Empls. Assn., Inc., Local 1000*, 200 AD3d at 1455-1456). Specifically, the arbitrator found that Section 2.1 (C) (8) (D) of the contract required petitioner New York City Transit Authority (NYCTA) to schedule a hearing for an employee on pre-disciplinary suspension status within 30 “calendar days” before returning that employee to payroll. This modification of the contract ignored Section 2.1 (E) (5), which provides that in computing the time within which any action must be taken Saturdays, Sundays, and holidays “shall not be counted except where otherwise specified.” Because Section 2.1 (C) (8) (D) states that employees on pre-disciplinary suspension status must be restored to the payroll after “thirty (30) days,” as opposed to “30 calendar days,” non-working days—i.e. Saturdays, Sundays, and holidays—are excluded under Section 2.1 (E) (5).

Moreover, the arbitrator’s interpretation impermissibly rewrote the contract by further limiting the amount of time that NYCTA had to schedule a hearing before returning an employee on pre-disciplinary suspension to the payroll (see *District Council 37*, 161 AD3d at 435; see also *Matter of City of New York v Davis*, 146 AD2d 480, 482-483 [1st Dept 1989]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O’Neill Levy, JJ.

16 In the *Matter of Park Row 23 Owners LLC*, Appellant, v Jacques Jiha, Respondent. [247 NYS3d 387]—

Taxation—Exemptions—Real Property—Industrial and Commercial Abatement Program

Judgment (denominated an order), Supreme Court, New York County (Kathleen Waterman-Marshall, J.), entered on or about July 15, 2024, which denied the petition seeking to vacate or annul an April 5, 2019 determination of respondent Jacques Jiha, as Commissioner of the New York City Department of Finance (DOF), that petitioner’s real property was not eligible for Industrial and Commercial Abatement Program (ICAP) benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Statutes setting forth tax exclusions are construed in favor of the taxing authority (see *Matter of Mobil Oil Corp. v Finance Adm’r of City of N.Y.*, 58 NY2d 95, 99 [1983]). “An exemption from taxation must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption” (see *Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975] [internal quotation marks

omitted]). Thus, to challenge the DOF determination, “[petitioner]’s interpretation of the statute must not simply be plausible, it must be the only reasonable construction” (see *Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 582 [2006] [internal quotation marks omitted]).

RPTL 489-bbbbbb (3) (f) (iii) (A), the section of the statute setting forth the special eligibility requirement (SER) for qualification under ICAP, does not define the term “building or structure.” We find that DOF’s interpretation of the term as referring to an entire building, and not, as petitioner contends, to just the commercial portion or to individual tax lots the building is located on, is reasonable and may not be disturbed (see *Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578 at 582). Accordingly, DOF had a rational basis for denying the application, since petitioner failed to meet the requirements of the SER under DOF’s interpretation.

We reject petitioner’s argument that DOF should be equitably estopped from denying its application, since estoppel may not be used to ratify administrative error (see *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988]). This is especially so here, where petitioner is a sophisticated party and, with reasonable due diligence, could have ascertained that the DOF representative, whose emails to petitioner’s representative were facially vague and confusing, was not setting forth a reliable opinion (see *id.*). Concur—Moulton, J.P., Friedman, Higgitt, O’Neill Levy, JJ.

17 The People of the State of New York, Respondent, v Christian Cruz, Appellant. [247 NYS3d 385]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ellen N. Biben, J.), rendered November 13, 2019, 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. Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O’Neill Levy, JJ.

18 The People of the State of New York, Respondent, v Esteban DeJesus, Appellant. [247 NYS3d 383]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Tara Collins, J.), rendered December 2, 2021, 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. Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O’Neill Levy, JJ.

19 The People of the State of New York, Respondent, v Ivan Rodriguez, Appellant. [248 NYS3d 49]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered January 4, 2024, 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. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

20 The People of the State of New York, Respondent, v Jennifer Berry, Appellant. [247 NYS3d 389]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered December 14, 2017, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

21 The People of the State of New York, Respondent, v Jermaine Jacobs, Appellant. [248 NYS3d 200]—Judgment, Supreme Court, Bronx County (Guy H. Mitchell, J., on motion to dismiss; Albert Lorenzo, J., at plea and sentencing), rendered June 14, 2023, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to five years of probation, unanimously affirmed.

Defendant’s appeal waiver, if valid, would not foreclose from review his Second Amendment claim (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). Additionally, defendant has standing to raise his challenge to the constitutionality of New York’s firearm licensing scheme, notwithstanding that he never applied to obtain a firearm license (*see Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *3). On the merits, defendant has failed to establish that the instant indictment is unconstitutional under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]).

To the extent that defendant challenges the “good moral character” provision in Penal Law § 400.00 (1) (b), his arguments are unpreserved because he failed to raise them in his motion to dismiss the indictment (*see People v Cabrera*, 41

NY3d 35, 42-51 [2023]), and we decline to review them in the interest of justice.

Defendant's contention that his counsel rendered ineffective assistance in challenging New York's then-former proper-cause requirement, rather than raising his challenge to the "good moral character" provision, is improperly raised for the first time in his reply brief (*see People v Douglas*, 193 AD3d 622, 622 [1st Dept 2021], *affd* 40 NY3d 385 [2023]), and in any event, this claim "is unreviewable on direct appeal, as it involves matters not reflected in the record, and must be raised in a CPL 440.10 motion" (*People v Gray*, 230 AD3d 1039, 1039 [1st Dept 2024], *lv denied* 42 NY3d 1035 [2024]). As an alternative holding, to the extent that the record allows review, we find that counsel did not render ineffective assistance (*see People v Caban*, 5 NY3d 143, 152 [2005]). Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ.

22 The People of the State of New York, Respondent, v Jose Santos, Appellant. [248 NYS3d 59]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Timothy W. Lewis, J.), rendered August 23, 2023, 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. Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ.

23 The People of the State of New York, Respondent, v Markiem Black, Appellant. [247 NYS3d 383]—

Crimes—Indictment—Validity of Waiver—Oral Agreement at Virtual Appearance—Court Initialed Waiver on Defendant's Behalf

Judgment, Supreme Court, Bronx County (Jeffrey Rosenbluth, J.), rendered August 17, 2021, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to five-year term of probation, unanimously reversed, on the law, the plea vacated, the Superior Court Information dismissed, and the case remanded for further proceedings on the felony complaint.

Article I, § 6 of the New York State Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury." The Constitution further provides that a defendant may waive prosecution by indictment, as long as the waiver is "evidenced by written instrument signed by the defendant in open

court in the presence of his or her counsel” (*id.*), and CPL 195.20 (a)-(d) codifies the procedure for waiving indictment. Court of Appeals’ precedent “makes clear that the parties must comply with the constitutional and statutory requirements relating to waiver of indictment” (*People v Pierce*, 14 NY3d 564, 570 [2010]). “Compliance with the constitutionally-specified waiver mechanism establishes the prima facie validity of the waiver of the right to prosecution by indictment” (*People v Myers*, 32 NY3d 18, 23 [2018]).

During the Covid-19 pandemic, defendant orally agreed at a virtual appearance to waive indictment and be prosecuted by the SCI charging him with fifth-degree drug possession, technical issues prevented him from signing the waiver and the court initialed the waiver on defendant’s behalf. As the People concede, the court’s initials on the waiver did not satisfy the constitutional and statutory requirement that defendant sign the waiver in open court (*see Myers*, 32 NY3d at 23; *People v Eulo*, 156 AD3d 720, 721 [2d Dept 2017]). Thus, the waiver of indictment was jurisdictionally defective, and defendant’s guilty plea must be vacated, the SCI dismissed, and the case remanded for further proceedings on the felony complaint (*see People v Zanghi*, 79 NY2d 815, 816 [1991]). Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

24 The People of the State of New York, Respondent, v Paulino Camacho, Appellant. [247 NYS3d 385]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure Declined

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about December 14, 2023, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]; *see also People v Lafrem*, 242 AD3d 644, 644 [1st Dept 2025] [*“Gillotti analysis . . . applies in full regardless of the applicability of an override”*]). Defendant has an extensive criminal history, including numerous sex offenses. He was adjudicated a level three offender based on an override, and there were no mitigating factors that were not adequately taken into account by the guidelines or outweighed by the seriousness of the underlying crime. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

25 The People of the State of New York, Respondent, v Roberson Ortiz, Appellant. [248 NYS3d 56]—

Crimes—Appeal—Valid Waiver**Crimes—Sentence—Probation—Curfew—Crime Took Place at Night**

Judgment, Supreme Court, Bronx County (Jeffrey Rosenbluth, J.), rendered May 29, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a firearm, and sentencing him to three years of probation, unanimously modified, on the law, to the extent of striking the conditions of probation requiring him to pay the surcharge and fees imposed at sentencing, and to submit to testing for alcohol and illegal substances if directed by the Department of Probation, and otherwise affirmed.

Defendant validly waived his right of appeal, which tracked the Model Colloquy endorsed in *People v Thomas* (34 NY3d 545, 567 [2019], *cert denied* 589 US 1302 [2020]). A written waiver supplemented defendant's oral waiver by reiterating the explanation of the waiver of appeal the court provided during the colloquy (*see People v Johnson*, 234 AD3d 503, 503 [1st Dept 2025], *lv denied* 43 NY3d 1009 [2025]). "The language in the colloquy and the written waiver did not suggest that defendant waived his right to appellate counsel" (*People v Rosario*, 242 AD3d 527, 527 [1st Dept 2025]). Nor did the court instruct defendant that the waiver was required as part of the plea process.

Defendant's valid waiver forecloses review of his excessive sentence claim (*People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]). In any event, we perceive no basis for reducing defendant's sentence. The valid waiver also forecloses review of his constitutional as-applied challenge to condition seven under the First, Fifth, and Fourteenth Amendments (*id.*; *see also People v Lombard*, 241 AD3d 1126, 1126 [1st Dept 2025]). To the extent that defendant asserts facial constitutional challenges, his claims survive his appeal waiver (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). However, all of defendant's constitutional challenges are unpreserved (*see People v Cabrera*, 41 NY3d 35, 42 [2023]), and we decline to review them in the interest of justice.

Defendant's non-constitutional challenges to his probation conditions do not require preservation because the "issue implicates the legality of the sentence imposed" (*People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]). At the time of his arrest, defendant, who was acting in concert with an unapprehended person, possessed a loaded firearm. Accordingly, the sentencing court providently deemed it "reasonably necessary" to order defendant to "avoid injurious

or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people” “to insure that the defendant will lead a law-abiding life or assist him to do so” (*Lowndes*, 239 AD3d at 575; *see also* Penal Law § 65.10 [1], [2]). Given that defendant’s crime took place at night, the court also providently deemed it necessary to order defendant to submit to a curfew if directed to do so by the Department of Probation. Under the circumstances, imposition of a curfew was “appropriate to ameliorate the conduct which gave rise to the offense” and “to prevent” defendant’s incarceration (Penal Law § 65.10 [5]).

We strike the condition ordering defendant to submit to testing for alcohol and illegal substances. There was “no evidence that defendant was under the influence of alcohol or drugs when he committed the offense” (*People v Saraceni*, 153 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]).

Under “the particular circumstances of [this] case” (*People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]), requiring payment of the surcharge and fees is not “reasonably related to [defendant’s] rehabilitation” (Penal Law § 65.10 [2] [I]). Defendant is indigent and unemployed (*see Percy*, 234 AD3d at 620). Accordingly, that condition is stricken. We note that the People do not oppose this relief. Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O’Neill Levy, JJ.

26 The People of the State of New York, Respondent, v Stephen Jackson, Also Known as Faris Matiyin, Appellant. [247 NYS3d 388]—

Crimes—Sex Offenders—Sex Offender Registration Act—Modification

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about September 24, 2021, which denied defendant’s Correction Law § 168-o (2) petition to modify his sex offender classification, unanimously affirmed, without costs.

The court providently exercised its discretion in denying a modification of defendant’s level three classification. Defendant failed to establish by clear and convincing evidence a basis for a modification (*see People v Lashway*, 25 NY3d 478, 483 [2015]). Defendant’s law abiding life since his release and the maximum expiration of his period of parole supervision, and his more than 12 years in the community unsupervised and without reoffense, do not outweigh the seriousness of the underlying sex crime committed against a child (*see People v Harper*, 176 AD3d 592, 592 [1st Dept 2019], *lv denied* 35 NY3d 902 [2020]; *People v Cabrera*, 91 AD3d 479, 480 [1st Dept 2012], *lv denied* 19 NY3d 801 [2012]). Moreover, defendant failed to satisfy his

burden of demonstrating that his advancing age or medical diagnoses reduced his specific risk of reoffending (*see People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]; *People v Portalatin*, 145 AD3d 463, 464 [1st Dept 2016]). Defendant also failed to submit any proof that he had completed sex offender treatment, and the record is devoid of any indications that he has accepted responsibility for his conduct (*see People v Shaljamin*, 164 AD3d 1169, 1169 [1st Dept 2018]; *People v Johnson*, 124 AD3d 495, 496 [1st Dept 2015]).

Although defendant challenges the adequacy of the court's findings, remand is unnecessary because the record is sufficient for this Court to make its own findings (*see People v Rosario*, 227 AD3d 416, 416 [1st Dept 2024], *lv denied* 42 NY3d 907 [2024]). Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

27 The People of the State of New York, Respondent, v Tyrone Brown, Appellant. [247 NYS3d 386]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Curtis Farber, J.), rendered May 23, 2022, 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. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

28 Juan Siguencia, Respondent, v The Hudson Companies Incorporated et al., Respondents-Appellants. The Hudson Companies Incorporated et al., Third-Party Plaintiffs-Respondents-Appellants, v New York Hoist, LLC, et al., Third-Party Defendants-Appellants-Respondents. The Hudson Companies Incorporated et al., Second Third-Party Plaintiffs-Respondents-Appellants, v B&V Contracting Enterprises Inc., Second Third-Party Defendant-Respondent. [251 NYS3d 55]—

Labor—Safe Place to Work—Elevation-Related Hazard—Falling Unsecured Doorframes

Indemnity—Contractual Indemnification—Worksite Injury

Order, Supreme Court, New York County (Nicholas W. Moyne, J.), entered October 2, 2024, which granted plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claim as against defendants Athena Housing Associates, LLC and Bruno Frustaci Contracting Inc. (collectively, owner/GC), and denied the motion of third-party defendants New York Hoist, LLC and NYC Crane Hoist & Rigging, LLC (col-

lectively Hoist/Crane) for summary judgment dismissing all claims and cross-claims against them and on their cross-claim against second third-party defendant B&V Contracting Enterprises Inc. for common-law indemnification and/or contribution, unanimously modified, on the law, to grant Hoist/Crane's motion for summary judgment dismissing all claims and cross-claims against them, and otherwise affirmed, without costs.

Plaintiff established *prima facie* entitlement to summary judgment on his Labor Law § 240 (1) claim against owner/GC. Plaintiff's evidence established that he was working in a crouched position when he was struck by several 250-pound, 9 feet tall doorframes with significant gravitational force as they toppled onto him from where they leaned unsecured against a wall (*see Argueta v 39 W 23rd St. LLC*, 236 AD3d 564, 565 [1st Dept 2025]; *Diaz v HHC TS Reit LLC*, 193 AD3d 640, 641 [1st Dept 2021]). Plaintiff's testimony was corroborated by other evidence, including the affidavit of Freddy Guartan, a co-worker who witnessed the accident, and the photographs taken by the general contractor's supervisor that showed unsecured, stacked, and leaning doorframes in other areas of the project. The Incident Investigation Report prepared by plaintiff describing the accident gave defendants adequate notice of Guartan's testimony by identifying him as "Freddy G."

In opposition, owner/GC offered no evidence that could give rise to a triable issue as to how plaintiff was injured (*see Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [1st Dept 2008]). Owner/GC's argument that plaintiff was obligated to demonstrate what safety devices enumerated in Labor Law § 240 (1) were required under the circumstances is unavailing (*see Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000]). In any event, plaintiff established that the failure to secure the doorframes at the worksite was a proximate cause of his injuries (*see e.g. Bonaerge v Leighton House Condominium*, 134 AD3d 648, 649 [1st Dept 2015]; *Loaiza v Museum of Arts & Design*, 228 AD3d 511 [1st Dept 2024]).

Hoist/Crane were entitled to summary judgment dismissing all third-party claims and cross-claims asserted against them by owner/GC and B&V. There was no evidence that Hoist/Crane had anything to do with storing the doorframes at the worksite, and owner/GC offered only speculation that Hoist/Crane were somehow responsible for the doorframes' toppling over onto plaintiff. The language in the two indemnification provisions at issue obligate Hoist/Crane to indemnify owner/GC for "any and

all claims . . . arising in whole or in part and in any manner from injury and/or death of person” “caused . . . by” or “resulting from [indemnitors] acts, omission, breach or default” in the performance of the subcontract work. Such language requires a showing of “fault” by the indemnitor in order to trigger the obligation to indemnify (*see Otero v 635 Owner LLC*, 210 AD3d 435, 437-438 [1st Dept 2022]). Thus, Hoist/Crane are entitled to summary judgment dismissing owner/GC’s contractual indemnification claim against them. As to the branch of Hoist/Crane’s motion for summary judgment dismissing owner/GC’s claims for common-law indemnification and contribution, owner/GC have not addressed these arguments, and these claims are deemed abandoned.

As there was no agreement between Hoist/Crane and B&V for contractual indemnity, B&V’s cross-claim against Hoist/Crane for such relief should be dismissed (*see Wunderlich v Turner Constr. Co.*, 147 AD3d 598, 598 [1st Dept 2017]). As for B&V’s common-law indemnity claim against Hoist/Crane, there is nothing in the record tending to show that Hoist/Crane was negligent (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). B&V’s contribution cross-claim against Hoist/Crane should also be dismissed in the absence of evidence of negligence on the part of Hoist/Crane.

In light of the dismissal of all third-party claims and cross-claims against Hoist/Crane, their arguments in support of summary judgment on their common-law indemnification and contribution claims against B&V are academic. Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O’Neill Levy, JJ.

29 Kareem Spence, Respondent, v Brosnan Risk Consultants, Ltd., Respondent. Yvette Walker et al., Nonparty Proposed Intervenor-Appellants. [248 NYS3d 62]—

Parties—Intervention—Challenge to Preliminary Settlement Approval and Class Certification

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about December 17, 2024, which, to the extent appealed from as limited by the briefs, denied proposed intervenors-appellants’ motion to intervene and granted plaintiff’s motion for preliminary settlement approval and class certification, unanimously affirmed, with costs.

Intervention may be sought as of right under CPLR 1012 and by permission under CPLR 1013. However, “[d]istinctions between intervention as of right and discretionary intervention are no longer sharply applied” (*Matter of HSBC Bank U.S.A.*, 135 AD3d 534, 534 [1st Dept 2016], quoting *Yuppie Puppy Pet*

Prods., Inc. v Street Smart Realty, LLC, 77 AD3d 197, 201 [1st Dept 2010]), and “[i]ntervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action” (*Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 201).

The court properly exercised its discretion in denying intervention. First, while the motion to intervene was not untimely insofar as it was made less than three months after plaintiff’s settlement with defendants, granting it would still have delayed resolution pursuant to the negotiated settlement. Supreme Court correctly concluded that proposed intervenors’ challenges to the settlement were based on theories of recovery that are largely speculative. In addition, plaintiff is not obviously adverse to the remainder of the class and has sufficient familiarity with the case, his counsel are experienced class action attorneys who have been involved in similar litigation, and the settlement was a product of a deliberate and fair mediation process that was not the product of collusion (see *Matter of HSBC Bank U.S.A.*, 135 AD3d at 534).

Further, the court appropriately determined that because remedies are available to proposed intervenors, including objecting to or opting out of the settlement, they are not prejudiced by the denial of their motion (see *Yuppie Puppy Pet Prods.*, 77 AD3d at 202 [“the potentially binding nature of the judgment on the proposed intervenor is the most heavily weighted factor in determining whether to permit intervention”]).

We have considered proposed intervenors’ remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

30 *Unitrin Safeguard Insurance Company, Respondent, v* *Ciro Della-Noce, Defendant, and Edward Mosquea et al., Appellants, et al., Defendants.* [248 NYS3d 58]—

Judgments—Default Judgment—Vacatur—Rebuttal of Showing of Proper Service

Process—Service of Process—Nail and Mail Service—Due Diligence—Attempts at Service during Same Time of Day

Order, Supreme Court, New York County (Mary V. Rosado, J.), entered on or about September 20, 2024, which denied the motion of defendants Edward Mosquea and Wandy De La Cruz-Ramos to vacate the default judgment against them, unanimously reversed, on the law, without costs, and the judgment vacated as against both defendants.

Plaintiff made a prima facie showing of entitlement to a

default judgment against Mosquea and De La Cruz-Ramos by submitting the affidavits of service confirming service pursuant to CPLR 308 (2) (see *Caba v Rai*, 63 AD3d 578, 582-583 [1st Dept 2009]). De La Cruz-Ramos rebutted this showing, however, by submitting his own affidavit averring that he had moved from the address where service was made, as well as a lease confirming that he had moved before the date of service (see *Commissioners of State Ins. Fund v Khondoker*, 55 AD3d 525, 526 [2d Dept 2008]). Plaintiff's argument that De La Cruz-Ramos continued to use the address where service was made is unavailing because the evidence is contained in documents created by third parties, rather than by defendant himself, as was the case in situations where relief was granted to plaintiff such as *Sharbat v Law Offs. of Michael B. Wolk, P.C.* (121 AD3d 426, 427 [1st Dept 2014]) and *U.S. Bank Natl. Assn. v Vanvliet* (24 AD3d 906, 908 [3d Dept 2005]). Thus, service upon De La Cruz-Ramos was a nullity, requiring the default judgment as against him to be vacated (see *Feinstein v Bergner*, 48 NY2d 234, 239 [1979] ["dwelling place" and "usual place of abode" not equivalent to "last known residence"]). Because De La Cruz-Ramos was not properly served, there was no need for him to assert a meritorious defense in support of his motion (see *Shaw v Shaw*, 97 AD2d 403, 404 [2d Dept 1983]).

We likewise grant vacatur as to Mosquea. Mosquea contends that the service was defective because the process server did not exercise "due diligence" in seeking to effectuate service on defendant before resorting to nail-and-mail service (CPLR 308 [4]). Generally, a plaintiff can establish diligence by providing an affidavit of service indicating efforts to serve the defendant at her residence on three different occasions, at different times of day (see e.g. *Ayala v Bassett*, 57 AD3d 387, 388 [1st Dept 2008]). As Mosquea argues, however, all of the dates of attempted personal service upon him were during the work week and during normal business hours in the same afternoon window. Thus, plaintiff did not establish the due diligence necessary to resort to nail and mail service (see *Board of Mgrs. of 50 W. 127th St. Condominium v Kidd*, 169 AD3d 432, 432 [1st Dept 2019]; *Spath v Zack*, 36 AD3d 410, 413 [1st Dept 2007] [finding lack of diligence under CPLR 308 (4) where there were no attempts to serve defendant on the weekend or outside of ordinary business hours, and the process server made no inquiries to ascertain defendant's whereabouts or place of business]). Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

31 Henry Venegas, Respondent, v CPC Norfolk Senior Housing Development Fund Corporation et al., Appellants. [250 NYS3d 522]—

Labor—Safe Place to Work—Elevation-Related Hazard—Falling Metal Locking Device—Absence of Protective Devices

Order, Supreme Court, New York County (Leslie A. Stroth, J.), entered on or about February 25, 2025, which, to the extent appealed from, granted plaintiff's motion for summary judgment on liability his Labor Law § 240 (1) claim and denied defendants' motion to dismiss plaintiff's Labor Law § 241 (6) claim predicated on 12 NYCRR 23-1.7 (a) (1) and (2), unanimously affirmed, without costs.

Plaintiff was injured by a metal locking device, known as a "super plate" or "butterfly," when it allegedly fell from overhead and struck plaintiff on his right shoulder and neck as he walked past a 15 feet to 18 feet high formwork wall at a construction site. The super plates were screwed onto the ends of tie rods that were used to hold the formwork in place; as the formwork structure was built, the super plates would be applied both before and after wired rebar was installed. At the time of the accident, plaintiff was tying wired rebar for the formwork construction, and super plates were not involved with that part of the work.

Plaintiff established *prima facie* entitlement to partial summary judgment on his Labor Law § 240 (1) claim. The parties do not dispute that there was no overhead protection for the workers who walked beneath the elevated work platform positioned near the top of the formwork structure. Further, the testimony by the superintendent for the general contractor that it was common knowledge that the workers should not walk under the area of the overhead work was rebutted by photographic evidence.

Defendants failed to raise a triable issue as to whether the super plate that struck plaintiff required securing for the purpose of the undertaking. The testimony established that the super plate was a component in the formwork structure being built at an elevated height, and that as the formwork was built higher, the super plate was put into place in alternating sequence with the rebar. Although defendants attempt to suggest that there were no loose super plates in the vicinity of the formwork under construction when the accident happened, the accident itself, in which plaintiff was hit by a falling super plate, establishes otherwise.

We reject defendants' argument that because plaintiff did

not see how the super plate came to fall on him or where it fell from, he failed to establish his entitlement to summary judgment. Plaintiff is not required to show precisely how the super plate fell, because under any theory, the absence of protective devices was the proximate cause of his injury (*Torres-Quito v 1711 LLC*, 227 AD3d 113, 117 [1st Dept 2024]). Defendants also have not raised a triable issue as to whether the plaintiff's account of the accident is credible (*cf. Simpertegui v Carlyle House Inc.*, 227 AD3d 486 [1st Dept 2024]).

In light of our determination on plaintiff's motion for summary judgment on liability with respect to his Labor Law § 240 (1) claim, defendants' arguments concerning plaintiff's section 241 (6) claim are academic (*see Harsanyi v Extell 4110 LLC*, 220 AD3d 528, 529 [1st Dept 2023]). Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

32 S.A.W., Respondent, v Archdiocese of New York et al., Defendants, and Aquinas High School et al., Appellants. [250 NYS3d 63]—

Schools—Students—Injury to Student—Sexual Abuse by Teacher—Actual and Constructive Notice of Teacher's Abusive Tendencies

Appeal—Appealable Paper—Order Declining to Sign Order to Show Cause

Order, Supreme Court, New York County (Sabrina Kraus, J.), entered March 24, 2025, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Aquinas High School and Dominican Convent of Our Lady of the Rosary, also known as Dominican Sisters of Our Lady of the Rosary (together, defendants), for summary judgment dismissing the negligent hiring and supervision claims as against them, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered May 20, 2025, which declined to sign defendants' order to show cause to renew their motion for summary judgment, dismissed, without costs, as taken from a nonappealable order.

Defendants failed to establish prima facie entitlement to summary judgment dismissing the negligent hiring and supervision claims as against them, as they did not submit evidence demonstrating that they lacked notice that defendant Edmond Parrakow (a nonparty to this appeal) had a propensity for sexually abusing children (*see Sayegh v City of Yonkers*, 228 AD3d 690, 691-692 [2d Dept 2024]). On the contrary, a witness for defendant Archdiocese of New York (ADNY), Bishop Gerald Walsh, testified that there had been prior letter complaints that Parrakow had committed sexual abuse, and that those letters would have been included in his ADNY file. Further,

Bishop Walsh testified that before Parrakow was assigned to Aquinas, he had an abnormally short tenure at his first assignment and an unusually long gap between assignments. Plaintiff herself also testified as to several incidents of alleged abuse that occurred on school grounds during school hours while she was a student at Aquinas from 1978 to 1982. This evidence raises issues of fact as to whether defendants were on notice of Parrakow's propensities.

In addition, in arguing that they lacked notice, defendants purported to submit Parrakow's "personnel file," which consisted of a bare bones, four-page employment application form from 1974 that included none of the letters referenced by Bishop Walsh, and did not list all of Parrakow's former assignments (*see L.S. v Roosevelt Union Free Sch. Dist.*, 236 AD3d 948, 950-951 [2d Dept 2025]). Defendants also submitted an affidavit of the individual who was the school principal during Parrakow's tenure, who attested in conclusory fashion that there was no record indicating that Parrakow abused any child before or during his assignment at the school. This evidence is insufficient to eliminate triable issues of fact as to whether defendants lacked constructive notice of Parrakow's alleged propensities (*see Sayegh*, 228 AD3d at 692; *MCVAWCD-DOE v Columbus Ave. Elementary Sch.*, 225 AD3d 845, 847 [2d Dept 2024]).

After Supreme Court denied their summary judgment motion, defendants sought leave to renew the motion based on the Court of Appeals' decision in *Nellenback v Madison County* (44 NY3d 329 [2025]) by means of an order to show cause, which Supreme Court declined to sign. No appeal lies from an order refusing to sign an order to show cause, as it is an *ex parte* order that does not decide a motion made on notice (CPLR 5701 [a] [2]; *see Castle Vil. Owners Corp. v Girardi*, 237 AD3d 532 [1st Dept 2025]).

We have considered defendants' remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

33 Deborah Wheeler, Respondent-Appellant, v Linden Plaza Preservation, LP, et al., Appellants-Respondents, RY Management Co. Inc., Respondent-Appellant, and Madison Security Group, Inc., Respondent. [248 NYS3d 60]—

Negligence—Duty—Security Contractor for Apartment Building—Denial of Access to Apartment

Damages—Nonpecuniary Damages in Personal Injury Actions—Denial of Access to Apartment to Obtain Medicines and Medical Supplies

Order, Supreme Court, New York County (Lynn R. Kotler,

J.), entered January 13, 2025, which, to the extent appealed from as limited by the briefs, granted defendant Madison Security Group's motion for summary judgment dismissing the complaint and all cross-claims against it, denied the separate motions of defendants Linden Plaza Preservation, LP and Linden Plaza Housing Co., Inc., and of RY Management Co. Inc. for summary judgment dismissing the complaint and all cross-claims against them, and dismissed plaintiff's claim for punitive damages, unanimously modified, on the law, to grant the motions of Linden Plaza Preservation and Linden Plaza Housing, and RY Management, and otherwise affirmed, without costs.

This action arises from the eviction of plaintiff from her apartment, which plaintiff states was legal. Plaintiff alleges that, after her ouster, defendants denied her access to the apartment to obtain medicines and medical supplies, despite her having obtained a court order on November 2, 2016, permitting her limited access.

Supreme Court properly granted defendant Madison Security's motion for summary judgment because Madison Security, which contracted with RY Management to provide security services in the apartment building, did not owe a duty to plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]).

However, Supreme Court should have also granted the motions of defendants Linden Plaza Preservation and Linden Plaza Housing, and RY Management because those defendants demonstrated prima facie entitlement to summary judgment on plaintiff's negligence claims. Defendants submitted the affidavit of a clinical neuropsychologist who opined that plaintiff's inability to retrieve her medications and medical supplies for the stated period did not have an adverse effect on her mental condition. In opposition, plaintiff failed to present evidence sufficient to raise a triable issue of fact as to damages. Plaintiff presented no evidence to dispute the opinion of the clinical neuropsychologist or that demonstrated that her physical condition deteriorated as a result of the lock out. Because damages are a necessary element of a negligence cause of action (*see Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]), summary judgment was warranted.

In any event, the causes of action were legally deficient. The negligent training and negligent supervision claims were defective because the complaint alleged that defendants' employees were acting within the scope of their employment when they denied her access to the apartment (*see Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]). Although there is an

exception to this principle where the injured plaintiff is seeking punitive damages (*id.*), here, the conduct cited in the complaint was insufficient to support a recovery for punitive damages. Defendants' alleged denial of access to the apartment after plaintiff obtained a court order was not aimed at the public generally, gross, or involve high moral culpability, but rather an isolated incident related to the conduct of a legitimate business (see *Fischer v Machon Bais Yaakov*, 176 AD2d 655, 656 [1st Dept 1991]).

Plaintiff's trespass to chattel cause of action was defective because no evidence was presented that plaintiff's medications or medical supplies were damaged (see *Abrams v Pecile*, 115 AD3d 565, 566 [1st Dept 2014]). The conversion claim was also unsupported because a lawful eviction and storage of a tenant's property does not constitute a conversion (see *Priester v R.F.H. Realty Corp.*, 13 Misc 2d 446, 447 [App Term, 2d Dept 1958]).

Finally, summary judgment on the negligent infliction of emotional distress cause of action was warranted because there was no evidence that plaintiff was ever in physical danger, and she testified that she had no physical contact with the building superintendent (see *Allstate Ins. Co. v Burger King Corp.*, 25 AD3d 472, 472 [1st Dept 2006]; see also *Stanley v Smith*, 183 AD2d 675, 676 [1st Dept 1992]).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

(February 10, 2026)

1 Latoya Anderson, Respondent-Appellant, v AAC Cross County Mall, LLC, et al., Appellants-Respondents, and King Fences, Inc., Respondent. [248 NYS3d 71]—

Negligence—Duty—Snow and Ice Removal Contractor—Slip and Fall on Patch of Ice Covered by Fresh Snowfall during Ongoing Storm

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 22, 2024, which, to the extent appealed from as limited by the briefs, granted the motion of defendant King Fences, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleges that she was injured in a parking lot when she slipped and fell on a patch of ice covered by fresh snowfall during an ongoing storm. Defendant AAC Cross County Mall, LLC, which managed the premises for defendant owner

Ashkenazy Acquisition Corp., had an ongoing snow and ice removal contract with King Fences, a snow removal contractor, to plow and salt the parking lot when necessary.

As an entity that had entered into a contract with AAC, King Fences owed no independent duty of care to plaintiff, with whom King Fences was not in privity. In addition, King Fences established prima facie that it did not owe plaintiff a duty of care under any of the exceptions set forth in *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140, 142 [2002]). King Fences' agreement with AAC contained no requirement that King Fences pre-salt the roadways or parking lots. Similarly, the agreement did not require King to inspect, monitor, or return to the premises after plowing or salting, or to remove snow from the premises. The evidence further established that King Fences did not plow or salt the parking lot on the day of the accident before plaintiff slipped and fell. Thus, King Fences cannot be found to have launched "a force or instrument of harm" subjecting it to potential liability (see *Espinal*, 98 NY2d at 140, 142).

In opposition, plaintiff speculates that her injury resulted from King Fences' negligent removal of snow after an earlier storm. The record, however, offers no support for this theory (see *Rios v Acosta*, 8 AD3d 183, 184 [1st Dept 2004]). Plaintiff's testimony that she did not see any snow or ice in the parking lot the night before the accident, and that the snow on the ground on the day she fell did not appear plowed, shoveled, salted, or treated with sand, refutes her supposition that King Fences' earlier snow-clearing activities created the dangerous condition (see *Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288, 290 [1st Dept 2008]).

In addition, the opinion of plaintiff's expert that plaintiff slipped because the temperature rose and then dropped before the accident, causing puddles in the parking lot to refreeze, does not support an inference that King Fences' snow removal efforts caused plaintiff's injury (see *Nadel v Cucinella*, 299 AD2d 250, 251 [1st Dept 2002]). Indeed, plaintiff's expert stated that the melted and refrozen condition that caused plaintiff's fall was a direct result of defendants' failure to apply a preventive application of rock salt—a "passive omission" that would not serve to impose liability on King Fences (see *Santos v Deanco Servs., Inc.*, 142 AD3d 137, 138 [2d Dept 2016]). Moreover King Fences had no obligation to apply rock salt unless AAC directed it to do so.

The other *Espinal* exceptions do not apply, as plaintiff does not argue on appeal that King Fences displaced AAC's duty to

maintain the premises or that she detrimentally relied upon King Fences' contractual snow-removal services (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 246 [1st Dept 2013]; *Lenti*, 52 AD3d at 290).

We have considered plaintiff's remaining contentions and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

2 Board of Managers of the 432 Park Condominium et al., Appellants, v 56th and Park (NY) Owner, LLC, Respondent/Third-Party Plaintiff-Respondent, et al., Defendants. SLCE Architects LLP et al., Third-Party Defendants-Respondents, et al., Third-Party Defendants. (And Six Other Third-Party Actions.) [251 NYS3d 67]—

Pleading—Amendment—Prejudice to Opposing Party—Need for Additional Discovery

Pleading—Sufficiency of Pleading—Fraud—Construction Defects

Appeal—Raising Issue for First Time on Appeal—Relation Back Doctrine

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about April 17, 2025, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion pursuant to CPLR 3025 (b) for leave to file a third amended complaint to assert claims for fraud against defendant/third-party plaintiff 56th and Park (NY) Owner, LLC and third-party defendants SLCE Architects LLP and WSP USA Buildings, Inc. and for aiding and abetting fraud against WSP USA Buildings, Inc., unanimously reversed, on the law, without costs, and the motion granted.

Plaintiffs commenced this construction defects action against the owners/sponsors and construction professionals connected with building the condominium located at 432 Park Avenue, New York, New York. In their second amended complaint dated May 9, 2023, plaintiffs asserted claims, among others, for: (1) breach of the offering plan against the sponsor, (2) breach of fiduciary duty against Harry Macklowe by the commercial board, (3) breach of the offering plan and purchase agreements against the sponsor on behalf of the residential unit owners, (4) breach of fiduciary duty against Macklowe by the residential board, (5) breach of the offering plan and purchase agreements against the sponsor on behalf of the commercial unit owners, and (6) breach of fiduciary duty against Macklowe by the commercial board. Approximately 18 months later plaintiffs moved under CPLR 3025 (b) for leave to file a third amended complaint, asserting new claims for fraud and aiding and abetting fraud against some of the defendants and third-party defendants.

Supreme Court's denial of plaintiffs' motion for leave to

amend based on the delay that would result from the need for additional discovery and the prejudice it would cause to the nonappearing third-party defendants was an improvident exercise of the court's discretion. The need for additional discovery pre-note of issue is insufficient to show prejudice for the purposes of denying leave to amend under CPLR 3025 (b) (see e.g. *Shareholder Representative Servs. LLC v NASDAQ OMX Group, Inc.*, 176 AD3d 632, 633 [1st Dept 2019]). Further, defendants will not be prevented "from taking a position they could have taken had the [claims] been earlier interposed" (*Sheets v Liberty Alliances, LLC*, 37 AD3d 170, 171 [1st Dept 2007]). Plaintiffs provided a reasonable excuse for the purported delay by explaining that they did not seek to amend the fraud-based claims until they had obtained evidence of defendants' alleged scienter with respect to the affirmative misrepresentations in the offering plan and in correspondence to the New York City Department of Buildings (DOB) (*id.*).

The proposed claims for fraud and aiding and abetting fraud in the third amended complaint are not palpably devoid of merit (see *Bhandari v Ismael Leyva Architects, P.C.*, 84 AD3d 607, 608 [1st Dept 2011]; see also *William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 503 [1st Dept 2018]). Plaintiffs adequately allege that not only are there significant problems with the building's façade, as alleged in the second amended complaint, but also that SLCE and WSP knew about the problems, failed to address them, and affirmatively misrepresented the condition in the offering plan and in a letter presented to the DOB. Whether the fraud-based claims could have been discovered earlier and may be time-barred under the statute of limitations is a fact-intensive inquiry that should be resolved on a fuller record.

In addition, in finding that the commencement of a new action would not prejudice plaintiffs, the court did not consider that plaintiffs would be deprived of any potential reliance on the relation back doctrine under CPLR 203 (f). Although plaintiffs did not raise the relation back doctrine in their papers before the court, where, as here "a party raises a legal argument for the first time on appeal, as long as the issue is determinative and the record on appeal is sufficient to permit review, this Court may consider the new argument" (*Watson v City of New York*, 157 AD3d 510, 511 [1st Dept 2018]). Application of the relation back doctrine under CPLR 203 (f) and *Buran v Coupal* (87 NY2d 173 [1995]) should also be addressed on the merits and upon a fuller record. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

3 Marcos A. Brenes, Appellant, v City of New York, Respondent. [248 NYS3d 70]—

Municipal Corporations—Notice of Street Defect—Affirmative Creation Exception—Prior Work

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered November 26, 2024, which granted defendant’s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he was injured when he tripped on a hole, approximately two inches deep and less than a foot wide, as he crossed a roadway while outside a crosswalk. According to plaintiff, although there was no ongoing construction work on the road at the time, defendant had done work on the roadway approximately 15 months before the accident.

Defendant established prima facie entitlement to summary judgment by submitting evidence that it did not receive prior written notice of the defect and was therefore exempt from liability under Administrative Code of City of NY § 7-201 (c) (2). The burden therefore shifted to plaintiff, who does not dispute the lack of written notice, to demonstrate the applicability of an exception to section 7-201 (c) (2) (*see Vega v City of New York*, 88 AD3d 497, 497 [1st Dept 2011]). Under the facts presented here, the only possible exception is the affirmative creation exception, which imposes liability if a defendant creates a defect by engaging in an affirmative act of negligence that immediately results in a hazardous condition (*id.* at 497-498).

Plaintiff failed to sustain its burden of showing that the exception applied, as he did not establish that defendant’s prior work on the roadway created the defect. Even if defendant did repaving work in the vicinity of plaintiff’s fall, that fact by itself does not provide a basis for an inference that the repair resulted in an immediately hazardous condition, and plaintiff has presented no other evidence that defendant created the hazard (*see Trentman v City of New York*, 162 AD3d 559, 559-560 [1st Dept 2018]; *see Epperson v City of New York*, 133 AD3d 522, 523 [1st Dept 2015]). The affidavit of plaintiff’s expert who inspected the area more than three years after the accident was not sufficient to sustain plaintiff’s burden. Although the expert opined that “inferior” work on the roadway caused the defect, this opinion, even if true, does not raise an issue of fact whether any negligence by defendant immediately resulted in a dangerous condition (*see Kales v City of New York*, 169 AD3d 585, 585 [1st Dept 2019]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

4 In the Matter of A.C. and Others, Children Alleged to be Neglected. A.C., Appellant; Administration for Children's Services, Respondent. [251 NYS3d 79]—

Parent, Child and Family—Abused or Neglected Child—Left Children Alone Multiple Times

Parent, Child and Family—Abused or Neglected Child—Corroboration of Child's Out-of-Court Statement—Physical Discipline

Corrected order of fact-finding and disposition (one paper), Family Court, Bronx County (Gigi N. Parris, J.), entered on or about May 6, 2025, which, to the extent appealed from as limited by the briefs, after fact-finding and dispositional hearings, determined that respondent mother neglected the five subject children, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence establishing that the mother had neglected the children by leaving them unattended and using excessive corporal punishment (*see* Family Ct Act §§ 1012 [f] [i] [B]; 1046 [b] [i]). The testimony at the hearing demonstrated that in July 2024, the then 11-year-old child told a caseworker who knocked on the door that the child was alone with the nine- and six-year-old siblings, and that the mother told the child to lie about being home alone should a caseworker visit the home. The child also reported that the mother often left the three younger children home alone, including at night, and did not tell them where she was going. This statement was corroborated by the child's then 13-year-old and 9-year-old siblings, both of whom reported to the caseworker that the mother left them alone often, including overnight. Although the court previously ordered the mother to properly supervise the children and comply with a referral to preventive services, the mother refused services and, a few months later, shelter staff again found that the three younger children were left alone (*see Matter of Lah De W. [Takisha W.]*, 78 AD3d 523, 524 [1st Dept 2010]; *Matter of Joyce A-M. [Yvette A.]*, 68 AD3d 417, 418 [1st Dept 2009]).

When the mother's absence was discovered this second time, she hit her then 11-year-old child with a phone and tried to leave the shelter with the children. Two of the children reported to the caseworker that the mother would discipline them by hitting them with phone charger cords and belts (*see Matter of Empress B. [Henrietta L.]*, 204 AD3d 562, 563 [1st Dept 2022]).

At a minimum, the two children cross-corroborated each other's statements concerning the mother's physical discipline (*see Matter of Jaiyana S. [Perla S.]*, 222 AD3d 503, 504 [1st Dept 2023], *lv denied* 41 NY3d 907 [2024]), which was further

corroborated by the medical records (*see Matter of S.A. [S.F.]*, 235 AD3d 523, 524 [1st Dept 2025]). Moreover, the New York City Police Department records documenting the mother's arrest after the three younger children were found to have been alone for three hours, also substantiates that finding (*see Matter of M.H. [Ricardo D.]*, 239 AD3d 411, 412 [1st Dept 2025]). Based on the mother's failure to testify, the court was allowed to draw the strongest inference against the mother that the opposing evidence permitted (*see Matter of Devante S.*, 51 AD3d 482, 482 [1st Dept 2008]).

The mother offered no excuse, let alone a reasonable excuse, for her failure to appear on the last day the hearing, and thus, it was within the court's discretion to deny an adjournment (*see Matter of Jayden J. [Florence J.]*, 184 AD3d 527, 527 [1st Dept 2020], *lv dismissed* 35 NY3d 1099 [2020]). Moreover, the mother failed to avail herself of the court's offer to reopen the hearing were she to proffer a reasonable excuse for her failure to appear.

We have considered the mother's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

5 Roger J. Contreras, Appellant-Respondent, v City of New York et al., Respondents-Appellants. [248 NYS3d 67]—

Labor—Safe Place to Work—Elevation-Related Hazard—Injuries Sustained during Break

Labor—Safe Place to Work—Elevation-Related Hazard—Struck by Unsecured Chisel

Order, Supreme Court, New York County (David B. Cohen, J.), entered September 19, 2024, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claim, granted his motion for leave to amend his bill of particulars to allege violations of Industrial Code (12 NYCRR) §§ 23-1.15 (c) and 23-5.1 (j) (1), granted defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, and denied their motion as to the Labor Law §§ 240 (1) and 241 (6) claims, unanimously modified, on the law, to grant plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claim, and otherwise affirmed, without costs.

Plaintiff alleged that he was injured when a chisel fell and struck him while he was taking a designated coffee break at a construction project involving an exterior restoration of a five-story school. Plaintiff took his break either on or underneath

the sidewalk bridge on the jobsite with two other coworkers. Plaintiff claims that the scaffolding above him had gaps in the planks and lacked sufficient netting and toeboards on the side closest to the building.

The court should have granted plaintiff's motion for summary judgment on the Labor Law § 240 (1) claim. It is immaterial that plaintiff was on a coffee break at the time of his accident because "injuries sustained while a worker was on site, although . . . on a break, come within the protections of Labor Law § 240 (1)" (*Hoyos v NY-1095 Ave. of the Ams., LLC*, 156 AD3d 491, 495 [1st Dept 2017]; see also *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 48 [1st Dept 2005]).

Plaintiff established that the chisel "required securing for the purposes of the undertaking" and that the scaffolding "proved inadequate" to protect him (*Mayorquin v Carriage House Owner's Corp.*, 202 AD3d 541, 541-542 [1st Dept 2022] [internal quotation marks omitted]). It is irrelevant that plaintiff did not know where the chisel fell from, or what caused it to fall, or hear anything fall, as "plaintiff is not required to show exactly how the [object] fell" (*Mercado v Caithness Long Is. LLC*, 104 AD3d 576, 576-577 [1st Dept 2013]). Any alleged inconsistency concerning the location of the accident is immaterial (see *Mayorquin*, 202 AD3d at 542). Similarly, it does not matter where the chisel struck plaintiff's body, as it is undisputed that it struck him. Even if the affidavit from plaintiff's supervisor conflicted with plaintiff's testimony about whether toeboards were located on the side of the scaffolding closest to the building, plaintiff alleges without contradiction that the scaffolding was defective in other ways, including the existence of gaps between the scaffolding planks.

In as much as plaintiff has shown entitlement to partial summary judgment on liability under Labor Law § 240 (1), the arguments related to his common-law negligence and Labor Law §§ 200 and 241 (6) claims are academic (see *Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

6 DLJ Mortgage Capital, Inc., Respondent, v Meyer Adler et al., Appellants, et al., Defendants. [248 NYS3d 63]—

Motions and Orders—Reargument or Renewal—Argument Not Articulated in Original Motion Papers—Change in Law
 Statutes—Retroactive Application of Statute—Foreclosure Abuse Prevention Act—Contracts and Due Process Clauses

Order, Supreme Court, New York County (Nancy M. Bannon,

J.), entered September 27, 2024, which denied the motion of defendants Meyer Adler and 56 West 126 Holding, LLC (together, defendants) for leave to renew their opposition to plaintiff's motion for summary judgment and 56 West's cross-motion to dismiss the complaint based on the statute of limitations, unanimously reversed, on the law, without costs, the motion for leave to renew granted and, upon renewal, plaintiff's motion denied and 56 West's cross-motion granted. The Clerk is directed to enter judgment accordingly. Appeals from order, same court and Justice, entered August 12, 2024, which granted plaintiff's motion for summary judgment and denied 56 West's cross-motion to dismiss, unanimously dismissed, without costs, as academic.

On or about July 28, 2005, defendant Meyer Adler granted a nonparty a note and a mortgage securing 56 West 126th Street in Manhattan. Adler later deeded the property to defendant 56 West 126 Holding, LLC. On September 8, 2009, nonparty GMAC Mortgage LLC brought a foreclosure action against Adler. In GMAC's complaint, it stated that it was accelerating the loan. GMAC then voluntarily discontinued the action on July 27, 2011, but never expressly stated that it was revoking the acceleration.

On September 12, 2016, Adler brought an action seeking a declaration canceling and discharging the note. In November 2018, while the declaratory judgment action was pending, plaintiff, GMAC's successor-in-interest, commenced this foreclosure action upon the note and mortgage. In May 2021, this Court affirmed the dismissal of the declaratory judgment action holding that the 2009 default notice did not accelerate the debt and that, even if it did, under *Freedom Mtge. Corp. v Engel* (37 NY3d 1 [2021]), the voluntary discontinuance of the 2009 action revoked the acceleration (*Adler v DLJ Mtge. Capital, Inc.*, 194 AD3d 633 [1st Dept 2021]).

On October 29, 2021, plaintiff moved for summary judgment in this foreclosure action. Defendant 56 West cross-moved to dismiss the complaint. The motion was fully submitted in January 2022.

On December 30, 2022, New York enacted the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821), which, among other things, amended CPLR 3217 to add subdivision (e), which provided that the voluntary discontinuance of an action on a note or mortgage "shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset" the statute of limitations (see L 2022, ch 821, § 8; cf. CPLR 213 [4]). FAPA § 10 provided that the act "shall take effect immediately" and would apply to

all foreclosure actions “in which a final judgment of foreclosure and sale has not been enforced” (L 2022, ch 821, § 10).

By order entered August 12, 2024, the motion court granted plaintiff’s motion for summary judgment based on the papers which were fully submitted by January 2022. In September 2024, defendants filed their motion seeking leave to renew and, upon renewal, to dismiss the action based on FAPA.

The motion court should have granted defendants’ motion to renew based on CPLR 3217 (e) (*see e.g. Bank of N.Y. Mellon v Bosboom*, 238 AD3d 504, 504 [1st Dept 2025]). FAPA applies to this action, as there has been no enforcement of a judgment of foreclosure and sale (*see* L 2022, ch 821, § 10). Under FAPA, GMAC’s 2011 discontinuance did not revoke its acceleration of the note (*see* CPLR 3217 [e]). Accordingly, since the note was accelerated in 2009, plaintiff had six years, i.e., until September 2015, to bring this action.

The court was correct to observe that the statute of limitations argument raised in the motion for leave to renew had not been articulated in defendants’ original motion papers. However, plaintiff’s summary judgment motion sought to dismiss defendants’ affirmative defenses, including those premised on the statute of limitations, and defendants opposed the motion, relying in part on the defenses raised in their answers. The law changed after the original motion and cross-motion were fully submitted. At that time defendants filed their motion to renew, using the precise procedural mechanism that the CPLR authorizes to undo a prior order based on a change in the law. At that time, they briefed their statute of limitations defense fully.

Plaintiff argues that FAPA does not have retroactive effect. The Court of Appeals rejected that argument conclusively in *Article 13 LLC v Ponce De Leon Fed. Bank* (— NY3d —, 2025 NY Slip Op 06536 [2025]) (*see Genovese v Nationstar Mtge. LLC*, 223 AD3d 37, 45 [1st Dept 2023]). Applying FAPA here would not violate the Contracts Clause of the United States Constitution, as plaintiff points to no contractual provision that allowed it to deaccelerate its loan or that FAPA otherwise impaired (*Article 13 LLC*, — NY3d at —, 2025 NY Slip Op 06536, *4-5; *see Bank of N.Y. Mellon v Del Rio*, 233 AD3d 529, 532 [1st Dept 2024]). *Article 13 LLC* also held that FAPA does not violate either the substantive or procedural due process protections provided by our state Constitution (*Bank of N.Y. Mellon v Del Rio*, 233 AD3d at 532). Nor would retroactive application of FAPA violate the Due Process Clause of the United States Constitution, as the 2011 stipulation of discontinuance

was silent as to whether GMAC deaccelerated its loan (*see id.* at 531-532).

Similarly, FAPA did not effect an unconstitutional taking. Plaintiff claims that FAPA deprived it of its property interest in its mortgage. We rejected that argument in *Bank of N.Y. Mellon v Del Rio* (233 AD3d at 532). Plaintiff had no right to rely on the law in effect when the original lender entered into the loan agreements under which GMAC could deaccelerate its mortgage by voluntarily discontinuing the 2009 action (*see Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1070-1071 [2d Dept 2024]; *see also Bosboom*, 238 AD3d at 505). Finally, FAPA is not an unconstitutional bill of attainder (*see Dagrín*, 233 AD3d at 1072; *see also Wilmington Trust, N.A. v Farkas*, 232 AD3d 524, 525-526 [1st Dept 2024]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

7 In the Matter of N.H. and Another, Infants. Abubakar M., Appellant; Administration for Children’s Services, Respondent. [248 NYS3d 65]—

Parent, Child and Family—Abused or Neglected Child—Person Legally Responsible

Order of fact-finding and disposition (one paper), Family Court, New York County (Maria Arias, J.), entered on or about March 27, 2024, which, to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent was a person legally responsible for the subject child N.H., unanimously affirmed, without costs.

A preponderance of the evidence demonstrated that respondent was a person legally responsible for N.H. Respondent did not testify, therefore the court “was entitled to draw the strongest negative inference against him as the opposing evidence would allow” (*Matter of N.C.M. [Christian A.]*, 239 AD3d 475, 476 [1st Dept 2025]). That evidence included the mother’s testimony, undisputed by respondent, that he is N.H.’s biological father, was the mother’s fiancé and lived with her prior to his arrest, and held himself out as N.H.’s father (*see Matter of Trenasia J. [Frank J.]*, 25 NY3d 1001, 1006 [2015]; *Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *Matter of Alisha A. [Nelson V.]*, 172 AD3d 403, 403-404 [1st Dept 2019]). The fact that respondent was removed from the home before N.H. was born, due to his arrest and prosecution on the charges that gave rise to these petitions, does not outweigh the evidence supporting the finding that respondent is a person legally responsible for the subject child (*see Matter of Tristian B. [Winston B.]*, 201 AD3d 583, 584 [1st Dept 2022]; *Matter of*

Iscela G. [Lorenzo T.], 193 AD3d 521, 522 [1st Dept 2021]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

8 Joey Hes, Appellant, v Adam Zirkin, Defendant, and Samantha Zirkin, Respondent. [248 NYS3d 66]—

Courts—Law of the Case—Prior Order of Motion Court

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about September 12, 2024, which, to the extent appealed from as limited by the briefs, granted defendant Samantha Zirkin's motion to dismiss plaintiff's claim of malicious prosecution, unanimously affirmed, with costs.

Plaintiff commenced this action in 2022 which, as amended, alleged causes of action against defendant for: (i) false arrest, (ii) intentional infliction of emotional distress, (iii) defamation, and (iv) malicious prosecution. By order dated August 11, 2023, the motion court granted defendant Adam Zirkin's motion to dismiss the complaint in full. As to the malicious prosecution claim, the court found that plaintiff did not allege with particularity the basis by which the criminal court dismissed the charges against her and therefore failed sufficiently to allege that the criminal proceedings were terminated in her favor. The court also found that plaintiff's pleadings did not establish the element of actual malice. Plaintiff then served a second amended complaint pleading the same causes of action.

The doctrine of law of the case may be applied where an issue before the court was necessarily decided by a prior order of the same court and Justice (*see Matter of Pettus v Board of Directors*, 169 AD3d 524, 525 [1st Dept 2019], *appeal dismissed* 33 NY3d 1047 [2019]; *see also Real World Holdings, LLC v 393 W. Broadway*, 236 AD3d 447, 447 [1st Dept 2025]). Here, in the prior order the motion court expressly found that plaintiff's allegations did not sufficiently state that the criminal prosecution against her, allegedly instigated by defendants, was terminated in her favor, which is a required element of a claim for malicious prosecution (*see Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]). While plaintiff appealed the prior order, she never perfected the appeal and is thus bound by the motion court's finding that the malicious prosecution claim inadequately pled the required element that the criminal proceedings terminated favorably in her favor.

In view of the foregoing, it is unnecessary for this Court to consider whether plaintiff satisfied the other pleading elements of her malicious prosecution claim. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

9 Erica T. Itzhak, Respondent, v Briarwood Insurance Services Inc., Defendant, and Atlantic Casualty Insurance Co., Appellant. [248 NYS3d 203]—

Insurance—Liability Insurance—Coverage under Policy—Certificate of Insurance

Insurance—Liability Insurance—General Liability—Damage to Insured’s Property

Order, Supreme Court, New York County (Louis L. Nock, J.), entered September 24, 2024, which denied defendant Atlantic Casualty Insurance Co.’s motion to dismiss the complaint as against it pursuant to CPLR 3211 (a) (7), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that her cooperative unit suffered damage during a renovation. The body of the complaint does not identify who damaged the property, the relationship among plaintiff, defendant Atlantic, and defendant Briarwood Insurance Services, Inc., or whom Atlantic or Briarwood insured. Instead, plaintiff contends that she was named as additional insured on an accord certificate of liability insurance, which she attached to her complaint. The certificate identifies commercial general liability as the type of coverage.

Only those named as an insured or additional insured on an insurance policy are entitled to coverage (*see Tribeca Broadway Assoc. v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]). As the party claiming coverage, plaintiff bears the burden of showing that the policy covers her (*see Moleon v Kreisler Borg Florman Gen. Constr. Co.*, 304 AD2d 337, 339 [1st Dept 2003]).

Supreme Court should have granted Atlantic’s motion to dismiss the complaint because plaintiff failed to plead facts showing that she was covered under the policy. The certificate of liability insurance is insufficient to prove that plaintiff was an additional insured because “[a] certificate of insurance is only evidence of a carrier’s intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists” (*Tribeca*, 5 AD3d at 200). Furthermore, the certificate contains a disclaimer stating that it was “issued as a matter of information only and confers no rights upon the certificate holder” (*Moleon*, 304 AD2d at 339).

Even if plaintiff were an additional insured, Atlantic would still be entitled to dismissal because the commercial general liability policy does not cover damage to property owned by the insured (*see Gap, Inc. v Fireman’s Fund Ins. Co.*, 11 AD3d 108,

111 [1st Dept 2004]). Rather, a commercial general liability policy offers only third-party coverage, typically resulting from a judgment or settlement against the insured (*see id.*; *see also Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2d 682, 688 [1999]). In any event, plaintiff did not comply with the requirements of Insurance Law § 3420 (b) (1) (*see Lang v Hanover Ins. Co.*, 3 NY3d 350, 354 [2004]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

10 Donna Marie Madourie, Appellant, v Montefiore Medical Center, Respondent. [250 NYS3d 524]—

Hospitals—Malpractice—Emergency or Disaster Treatment Protection Act—Injuries from Intubation and Sedation as Result of COVID-19—Pressure Ulcer

Order, Supreme Court, Bronx County (Michael A. Frishman, J.), entered on or about July 3, 2024, which granted defendant Montefiore Medical Center’s motion to dismiss the complaint or, in the alternative, for summary judgment pursuant to CPLR 3212, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff alleges that she developed a pressure ulcer while hospitalized from March 30, 2020, through June 1, 2020. Plaintiff, then age 60, first presented with a cough, fever, and shortness of breath, as well as preexisting comorbidities including morbid obesity, diabetes, hypertension, and removal of a kidney. Due to hypoxemic respiratory failure, plaintiff was placed on a ventilator before testing positive for COVID-19 on April 2, 2020. The need for sedation, coupled with her critical illness, rendered plaintiff unresponsive and unable to ambulate. In particular, plaintiff’s sedation and ventilator-dependent state made it difficult to reposition her, as repositioning could cause her to lose synchronicity with the ventilator, potentially impairing rather than assisting respiration.

As a consequence of these factors, the skin at the base of plaintiff’s spine began to break down. Plaintiff alleges that the ulcer resulted from defendant’s failure to turn her every one or two hours, as required by the standard of care.

This action was properly dismissed under the immunity provision of New York’s Emergency or Disaster Treatment Protection Act (the EDTPA). While plaintiff challenges the applicability of this provision, we find that the evidence submitted on the motion was sufficient to establish that “the treatment of the individual [was] impacted by the health care facility’s . . . decisions or activities in response to or as a result of the COVID-19 outbreak” (Public Health Law § 3082 [1] [a]-[c]).

In support of its motion defendant submitted, among other

things, (1) plaintiff's medical records, (2) an affirmation of a reviewing pulmonary and critical physician expert witness, Elizabeth Awerbuch, D.O., and (3) an affidavit and deposition testimony from defendant's Assistant Vice President of Nursing during plaintiff's admission, Joan O'Brien, R.N.

While Dr. Awerbuch was not employed by defendant, she affirmed that she worked at Elmhurst Hospital and treated thousands of COVID-19 patients there during the early months of the pandemic. Dr. Awerbuch opined that here, despite defendant's best efforts, the need for retraining, coupled with staffing shortages throughout the hospital, elevated the nurse-to-patient ratio as high as 1:10 during plaintiff's stay in the makeshift ICU unit. Dr. Awerbuch found that defendant lacked the resources to meet the same skin care standards it had employed prior to the pandemic, and that defendant was forced to shift its focus to saving as many lives as possible. While the documentation relating to plaintiff's skin care was relatively sparse, this was due to Governor Cuomo's Executive Order 202.10 (9 NYCRR 8.202.10), which suspended ordinary documentation requirements, and the fact that detailed documentation was often not possible given the unprecedented patient demand at that time. Plaintiff's condition as a ventilator-dependent COVID-19 patient also rendered her immobile and more difficult to move safely. Dr. Awerbuch concluded that defendant's care team was able to save plaintiff's life, perform a critical surgery, and treat the decubitus ulcer that formed such that it ultimately healed, which was in accordance with the then-existing standard of care.

Defendant's other witness, Nurse O'Brien, who was directly involved with defendant's response to COVID-19, similarly stated in her affidavit and based on her personal knowledge that the outbreak created staffing issues, a high patient-to-nurse ratio, a reduced prioritization of skin care, and a relaxed documentation requirement. She explained that these factors resulted in less staff time with each patient, and often required staff to prioritize life saving measures, such as ventilator care, over less urgent nursing functions such as skin care.

This Court has granted motions to dismiss based on EDTPA immunity in the context of claims stemming from a plaintiff's death from COVID-19 (*see e.g. Silva-Rios v New York Presbyt. Columbia Med. Ctr.*, 246 AD3d 416 [1st Dept 2026]; *Hasan v Terrace Acquisitions II, LLC*, 224 AD3d 475, 476, 478 [1st Dept 2024]). In a case where the plaintiff has died from COVID-19, it is usually self-evident that plaintiff's treatment was

“impacted by [defendant’s] decisions or activities in response to or as a result of the COVID-19 outbreak” (*Holder v Jacob*, 231 AD3d 78 [1st Dept 2024], quoting former Public Health Law § 3082 [1] [b]), such that dismissal based on the pleadings and the motion’s supporting documentation is appropriate.

Similarly, in a case such as this where plaintiff did not succumb to her illness but rather sustained injuries and complications from her hospitalization for COVID-19—particularly where plaintiff was intubated and sedated as a result of COVID-19, making it difficult to move her safely—we need not concern ourselves that plaintiff will be placed in the position of “having to accept [defendant’s] word on potentially dispositive issues” (*Jackson v BronxCare Health Sys.*, 236 AD3d 594, 596 [1st Dept 2025]). Evidence submitted on a dismissal motion reflecting pandemic-related overcapacity, staffing, supply shortages, and changes to the relevant care guidelines because of the pandemic will ordinarily suffice.

This case is distinguishable from this Court’s decisions in *Jackson* (236 AD3d at 596) and *Holder* (231 AD3d at 88-89), as those cases did not involve intubated patients whose injuries were directly tied to COVID-19. *Jackson* involved a multiple sclerosis patient who had tested positive for COVID-19 three weeks earlier and fell while trying to walk to the bathroom after purportedly not being timely provided with an assistive device for walking. The Court could not conclusively find on the dismissal motion that the pandemic specifically impacted the defendant’s ability to provide plaintiff with a walking device. Similarly, in *Holder*, the question presented was whether the pandemic impacted the hospital’s ability to prevent a fall and diagnose a stroke in an ulcerative colitis patient. That Court found that it would be premature to make that finding on the dismissal motion.

We are presented with a different case here, where the plaintiff’s injuries were a direct result of COVID-19. Her condition rendered her immobile and more difficult to move safely, which had a direct impact on the standard of care. Based on these facts, the evidence submitted was sufficient to show that the care provided to plaintiff was performed in good faith, that plaintiff’s sacral ulcer was not the product of gross negligence, and that defendant did not depart from the then-existing standards of practice. Concur—Manzanet-Daniels, J.P., Webber, Friedman, González, Michael, JJ.

11 Nicholas Industries & Construction Services, Inc., Appellant-Respondent, v NASDI, LLC, et al., Respondents-Appellants. [248 NYS3d 69]—

Contracts—Construction Contracts—Failure to Comply with Strict Notice Provisions**Contracts—Construction Contracts—Equitable Estoppel—Notice of Claim Requirements**

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered on or about January 7, 2025, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment insofar as it sought to void plaintiff's mechanic's lien as willfully exaggerated, and denied the motion insofar as it sought to dismiss the cause of action for breach of contract (first cause of action), unanimously modified, on the law, to grant defendants' motion insofar as it sought to dismiss the cause of action for breach of contract, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Defendants established prima facie entitlement to summary judgment on the cause of action for breach of contract by submitting evidence that plaintiff failed to comply with the strict notice of claim requirements of the subcontract and therefore waived its right to assert a claim for the extra excavation work it performed (*see APS Contrs., Inc. v New York City Hous. Auth.*, 193 AD3d 628, 629 [1st Dept 2021] ["By failing to comply with the strict notice provisions of the public contract, plaintiff waived its claims"]; *Northgate Elec. Corp. v Barr & Barr, Inc.*, 61 AD3d 467, 468-469 [1st Dept 2009]).

Plaintiff's opposition failed to raise an issue of fact as to whether it was equitably estopped from complying with the notice of claim provisions because NASDI "hindered or prevented" it from doing so through its "bad faith, negligence, or misconduct" (*Trocom Constr. Corp. v City of New York*, 238 AD3d 433, 434 [1st Dept 2025]). Plaintiff relies on emails and documents supposedly demonstrating that NASDI's disorganized and misleading accounting and communication lulled plaintiff into believing that it did not need to satisfy the subcontract's notice of claim requirements. However, none of those documents demonstrates that NASDI prevented or hindered plaintiff's compliance with the subcontract's notice of claim requirements (*see A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 NY2d 20, 34 [1998] [there was "no showing that the Housing Authority's alleged misconduct impaired respondent's ability to fulfill these contractual undertakings"]). Plaintiff's claim for extra work pursuant to section 6.2 of the subcontract must also be dismissed because plaintiff failed to comply with the subcontract's notice of claim provisions (*see Five Star Contr. Cos., Inc. v Fashion Inst. of Tech.*, 194 AD3d 405, 405-406 [1st Dept 2021]).

Because the breach of contract cause of action is being dismissed, plaintiff's cause of action to foreclose on its mechanic's lien must also be dismissed (*see MCC Dev. Corp. v Perla*, 81 AD3d 474, 474 [1st Dept 2011] [holding that "Supreme Court correctly dismissed the complaint, discharged the mechanic's lien and cancelled the notice of pendency on the ground that plaintiff failed to satisfy the contract's conditions precedent to commencing litigation"], *lv denied* 17 NY3d 715 [2011]; *Windjammer Homes v Lieberman*, 278 AD2d 411, 411-412 [2d Dept 2000] ["As the breach of contract cause of action must be dismissed because of (plaintiff's) failure to substantially perform, (plaintiff's) cause of action to foreclose its mechanic's lien must also be dismissed"]).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Kern, J.P., Friedman, Kapnick, Shulman, Hagler, JJ.

12 In the Matter of New York State Unified Court System, Appellant, v New York State Public Employment Relations Board et al., Respondents. [251 NYS3d 64]—

Civil Service—Collective Bargaining—Impracticability of Bargaining Procedures—Requirement to be Tested and Vaccinated for COVID-19

Civil Service—Public Employment Relations Board—Remedy to Make Bargaining Unit Members Whole

Order and judgment (one paper), Supreme Court, New York County (Arlene P. Bluth, J.), entered June 5, 2024, which denied the petition of the New York State Unified Court System (UCS) seeking to annul the November 8, 2023 determination of respondent State Public Employment Relations Board (PERB) finding, after a hearing, that UCS failed to engage in collective bargaining negotiations over its COVID-19 testing and vaccine policies in violation of the Public Employees' Fair Employment Act (Taylor Law), granted the motions to dismiss the petition, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

This proceeding arises from respondents' filing of improper practice charges before PERB under the Taylor Law, alleging that UCS failed to negotiate the formulation and implementation of its COVID-era testing and vaccination policies in 2021. Under those policies, UCS initially required employees to be tested weekly for COVID-19 and later required them to be vaccinated. Under the testing policy, which exempted nonjudicial personnel who provided proof of vaccination, employees were required to submit proof each week that they had received a COVID-19 test and coordinate with their supervisors to take a one-hour excused leave to be tested or be tested outside of

work hours with no grant of leave or compensatory time. Any employee failing to upload proof of testing or arrange an alternate testing date and time was to be designated as unfit for service and would not be allowed to report to work and would be allowed to charge annual or compensatory leave accruals or have pay docked if they had no accruals.

As a threshold matter, Supreme Court appropriately applied the arbitrary and capricious standard, as UCS challenges only PERB’s “‘interpretation or application of a statute or regulation’” (*Matter of Union of Auto. Technicians, AFL-CIO Local 563 v Port Auth. Empl. Relations Panel*, 192 AD3d 445, 446 [1st Dept 2021], quoting *Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239 [1997]; see also *Matter of County of Nassau [Nassau Community Coll.] v New York State Pub. Empl. Relations Bd.*, 76 NY2d 579, 582, 585-586 [1990]).

In any event, under either the arbitrary and capricious or substantial evidence standard (CPLR 7803 [3], [4]), PERB rationally found, based on the record before it, that UCS’s procedure implementing its decision to require employees to be tested weekly for COVID-19 and, later, to be vaccinated, was not excluded from mandatory bargaining with respondent unions. Even if an employer has the undisputed right to make a particular decision that is “not a subject of mandatory negotiation, the [employer] must negotiate the procedures necessary to effectuate that right” (*Matter of City of Long Beach v New York State Pub. Empl. Relations Bd.*, 39 NY3d 17, 26 [2022]; *Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd.*, 95 NY2d 73 [2000]). Here, UCS’s undisputed right to require testing and vaccinations was not so “inextricably intertwined” with the procedures that UCS implemented for such testing and vaccination as to make bargaining over the procedures impracticable (see *Matter of Nassau County Police Benevolent Assn. [County of Nassau (Nassau County Police Dept.)]*, 27 PERB ¶ 3054 [1994]).

“As the agency charged with implementing the fundamental policies of the Taylor Law, PERB is presumed to have developed an expertise and judgment that requires [courts] to accept its decisions with respect to matters within its competence” (*Matter of Chenango Forks Cent. Sch. Dist. v New York State Pub. Empl. Relations Bd.*, 21 NY3d 255, 265 [2013] [internal quotation marks and brackets omitted]). Moreover, the challenged remedy directing the UCS to make bargaining unit members whole for any “loss of pay and/or benefits” suffered was authorized by statute (Civil Service Law § 205 [5] [d]) and applied

reasonably under the circumstances (*see Matter of Town of Islip v New York State Pub. Empl. Relations Bd.*, 23 NY3d 482, 494 [2014]).

We have considered UCS's remaining contentions and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

13 In the Matter of Panstar Realty LLC, Respondent, v New York Teachers Housing Corp., Appellant. [250 NYS3d 65]—

Adjoining Landowners—Entry on Adjoining Land to Make Improvements—Requisite Need—Approval of Alternative Plan by Department of Buildings
Adjoining Landowners—Entry on Adjoining Land to Make Improvements—License Fee—Parking Spaces
Adjoining Landowners—Entry on Adjoining Land to Make Improvements—Engineering and Attorneys' Fees

Order, Supreme Court, Bronx County (Bianka Perez, J.), entered on or about July 8, 2025, which granted petitioner's application pursuant to RPAPL 881 for a temporary license to access respondent's property for a period of nine months; directed a license fee of \$1375.00 per month to be paid to respondent; directed petitioner procure a \$250,000 bond; and declined respondent's request for engineering and attorneys' fees, unanimously modified, on the law, to limit the license to access to respondent's property for the purpose of installing an overhead protection using needle beams, remand for reconsideration of respondent's request for engineering and attorneys' fees, and otherwise affirmed, without costs.

The court erred to the extent it granted the RPAPL 881 license allowing, and issued a directive requiring, petitioner to perform repairs to the retaining wall and parking lot on respondent's property. At the time petitioner commenced this special proceeding, the Department of Buildings (DOB) had a stop-work order in place that required the completion of those repairs prior to any authorization of the next stage of work on petitioner's school construction project. However, DOB fully rescinded the stop-work order, and it granted approval to petitioner's alternative plan to install overhead protection that used needle beams attached to a concrete slab on petitioner's property, obviating the need for repair of respondent's retaining wall and parking lot prior to the installation of overhead protections. Accordingly, there was no basis for finding that petitioner had the requisite need for an access license for making the repairs (*see Matter of Thomas Anthony Holdings LLC v Goodbody*, 216 AD3d 538, 539 [1st Dept 2023]; *Matter of Lincoln Spencer Apts., Inc. v Zeckendorf-68th St. Assoc.*, 88 AD3d 606 [1st Dept 2011]), and the license should have been

limited to access for the purpose of installing the needle beam overhead protection.

The court properly set a \$1,375.00 monthly license fee (retroactive from March 2023 and continuing for the nine-month access period) based on the \$125.00 monthly fee respondent charges its tenants for the parking spaces. Respondent does not provide evidentiary support for the higher monthly amount it asks this Court to impose, nor does it show that the issue should be remanded for an evidentiary hearing to allow it to offer evidence that it could have previously submitted (*see Matter of 18 W. 55th St. LLC v Pleiades House LLC*, 230 AD3d 990, 991 [1st Dept 2024]). The court also reasonably concluded that the \$250,000 bond was sufficient to address the potential future damages that might result in connection with the access license, especially in light of respondent's failure to present evidence on this issue.

As to respondent's request for engineering and attorneys' fees, the court did not specifically address the request but implicitly denied the request when it found the parties' remaining contentions unavailing. In implicitly denying the request, it is unclear whether the court applied the proper standard. Accordingly, the issue of respondent's fee requests is remanded for a ruling on the assessment of the factual disputes concerning the conduct of the parties during negotiations for a license, their conduct during the pendency of this proceeding, and a balancing of the equities based on those factual determinations (*see Matter of 1643 First LLC v 1645 1st Ave. LLC*, 224 AD3d 623, 624-625 [1st Dept 2024]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

14 The People of the State of New York, Respondent, v Dominique Johnson, Appellant. [251 NYS3d 69]—

Crimes—Appeal—Waiver—Constitutional Challenge to Firearm Licensing Scheme

Crimes—Possession of Weapon—Constitutional Challenge to Firearm Licensing Scheme

Judgment, Supreme Court, Bronx County (George R. Villegas, J., at suppression hearing, plea and sentencing), rendered January 9, 2024, convicting defendant of criminal possession of a weapon in the fourth degree, and sentencing him to a two-year term of probation, unanimously affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559-560 [2019], *cert denied* 589 US 1302 [2020]). However, defendant's facial constitutional challenge to New York's gun licensing scheme pursuant to *New*

York State Rifle & Pistol Assn., Inc. v Bruen (597 US 1 [2022]) survives his voluntary waiver (*People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). He also has standing to assert this facial challenge (*Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *2). In contrast, defendant’s discrete as-applied constitutional challenge to the “good moral character” requirement of the licensing scheme is encompassed by defendant’s valid appeal waiver and he lacks standing in any event (*id.*). This argument is also unpreserved because he did not raise it in the trial court (*see People v Martinez*, 238 AD3d 423, 424 [1st Dept 2025]), and we decline to review it in the interest of justice. Further, defendant’s constitutional challenges are not properly before this Court because defendant failed to serve notice of these claims on the Attorney General pursuant to Executive Law § 71 (*see People v Castillo*, 234 AD3d 557, 558 [1st Dept 2025], *lv denied* 43 NY3d 1006 [2025]).

In the alternative, defendant’s constitutional challenges are unavailing. The facial challenge fails because *Bruen* did not invalidate New York’s gun licensing scheme in its entirety (*see People v Martin*, 241 AD3d 1211, 1212 [1st Dept 2025]). As to defendant’s challenge to the good moral character requirement, defendant’s failure to preserve the issue leaves a record wholly inadequate to determine whether that limitation “is consistent with this Nation’s historical tradition of firearm regulation” (*Bruen*, 597 US at 34).

Defendant also argues that, based on a suppression hearing cut short by defendant’s guilty plea, we should rule, in the interest of justice, that the police engaged in a “flagrant constitutional violation” by opening defendant’s fanny pack, revealing a gun inside. Defendant forfeited the argument by pleading guilty before the suppression hearing was completed and expressly waived it when he voluntarily waived the right to appeal (*see People v Fernandez*, 67 NY2d 686 [1986]; *People v Fagairo*, 149 AD3d 537, 538 [1st Dept 2017]). In any event, the truncated record is inadequate for appellate review (*see Fernandez*, 67 NY2d at 688). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

15 The People of the State of New York, Respondent, v J.W., Appellant. [248 NYS3d 207]—

Crimes—Sentence—Youthful Offender—Mandatory Surcharges and Fees

Judgment, Supreme Court, New York County (Ellen N. Biben, J., at plea; Ruth Pickholz, J., at sentencing), rendered March 16, 2023, convicting defendant, upon his plea of guilty,

of attempted robbery in the third degree, adjudicating him a youthful offender, and sentencing him to a jail term of one year, unanimously modified, on the law, to the extent of vacating the mandatory surcharge and crime victim assistance fee imposed at sentencing, and otherwise affirmed.

The statutory provisions authorizing the imposition of mandatory surcharges and crime victim assistance fees upon youthful offenders were repealed effective August 24, 2020, before defendant was sentenced (L 2020, ch 144, §§ 3-4; *see* former Penal Law §§ 60.02 [3]; 60.35 [10]). Accordingly, the sentencing court had no authority to impose the surcharge and fee (*People v L.P.*, 234 AD3d 578, 579 [1st Dept 2025]; *People v D.S.*, 230 AD3d 1036 [1st Dept 2024]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

16 The People of the State of New York, Respondent, v M.O., Appellant. [248 NYS3d 205]—

Crimes—Sentence—Youthful Offender

Judgment, Supreme Court, Bronx County (Alvin Yearwood, J.), rendered October 5, 2021, convicting defendant, upon his plea of guilty, of hindering prosecution in the second degree (Indictment No. 1554/19), and sentencing him to a jail term of one year, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed. Judgment, same court, and date, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (indictment No. 241/21), and sentencing him to a concurrent prison term of two years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the mandatory surcharge, the DNA fee and the crime victim assistance fee imposed at sentencing, and otherwise affirmed.

On Indictment No. 1554/19, we vacate the sentence and remand the matter for resentencing because, as the People concede, the court failed to determine defendant's youthful offender status on the record (*see People v D.B.*, 240 AD3d 445, 446 [1st Dept 2025], *lv denied* 44 NY3d 1010 [2025]).

Based on our own interest of justice powers, we vacate the surcharge and fees imposed on defendant at sentencing on indictment No. 241/21 (*see People v Chirinos*, 190 AD3d 434, 435 [1st Dept 2021]). We note that the People do not oppose this relief. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

17 The People of the State of New York, Respondent, v Roniel Dotel, Appellant. [248 NYS3d 73]—

Crimes—Appeal—Valid Waiver

Judgment, Supreme Court, Bronx County (Guy H. Mitchell, J.), rendered July 18, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of three and one-half years, followed by five years of postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed at sentencing, and otherwise affirmed.

Under the “totality of the circumstances,” defendant’s waiver of the right to appeal was valid (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). The waiver colloquy mirrored the model colloquy nearly verbatim (*see People v Nunez*, 220 AD3d 597, 597-598 [1st Dept 2023], *lv denied* 41 NY3d 1004 [2024]). Furthermore, “[t]he court properly explained defendant’s right to counsel on appeal, and did not imply that by waiving appeal, defendant would forfeit his right to appellate counsel for claims that survived the waiver” (*People v Yizar*, 240 AD3d 416, 416 [1st Dept 2025], *lv denied* 44 NY3d 985 [2025]). Defendant’s valid waiver of his right to appeal forecloses review of his excessive sentence claim (*see Nunez*, 220 AD3d at 597). In any event, we perceive no basis for reducing the sentence.

Based on our own interest of justice powers, we vacate the surcharge and fees imposed on defendant at sentencing (*see e.g. People v Lara-Medina*, 195 AD3d 542 [1st Dept 2021], *lv denied* 37 NY3d 993 [2021]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

18 The People of the State of New York, Respondent, v Shayron Porter, Appellant. [248 NYS3d 73]—

Crimes—Unlawful Search and Seizure—Matched Description from Anonymous Tip—Unusual Behavior

Crimes—Possession of Weapon—Sufficiency of Indictment—Operability—Citation to Name of Statute

Judgment, Supreme Court, New York County (Robert Mandelbaum, J., at hearing; Curtis J. Farber, J., at plea and sentencing), rendered August 15, 2022, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 6½ years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019], *cert denied* 589 US 1302 [2020]). The combination of the court’s colloquy and the detailed written waiver that defendant signed after consulta-

tion with counsel satisfied the requirements of a valid waiver which forecloses review of his suppression claim (*see People v Bawa*, 234 AD3d 601, 602 [1st Dept 2025], *lv denied* 43 NY3d 943 [2025]).

In any event, as an alternative holding, we reject his claim on the merits. The record did not show that the radio run transmitted the identity of the caller, and thus, for purposes of a reasonable suspicion analysis, the tip was anonymous (*see People v Brown*, 172 AD3d 41, 42 [1st Dept 2019], *lv denied* 33 NY3d 1067 [2019]). Although the description of a Black man wearing a white t-shirt involved in a dispute with a gun in the lobby of a specified building was generic, the officer observed defendant—a Black man wearing a light colored t-shirt—“right by the entrance to the building” reported in the call, two minutes after the transmission, and he was the only person at the location who matched the radioed description. This provided the officers with a founded suspicion that criminal activity was afoot (*see generally People v De Bour*, 40 NY2d 210, 223 [1976]). That founded suspicion was elevated to reasonable suspicion when the officer, approaching in a marked vehicle, observed defendant walking quickly toward a black vehicle that was moving slowly through the crosswalk. Defendant entered the front passenger seat of the car, which quickly drove away before defendant closed the car door. This “unusual” behavior drew the officer’s attention to defendant, and in conjunction with the radioed information, provided the officer with reasonable suspicion that defendant was involved in a crime (*see People v Williams*, 146 AD3d 410, 411 [1st Dept 2017], *lv denied* 29 NY3d 954 [2017]; *People v Curtis*, 29 AD3d 316, 317 [1st Dept 2006], *lv denied* 7 NY3d 866 [2006]).

Defendant’s challenges to counts 2, 3, and 4 of the indictment, based on the failure of the indictment to allege that the firearm was operable, are moot because he was not convicted of those counts (*see People v Johnson*, 242 AD3d 588, 589 [1st Dept 2025]; *People v Watts*, 234 AD3d 620, 621 [1st Dept 2025], *lv denied* 43 NY3d 1059 [2025]). In any event, his claims are non-jurisdictional and were waived by his guilty plea (*see People v Iannone*, 45 NY2d 589, 600 [1978]; *People v Tammaro*, 155 AD3d 473, 475 [1st Dept 2017], *lv denied* 30 NY3d 1109 [2018]). The indictment was not jurisdictionally defective for omitting the material element of operability. Although the text of Penal Law §§ 265.03 (1) (b), 265.03 (3), and 265.02 (3) are silent regarding operability, it is well established that by citing the name of the statute, the People alleged all of the statutory elements, even those that are the product of a “judicial gloss”

(see *People v Smith*, 237 AD3d 590, 590-591 [1st Dept 2025], *lv denied* 43 NY3d 1048 [2025]; *People v Daniels*, 224 AD3d 554 [1st Dept 2024], *lv denied* 41 NY3d 982 [2024]; *People v Luis R.*, 220 AD3d 549, 549-550 [1st Dept 2023], *lv denied* 42 NY3d 1080 [2025]). Count 4 of the indictment, charging possession of a large capacity ammunition feeding device, is not jurisdictionally defective for failing to allege the proviso, contained in Penal Law § 265.02 (8) at the time of defendant's crime but since removed, permitting possession if that person lawfully possessed the device before January 15, 2013, and met other conditions, as such information was uniquely within defendant's knowledge such that affirmatively proving it would require the People to go to "intolerable lengths" (see *People v Davis*, 13 NY3d 17, 32 [2009]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

19 The People of the State of New York, Respondent, v Jose Almodovar, Appellant. [248 NYS3d 68]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Guy H. Mitchell, J.), rendered April 14, 2022, and 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. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

20 The People of the State of New York, Respondent, v Michael Worrell, Appellant. [248 NYS3d 71]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Judith S. Lieb, J.), rendered November 21, 2024, 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. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

21 The People of the State of New York, Respondent, v Zephaniah Hulcome, Appellant. [248 NYS3d 204]—Judgment, Supreme Court, New York County (Curtis J. Farber, J.), rendered May 1, 2019, 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. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

22 Haley Perrotte, Respondent, v Bloomberg, L.P., et al., Appellants, et al., Defendants. [248 NYS3d 206]—

Appeal—Matters Appealable—Status Conference Order

Disclosure—Discovery and Inspection—Claim for Lost Wages—Records of Credit Card Transactions

Disclosure—Examination before Trial—Lost Wages Claim—Receipt of Checks

Order, Supreme Court, New York County (Leslie A. Stroth, J.), entered on or about February 13, 2025, which, in effect, granted plaintiff's letter application to quash defendants' subpoenas on J.P. Morgan Chase and nonparty Catherine Vance Thompson, unanimously modified, on the law, to allow the deposition of Thompson after issuance of a new subpoena, and otherwise affirmed, without costs.

Initially, despite plaintiff's contention otherwise, the status conference order is appealable. The order was not issued sua sponte, but instead resolved plaintiff's letter application, which defendants opposed through their own letter submissions (see *Naramore v Mount Sinai Health Sys., Inc.*, 227 AD3d 528, 529 [1st Dept 2024]). Under these circumstances, the process afforded the parties the opportunity to be heard and created a proper record for appellate review (*id.* at 529).

As to the merits, Supreme Court providently exercised its discretion in granting plaintiff's application to quash defendants' subpoena for her Chase records. As the submitted evidence makes clear, these records show plaintiff's credit card transactions and thus have no bearing on her claim for lost wages (see e.g. *Leibowitz v Babad*, 175 AD3d 639, 641 [2d Dept 2019]; cf. *Kim v White & Case LLP*, 216 AD3d 408, 409 [1st Dept 2023]). To the extent defendants seek to undermine plaintiff's credibility regarding her employment history or establish that she mitigated her damages, they already have access to plaintiff's banking records from Bank of America, N.A., which show large deposits that may reflect employment.

However, Supreme Court should have permitted defendants to seek Thompson's deposition. Plaintiff's Bank of America records show that she received several checks from Thompson with memo lines indicating that they were payment for "invoices." Because plaintiff has repeatedly stated that she has not been employed since her termination, Thompson's deposition is material and necessary to determining why these checks were issued (*see Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]).

Plaintiff failed to preserve her argument that Thompson's subpoena is defective, as she failed to raise it before Supreme Court (*see 324 E. 9th St. Corp. v Acordia Northeast-N.Y.*, 29 AD3d 367, 367 [1st Dept 2006]). In any event, defendants will need to serve a new subpoena with a new deposition date. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

23 Priority Management LLC, Respondent, v Gilaad Deutsch et al., Appellants. [248 NYS3d 205]—

Landlord and Tenant—Warranty of Habitability—Did Not Live in Apartment during Relevant Period

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered on or about January 7, 2025, which granted plaintiff's motion for summary judgment on its breach of contract cause of action and for summary judgment dismissing defendants' affirmative defense and counterclaims for breach of the warranty of habitability and emotional distress, unanimously affirmed, with costs.

Supreme Court properly granted plaintiff's motion for summary judgment on its breach of contract claim because plaintiff established, through documents and defendants' admissions, the existence of a lease, defendants' breach of the lease, and resulting damages. Defendants conceded that they entered the lease agreement and that they did not live at the premises or remit any rent during the period claimed by plaintiff.

The court also properly granted summary judgment dismissing defendants' affirmative defense and counterclaim that plaintiff breached the warranty of habitability set forth in Real Property Law § 235-b by failing to address faulty electrical wiring in the apartment building. Defendants did not live in the apartment during the period for which they claim a breach, and thus are not entitled to compensation (*see Genson v Sixty Sutton Corp.*, 74 AD3d 560, 560 [1st Dept 2010]; *see also Adler v Ogden CAP Props.*, 126 AD3d 544, 545 [1st Dept 2015]). In addition, there is no evidence that defendants left their apart-

ment or failed to return due to faulty electrical wiring or any other condition that represented a threat to their safety or otherwise rendered their apartment uninhabitable (*see Adler*, 126 AD3d at 545; *see also Solow v Wellner*, 86 NY2d 582, 588-589 [1995]).

Furthermore, the court properly granted summary judgment dismissing the counterclaim for emotional distress. Defendants failed to raise any triable issue that plaintiff's conduct in commencing this action amounted to extreme and outrageous conduct, which is necessary to support a claim for intentional infliction of emotional distress (*see generally Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Nor did defendants raise any triable issue as to whether any harm they experienced was "[a] direct, rather than [a] consequential" result of plaintiff breaching any duty so as to support a claim for negligent infliction of emotional distress (*Brown v New York Design Ctr., Inc.*, 215 AD3d 1, 5-9 [1st Dept 2023]).

We have considered defendants' remaining arguments and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ. [**Prior Case History: 84 Misc 3d 1265(A), 2025 NY Slip Op 50039(U).**]

24 Dorothy S. Carvello, Respondent, v Warner Music Group Corp. et al., Defendants, and Jason Flom, Appellant. [248 NYS3d 202]—

Negligence—Negligent Infliction of Emotional Distress—Duty to Control Behavior of Others

Torts—Intentional Infliction of Emotional Distress—Extreme and Outrageous Conduct—Directing Co-Worker to Sit on Lap

Order, Supreme Court, New York County (Mary V. Rosado, J.), entered on or about January 21, 2025, which, to the extent appealed, denied so much of the motion of defendant, Jason Flom, to dismiss plaintiff's complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's claim for negligent infliction of emotional distress against defendant Jason Flom, her co-employee, should have been dismissed as barred by the exclusivity of the Worker's Compensation Law (*see Thomas v Northeast Theatre Corp.*, 51 AD3d 588, 589 [1st Dept 2008]). In addition, plaintiff failed to plead facts to show that Flom had a duty to plaintiff to control the behavior of others who were committing acts of misconduct towards her (*see Jonathan A. v Board of Educ. of City of N.Y.*, 8 AD3d 80, 81 [1st Dept 2004]).

Plaintiff's claim for intentional infliction of emotional

distress based on Flom's having allegedly directed her to sit on his lap during a business meeting should have been dismissed, because, while inappropriate, the alleged misconduct was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016] [internal quotation marks omitted]).

Finally, plaintiff's claim for civil conspiracy should also have been dismissed, as New York does not recognize an independent cause of action for conspiracy to commit a civil tort (*see Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]). Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

25 Dorothy S. Carvello, Respondent, v Warner Music Group Corp. et al., Appellants, et al., Defendants. [251 NYS3d 1]—

Employment Relationships—Respondeat Superior—Vicarious Liability—Allegations of Sexual Misconduct by Employee

Workers' Compensation—Exclusiveness of Remedy—Negligent Infliction of Emotional Distress

Corporations—Liability of Successor Corporation—Sufficiency of Pleading

Order, Supreme Court, New York County (Mary V. Rosado, J.), entered on or about January 17, 2025, which, to the extent appealed from, denied the motion of defendants, Warner Music Group Corp. and Atlantic Recording Corporation to dismiss the first, second, third, and fourth causes of action in the complaint, except to the extent that those causes of action were brought under Penal Law § 20.20, the fifth cause of action to the extent it alleged civil conspiracy, and the sixth, seventh, and ninth causes of action, unanimously modified, on the law, the fifth cause of action dismissed, with prejudice, and the remaining causes of action dismissed, without prejudice and with leave to plaintiff to replead, and otherwise affirmed, without costs.

Plaintiff's intentional tort causes of action should have been dismissed because neither Warner nor Atlantic can be held responsible, under a theory of respondeat superior, for the intentional conduct of Atlantic's employees—allegedly serious acts of sexual misconduct—which were not in any way related to the advancement of Atlantic's business, authorized by it, or performed within the scope of the employees' duties (*see Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; *Taylor v United Parcel Serv., Inc.*, 72 AD3d 573, 573 [1st Dept 2010], *lv denied* 15 NY3d 705 [2010]; *Bowman v State of New York*, 10 AD3d 315, 316-317 [1st Dept 2004]). However, dismissal is without prejudice and plaintiff is granted leave to replead (*see Espallat v Breli Originals*, 227 AD2d 266, 267 [1st Dept 1996]).

Plaintiff's claims for negligent infliction of emotional distress and negligence should also have been dismissed as barred by the exclusive remedy provisions of the Worker's Compensation Law because there is no allegation that the intentional acts of Warner and Atlantic's employees that gave rise to those claims was directed by those defendants (*see Martinez v Canteen Vending Servs. Roux Fine Dining Chartwheel*, 18 AD3d 274, 275 [1st Dept 2005]). Again, however, dismissal is without prejudice to plaintiff repleading these causes of action (*see Serdans v New York & Presbyt. Hosp.*, 112 AD3d 449, 451 [1st Dept 2013]).

Plaintiff's claim for civil conspiracy should have been dismissed with prejudice because an independent cause of action for conspiracy is not recognized in New York (*see Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]).

Finally, on this preanswer motion to dismiss, Warner has not shown, as a matter of law, that it is immune from liability despite being Atlantic's successor. It is true that a corporation that acquires the assets of another corporation is generally not liable for its predecessor's torts (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). However, several exceptions to this general rule exist (*id.* at 245), and the pleading in this case is sufficient despite plaintiff not having specifically identified one or more of them. To the extent that, in moving for dismissal, Warner relied on documentary evidence that it did not exist when the misconduct alleged in the complaint took place, such documentation did not sufficiently rebut plaintiff's allegation that it did have successor liability. Other documents referred to by Warner on this appeal are not in the record before us. Concur—Kennedy, J.P., Scarpulla, Gesmer, Mendez, Hagler, JJ.

(February 17, 2026)

1 415 East 12th Street Housing Development Fund Corporation, Appellant, v Erasmo Duran et al., Respondents. [251 NYS3d 82]—

**Limitation of Actions—Four-Month Statute of Limitations—Challenge to Final Determination by Board of Directors
Condominiums and Cooperatives—Board of Directors—Termination of Lease—Defective Notice**

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered June 23, 2025, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary

judgment on its first, second, and third causes of action declaring defendant Erasmo Duran's proprietary lease and shares were duly canceled, declaring that plaintiff is entitled to specific performance by defendant of the provisions of the proprietary lease requiring him to surrender the shares and proprietary lease, and for an order of ejectment, and dismissing defendants' first, second, third, and seventh counterclaims; granted defendants' cross-motion for summary judgment on their breach of contract counterclaim to the extent of declaring void plaintiff's termination of defendant's stock and proprietary lease, and dismissing plaintiff's first through third causes of action, unanimously modified, on the law, and plaintiff's motion granted only to the extent that all of defendant's counterclaims are dismissed, and otherwise affirmed, without costs.

On July 12, 2023, plaintiff cooperative housing corporation mailed a notice of default to defendant Erasmo Duran both by certified mail, return receipt requested, and by first class mail. The default notice afforded defendant a 30-day opportunity to cure his alleged objectionable conduct. The notice advised defendant that he was in default under the lease and that he had violated the lease provision pertaining to unreasonable noise or annoyance of other shareholders. Although the notice was missing a page, it included a single paragraph that referred to defendant's continuing conduct in yelling at and harassing residents in the hallways and on the street, slamming doors, screaming obscenities outside residents' doors, and playing music loudly while leaving the door open. There were no specific instances of conduct described. The USPS tracking information reflects that delivery of the notice of default was marked "refused."

On August 23, 2023, plaintiff issued a notice of termination which advised defendant that his proprietary lease and shares were canceled as of August 31, 2023, due to continuing objectionable conduct. While the notice of termination included dates and detailed descriptions of more than ten incidents, each preceded the 30-day cure period set forth in the July 12 notice of default. The notice of termination also included the same nonspecific boilerplate paragraph from the notice of default claiming that defendant continued his objectionable conduct. The notice of termination demanded defendants' vacatur and surrender of the apartment by or before August 31, 2023. The USPS tracking information for the notice of termination reflects that it was "refused."

The court should have found that defendants' counterclaims are barred by the statute of limitations applicable to CPLR

article 78 proceedings. Where, as here, the gravamen of the counterclaims is a challenge to a final determination by a board of directors, “such challenge is to be made in the form of an article 78 proceeding and must be commenced within four months after the determination to be reviewed becomes final and binding upon” defendant (*Dau v 16 Sutton Place Apt. Corp.*, 205 AD3d 533, 534-535 [1st Dept 2022] [internal quotation marks omitted]; *see also Musey v 425 E. 86 Apts. Corp.*, 154 AD3d 401, 403-404 [1st Dept 2017], *lv dismissed* 31 NY3d 1065 [2018]; CPLR 217 [1]). Defendants’ attempt to couch their counterclaims as sounding in breach of the proprietary lease is unavailing (*see Dau*, 205 AD3d at 535).

However, the court correctly declared that plaintiff did not validly terminate defendants’ lease or proprietary shares because the notice of termination was defective. Plaintiff’s argument that the court incorrectly focused on the notice of default misses the mark. The notice of termination failed to include “new allegations about defendant’s conduct arising” during the cure period (*see e.g. Tomfol Owners Corp. v Hernandez*, 201 AD3d 453, 454 [1st Dept 2022]). This defect in the notice of termination necessitates dismissal of plaintiff’s first three causes of action (*see 49 W. 12 Tenants Corp. v Seidenberg*, 6 AD3d 243, 244 [1st Dept 2004]).

Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

2 In the Matter of Anthem HealthChoice Assurance, Inc., Doing Business as Anthem Blue Cross and Blue Shield, Appellant, v Renee Campion et al., Respondents. [251 NYS3d 608]—

Municipal Corporations—Contract for Professional Services—Scoring of Proposal—Absence of Anticipated Cost Savings

Judgment (denominated an order), Supreme Court, New York County (Lyle E. Frank, J.), entered on or about September 19, 2024, which denied the petition to annul the August 2, 2023 determination of respondent The City of New York Office of Labor Relations (OLR) excluding petitioner from further negotiations in a bidding process to provide health benefit services for respondent The City of New York’s active employees and their dependents and to annul OLR’s September 26, 2023 and October 20, 2023 decisions denying petitioner’s protests of the initial decision, denied petitioner’s motion for leave to take limited discovery, and dismissed this proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

As a threshold matter, the August 11, 2023 challenges to OLR’s request for multi-year trend guarantees, request for

self-insured administrative-services-only options, and provision of claims data to vendors were made well outside the 10-day period provided for asserting protests (9 RCNY 2-10 [a] [2]). Thus, petitioner failed to exhaust its administrative remedies as to those issues (*see* CPLR 7801 [1]; *Ahmed v City of New York*, 44 Misc 3d 228, 238 [Sup Ct, NY County 2014], *mod on other grounds* 129 AD3d 435 [1st Dept 2015]).

As to the remaining issues, petitioner challenges the scoring of its proposal to give it zero points, the decision not to select it as a finalist for the contract award, and the denials of its protests. However, none of these actions by respondents were arbitrary or capricious, affected by an error of law, or done in violation of lawful procedure, nor did they constitute an abuse of discretion (CPLR 7803 [3]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). OLR informed petitioner that its proposal was expected to increase the City's costs and found that petitioner's subsequent submission did not satisfy the cost-savings goal of the solicitation. Thus, in the absence of any anticipated cost savings, it was not irrational for OLR to allot zero points to petitioner's relative cost score. Furthermore, petitioner fails to demonstrate that OLR deviated from the formula of "relativity to best price" (*cf.* *Matter of ACME Bus Corp. v Orange County*, 28 NY3d 417, 425 [2016]; *Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast*, 17 NY3d 136, 144 [2011]). It was also rational for OLR to determine that petitioner's arguments regarding other vendors were speculative and unsupported by the record.

Finally, Supreme Court providently exercised its discretion in denying leave to seek discovery (CPLR 408; *see Matter of People v Northern Leasing Sys., Inc.*, 193 AD3d 67, 74 [1st Dept 2021], *lv dismissed* 37 NY3d 1088 [2021]; *Matter of L&M Bus Corp. v New York City Dept. of Educ.*, 71 AD3d 127, 136 [1st Dept 2009], *affd as mod* 17 NY3d 149 [2011]). Petitioner's arguments in support amount to "no more than an expression of hope insufficient to warrant deferral of judgment pending discovery" (*Price v New York City Bd. of Educ.*, 51 AD3d 277, 293 [1st Dept 2008], *lv denied* 11 NY3d 702 [2008]).

We have considered petitioner's remaining contentions and find them unavailing. Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

3 Delroy Askins, Appellant, v Marlene Santos, Respondent. [248 NYS3d 224]—

Appeal from order, Supreme Court, New York County (Suzanne Adams, J.), entered on or about July 31, 2024, which granted defendant's motion to dismiss the complaint on default, unanimously dismissed, without costs, as taken from a nonappealable paper.

No appeal lies from an order entered on default (CPLR 5511; see *Matter of Colon v Delgado*, 106 AD3d 414, 415 [1st Dept 2013]). Plaintiff's remedy was to move to vacate his default, in which event he would be required to demonstrate both a reasonable excuse for the default and a meritorious claim (see *French v NYS Dept. of Labor*, 231 AD3d 620, 620 [1st Dept 2024]; *Matter of Lenea'jah F. [Makeba T.S.]*, 105 AD3d 514, 514 [1st Dept 2013]).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

4 Bren-el Realty LLC, Appellant-Respondent, v Planetarium Travels Inc. et al., Respondents-Appellants. [252 NYS3d 35]—

Landlord and Tenant—Rent—Nonpayment—Damages
Landlord and Tenant—Lease—Provision Requiring Landlord to Maintain Premises and Make Structural Repairs—Ceiling Collapse from Leaks
Landlord and Tenant—Constructive Eviction—Ceiling Collapse

Order, Supreme Court, New York County (Nicholas W. Moyné, J.), entered on or about May 1, 2025, which granted that part of plaintiff-landlord's motion under CPLR 3212 for summary judgment as to liability on its first and second claims for breach of the lease and guaranty and for dismissal of defendant-tenant and guarantors' affirmative defenses, first counterclaim for failure to make repairs, and third counterclaim for tenant harassment, and denied that part of plaintiff's motion seeking dismissal of defendants' second counterclaim for constructive eviction, unanimously modified, on the law, to deny the motion with respect to defendants' first counterclaim for failure to make repairs, their first affirmative defense for failure to state a claim, their sixth affirmative defense for breach of the lease, their eighth affirmative defense for constructive eviction, and their tenth affirmative defense based on the plaintiff's bad faith failure to make repairs, and the counterclaim and those affirmative defenses reinstated, and otherwise affirmed, without costs.

The motion court properly granted summary judgment to plaintiff-landlord on its first and second causes of action under the lease and guaranty as to liability only, and properly declined to determine as a matter of law that it was entitled to

its attorneys' fees (*see 558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561, 562 [1st Dept 2021], *appeal dismissed* 37 NY3d 1040 [2021]). Although the landlord established that defendant-tenant stopped paying rent and additional rent in or about April 2020, the landlord did not establish as a matter of law what amounts were due and owing, as its submissions did not appear to account for the application of the tenant's security deposit, nor did the evidence resolve defendants' dispute as to certain other charges, requiring further proceedings on damages (*558 Seventh Ave. Corp.*, 194 AD3d at 562). As discussed below, tenant's constructive eviction claim may result in an offset to the amounts due to landlord. Contrary to defendants' contention, the affidavit of landlord's agent sufficiently identified the lease containing the guaranty terms, as the existence of the lease is not genuinely in dispute (*see e.g. Acevedo v Audubon Mgt.*, 280 AD2d 91, 95 [1st Dept 2001]).

Article 4 of the lease required landlord to maintain the premises and make structural repairs, and its failure to do so entitled defendant-tenant to counterclaim for breach of the lease. Because the landlord did not eliminate questions of fact surrounding the cause of the ceiling collapse and the resultant mold condition, alleged by defendants to have resulted from roof and/or plumbing leaks, the first counterclaim seeking damages for failure to make repairs and the sixth affirmative defense asserting the landlord's breach of the lease should not have been dismissed.

Although the first counterclaim refers to the warranty of habitability, which does not apply to commercial premises, a commercial tenant is entitled to premises that are fit for their stated use (*see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 256 [1st Dept 2009]). Landlord did not attempt to rebut the evidence submitted by tenant, including emails, photographs, and mold reports, demonstrating that landlord was on notice of the ongoing leaks in tenant's office from 2018 through 2020; that landlord failed to abate the condition permanently, causing the ceiling to collapse in late February, prior to the issue of COVID-19 Executive Orders directing business closures in New York State; and that thereafter, landlord failed to make repairs for eight months while portions of the premises remained unusable and infested with mold. Accordingly, the landlord failed to eliminate questions of fact relating to the tenant's entitlement to damages for breach of article 4 of the lease.

The motion court properly sustained the second counterclaim sounding in constructive eviction (*see Johnson v Cabrera*, 246

AD2d 578, 579 [2d Dept 1998]), and should not have dismissed the corresponding eighth affirmative defense. Because landlord failed to submit an affidavit from a party with knowledge addressing any of the foregoing conditions, questions of fact remain as to whether and to what extent tenant was partially constructively evicted. The record does not otherwise resolve the question of whether the ceiling collapse triggered the casualty provisions of article 9 of the lease, which governs landlord's duty to repair and tenant's right to suspend rent (*see e.g. Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 472 [2004] [article 9 casualty provision applied where "a wall . . . adjacent to the leased premises . . . collapsed"]). Accordingly, further proceedings are required to compile a factual record.

The third counterclaim for commercial tenant harassment was properly dismissed, albeit for a different reason than stated by the motion court. Administrative Code of the City of New York § 22-902 (a) (14) prohibits a landlord from engaging in commercial tenant harassment, including "attempting to enforce a personal liability provision that the landlord knows or reasonably should know is not enforceable pursuant to section 22-1005 of the code." Administrative Code § 22-1005 constitutes the "guaranty law," which provides that a natural person guarantor's obligations are not enforceable for defaults occurring within the statutory period of March 7, 2020, through June 30, 2021, if the tenant was required to close its business under Executive Order (A. Cuomo) Nos. 202.3 (9 NYCRR 8.202.3) (covering on-site food or beverage service), 202.6 (9 NYCRR 8.202.6) (covering retail establishments), or 202.7 (9 NYCRR 8.202.7) (covering personal care services).

Defendants assert on appeal that the tenant's travel agency was closed under Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8). However, because closures under that executive order do not fall within the ambit of the guaranty law, the guarantor's liability here is not affected by it (*see e.g. Knickerbocker Retail LLC v Bruckner Forever Young Social Adult Day Care Inc.*, 204 AD3d 536, 538 [1st Dept 2022] ["while the spirit of the law would appear to include the guarantor, the letter of the law does not include him"]). As a result, there could not have been any tenant harassment arising under Administrative Code § 22-902 (a) (14), requiring dismissal of the third counterclaim and eleventh affirmative defense asserting the protections of the guaranty law.

Finally, the motion court should not have dismissed the affirmative defenses asserting failure to state a claim, breach of

lease and bad faith failure to make repairs. An affirmative defense asserting the failure to state a claim is generally regarded as mere surplusage and its dismissal proper “only if all the other affirmative defenses are found to be legally insufficient” (*Tribbs v 326-338 E 100th LLC*, 215 AD3d 480, 482 [1st Dept 2023] [internal quotation marks omitted]). The affirmative defense asserting the landlord’s breach of lease remains viable for the same reasons discussed above. Because of the landlord’s failure to address any of the facts and circumstances relating to the ceiling collapse, there was no basis to dismiss the affirmative defense asserting the landlord’s bad faith neglect of the condition in tenant’s premises.

We have considered the remaining contentions and find them unavailing. Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

5 In the Matter of Brittany W., Petitioner, v Suzanne Miles-Gustave et al., Respondents. [253 NYS3d 15]—

**Social Services—Register of Child Abuse and Maltreatment—Petitioner Mother Brought Infant Child to Meet Abusive Father
Administrative Law—Administrative Review—Hearsay Evidence—Documents Regarding Physical Altercation while Holding Child**

Determination of respondent New York State Office of Children and Family Services (OCFS), dated July 28, 2023, which, after a hearing, denied petitioner’s request to amend, as unfounded, and to seal a September 8, 2017 indicated report finding maltreatment of her child, 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 [Shahabuddeen Abid Ally, J.], entered July 26, 2024) dismissed, without costs.

Substantial evidence supports OCFS’s determination that petitioner maltreated her infant child (CPLR 7803 [4]). Notably, “[s]ubstantial evidence is a minimal standard . . . and requires only that a given inference is reasonable and plausible. Where substantial evidence exists, the reviewing court may not substitute its judgment for that of [OCFS], even if the court would have decided the matter differently” (*Matter of Jeter v Poole*, 43 NY3d 241, 253-254 [2024] [internal quotation marks and citation omitted]). A maltreated child includes one whose physical, mental, or emotional condition has been impaired or placed in imminent danger of impairment because of a parent’s failure to exercise a minimum degree of care (Social Services Law § 412 [2]; Family Ct Act § 1012 [f] [i]). The determination here rests on the totality of the circumstances surrounding petitioner’s maltreatment of her infant child in

September 2017, and not on the resolution of any single disputed factual detail.

At the fair hearing, documentary evidence of petitioner's maltreatment included the Child Protective Services Investigation Summary, the September 8, 2017 Oral Transmittal Report in issue and the Administration for Children's Services' (ACS) Intake Records and Investigative Progress Reports (contemporaneously prepared in the ordinary course of ACS's duties). These records were admitted without objection. In partially corroborative testimony, petitioner admitted that on September 7, 2017, "for some strange reason," she retrieved her seven-month old child from a maternal aunt's home, a safe and secure residence which protected her child from potential harm, and brought her infant child to meet the infant's abusive father outside a secure, then undisclosed domestic violence shelter where petitioner had been residing. As our dissenting colleague painstakingly details, petitioner was indisputably aware of the infant's abusive father's extensive history of injurious domestic violence towards her and her other children. Moreover, an outstanding order of protection was in effect against the infant's abusive father to stay away from both. Nonetheless, petitioner and her infant child went with the infant's abusive father to his paternal great aunt's home, where a violent confrontation between them ensued, resulting in her abuser's eventual arrest. Even assuming for the sake of argument that petitioner was not holding her infant child at the precise moment the assault against her occurred, as petitioner contends, petitioner's unreasonable decision to remove her youngest child from safety and place this child in the custody and control of the infant's abusive father exposed this child to an imminent risk of serious harm and fell below the minimum degree of care required under the circumstances (see *Matter of Anonymous v Poole*, 162 AD3d 598, 598-599 [1st Dept 2018]). Further, petitioner's admitted violation of an existing order of protection for her child also constituted a separate and distinct finding of maltreatment because her conduct unreasonably exposed her infant to a substantial risk of harm (see *Matter of Jasmine A. [Albert G.]*, 120 AD3d 1125, 1125 [1st Dept 2014], citing *Matter of Diamond Tyneshia B. [Aisha K.]*, 109 AD3d 740 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013], *cert denied* 574 US 845 [2014]).

Contrary to our dissenting colleague's unduly narrow focus, a finding of maltreatment does not require proof that the child was physically injured or in direct contact with the violence. Imminent risk may be established where a parent's actions

foreseeably place a child in a volatile and dangerous environment (see *Matter of Melanie J.A. [Ramon J.]*, 221 AD3d 421, 421-422 [1st Dept 2023] [domestic violence in close proximity to the child creates a reasonable inference that the child was in imminent danger of physical impairment]; *Matter of Diamond Tyneshia B.*, 109 AD3d at 741). Thus, the ALJ reasonably concluded that petitioner's unreasonable decision to leave a confidential shelter and take her infant child to the home of her abuser's relative created precisely such a risk.

Nor does *Nicholson v Scoppetta* (3 NY3d 357 [2004]) compel a different result. The ALJ expressly acknowledged that petitioner had an extensive history of domestic violence at the hands of her abuser but had ample resources and options available to her (see *Anonymous*, 162 AD3d at 599). For instance, when her infant daughter was a few months old, petitioner's aunt, a Westchester County Police Commissioner, referred petitioner to Safe Horizon which then took both to an undisclosed domestic violence shelter, providing a bevy of support services such as domestic violence services, individual counseling, and housing assistance. Thus, when viewed through a lens of a reasonable person in similar circumstances, the ALJ properly concluded that petitioner failed to exercise a minimum degree of care (*id.*).

To the extent petitioner challenges the evidentiary basis for the determination, her arguments invite this Court to reweigh the evidence and reassess credibility, a function beyond the scope of substantial evidence review (see generally *Matter of Berenhaus v Ward*, 70 NY2d 436, 444 [1987]; *Matter of Riel v State of N.Y. Off. of Children & Family Servs.*, 175 AD3d 1166, 1167 [1st Dept 2019]). It is also well settled that hearsay is admissible in administrative proceedings and may constitute substantial evidence where it is relevant and probative (see *Matter of R.B. v New York State Off. of Children & Family Servs.*, 199 AD3d 429, 430-431 [1st Dept 2021]). Accordingly, the ALJ was entitled to credit the documentary evidence, portions of which were read into the record, that petitioner and her abuser "engaged in a physical altercation, both being physically aggressive toward each other, while [petitioner] was holding [the infant child] (7 months old) in her arms." Petitioner's testimony disputing certain details of the September 2017 violent altercation simply does not negate the rational basis for the determination.

Finally, although OCFS determined that petitioner's unreasonable conduct placed her infant in imminent danger, it fairly concluded that this maltreatment finding was not relevant or

reasonably related to employment in childcare, adoption, or foster care. Consequently, the indicated report dated September 8, 2017, cannot be disclosed to agencies during the petitioner's application process in those fields. Concur—Kern, J.P., Scarpulla, Shulman, Hagler, JJ.

Kapnick, J., dissents in a memorandum as follows: I respectfully dissent. I would annul the New York State Office of Children and Family Services' (OCFS) decision, dated July 28, 2023, which, after a hearing, denied petitioner Brittany W.'s request to amend and seal as "Unfounded" the September 2017 indicated report finding that she maltreated her child, C.B.

When reviewing the determinations of administrative tribunals, we consider whether there was "substantial evidence" to support OCFS's determination that Ms. W. maltreated her child (CPLR 7803 [4]; see *Matter of Charles v Poole*, 164 AD3d 1148, 1149 [1st Dept 2018]). A "maltreated child" is defined as a "child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care" (Social Services Law § 412 [2]; Family Ct Act § 1012 [f]). In my view, the record here does not satisfy the substantial evidence burden, even though the standard for substantial evidence is minimal.

Ms. W. first met Mr. B. in August 2014. Thereafter, Mr. B. repeatedly beat Ms. W., confined Ms. W. against her will, confiscated her phone and belongings, and trafficked her to other men. She described Mr. B. like "an animal." As Ms. W. testified, "[i]f you fight, he's going to almost beat you to death."

In 2015, Ms. W. testified that she left her other three children with her aunt to protect them from Mr. B.'s violence. The Administration for Children's Services (ACS) subsequently filed a neglect petition against her. At a December 2, 2015 court appearance on the petition, Ms. W. described Mr. B.'s ongoing abuse and the presiding judge instructed her "to get [Mr. B] out of [her] household." Ms. W. testified that she "didn't have any resources to get him out" at that time. Instead, she arranged for her children to live with their father and grandmother in Orange County while she "g[ot] [her]self out of this situation."

Mr. B.'s abuse nevertheless continued. The violence escalated to a point that Ms. W. was hospitalized. At the hospital, a social worker advised Ms. W. to seek an order of protection against Mr. B. in family court, which she did. Despite the order, Mr. B. continued to terrorize Ms. W. at her apartment since he still

had her keys and phone. Ms. W. testified that by this point she no longer had the “physical strength to fight him anymore” and she was in a state of “freeze-appease.”

In February 2017, Ms. W. gave birth to C.B. According to her testimony, Mr. B.’s abuse worsened after C.B. was born, and became unbearable. In March 2017, Ms. W. fled into a bar to escape him. There, security protected her and contacted the police. Ms. W. notified ACS of the incident, and her aunt referred her to Safe Horizon, an organization that provides services to domestic violence victims. Shortly after, Safe Horizon placed Ms. W. in a domestic violence shelter, where she remained from March 2017 through September 2017. During this time, C.B. resided safely with Ms. W.’s aunt.

The incident giving rise to the indicated report occurred on September 7, 2017. According to Ms. W., Mr. B. called her while she was with a friend and claimed that he was standing outside the domestic violence shelter where she had been living. Ms. W. testified that Mr. B. told her that he obtained her phone number and the shelter location from his mother and another individual. Ms. W. testified that “for some strange reason,” she walked to the shelter to meet Mr. B. She entered a state of appeasement, explaining that she “couldn’t fight” and “just went with him.” Once they met, Mr. B. “demanded that [Ms. W.] get C.B. and bring her with—with [them] to his aunt’s house.” At Mr. B.’s demand, she retrieved C.B. and accompanied him to his aunt’s home.

At the aunt’s house, Mr. B. became violent with Ms. W. He pushed her inside a bathtub and down a flight of steps and then repeatedly punched her in the face. Ms. W. testified that C.B. was still in Mr. B.’s aunt’s home during the assault, while she and Mr. B. were outside “in front of [the aunt’s front] door.”

Ms. W. recalls that she and Mr. B. left his aunt’s home and ended up in Manhattan where she sought hospital treatment. Mr. B. was then arrested.

The following day, an undisclosed individual¹ called in a report to the Statewide Central Register (SCR) concerning the incident. ACS investigated and indicated the report against Ms. W. on November 7, 2017.

Ms. W. entered treatment and counseling to address the abuse she endured. She learned that she had been experiencing Stockholm syndrome and PTSD, which placed her “in a

1. The identity of sources who report suspected child abuse or maltreatment to SCR is confidential (Social Services Law § 422 [4] [A]), but the record indicates that the source lives in the same home as Mr. B.’s aunt.

state of freeze” during the relevant events. Ms. W. resumed living with her children following treatment. She is currently employed as a Home Health Aide and aspires to become a domestic violence advocate and lawyer. In March 2020, Ms. W. was notified that a prospective employer had inquired of OCFS whether she was on the SCR as a person responsible for child abuse or maltreatment. Ms. W. requested a hearing to challenge the indicated report.

At the OCFS hearing, ACS relied exclusively on documentary evidence, which it is permitted to do, including the Oral Transmittal Report (OTR) dated September 8, 2017, the 2017 CPS Investigation Summary, and ACS’s 2017 Investigation Progress Notes. ACS did not call any witnesses to testify. ACS argued that this documentary evidence established by a fair preponderance of the evidence that Ms. W. failed to provide adequate guardianship for C.B. in 2017. Ms. W. also submitted documentary evidence, including certificates showing that she completed a domestic violence intervention program and parenting classes. Ms. W. was the only witness to testify at the hearing and presented un rebutted testimony concerning the abuse she suffered, her psychological state at the time, and the steps she took to protect her children.

On this record, I disagree with the majority’s holding that substantial evidence supported OCFS’s determination that Ms. W.’s conduct placed C.B. in actual or imminent danger of impairment (*see Matter of Charles v Poole*, 164 AD3d at 1149 [“OCFS’s determination that child maltreatment by petitioners was ‘indicated’ is not supported by substantial evidence”]; *Matter of Parker v Carrión*, 80 AD3d 458, 459 [1st Dept 2011] [“We conclude on the record before us that the administrative determination that petitioner neglected her daughter by the use of excessive corporal punishment was not supported by substantial evidence”]). OCFS determined that “[t]he Appellant’s actions placed C.B. at imminent risk of severe physical impairment” based on its finding that Ms. W. “engaged in a physical altercation with Mr. B. while holding C.B.” However, the only document that ACS admitted into evidence to support this conclusion was a call narrative in an OTR from an undisclosed third-party who stated that Ms. W. was “holding C.B. (7 months old) in her arms” when Mr. B. attacked her.² The call narrative was not read into the record during the hearing, and neither

2. The ACS Investigation Progress Notes include a duplicate report that originated from an undisclosed third party and was subsequently sent by the police to SCR. The narrative says that an aunt and uncle “took C.B. from the mother’s arms and removed the child from the situation.” The OTR from the

(n. cont’d)

the undisclosed caller nor the caseworker who transcribed the call and wrote the report testified at the hearing.

This Court has found that while it is proper “to rely on hearsay evidence that is relevant and probative,” such hearsay “d[oes] not constitute substantial evidence of child maltreatment” where it is “controverted by petitioner’s sworn testimony, which was subject to cross-examination” (*Matter of Veronica C. v Carrión*, 55 AD3d 411, 412 [1st Dept 2008]; see also *Matter of Gerald HH. v Carrion*, 130 AD3d 1174, 1176 [3d Dept 2015] [“Hearsay evidence will not satisfy (the substantial evidence) standard if the facts it purportedly establishes are ‘seriously controverted’ ”]).

Here, the OTR call narrative stating that Ms. W. was holding C.B. during the assault contradicts Ms. W.’s sworn testimony that Mr. B. beat her “in front of [his aunt’s] door,” while C.B. “was still in [Mr. B’s aunt’s] . . . home.” This testimony refutes the undisclosed caller’s narrative, which suggested that C.B. was in Ms. W.’s arms while Mr. B. attacked her. OCFS’s decision to credit the undisclosed caller’s statement in the OTR over Ms. W.’s sworn testimony was also improper because the caller’s “credibility could not be assessed” on cross-examination (see *Matter of McGillicuddy’s Tap House, Ltd. v New York State Liq. Auth.*, 57 AD3d 1052, 1054 [3d Dept 2008] [“the Administrative Law Judge’s decision to credit (a hearsay) account was improper because (the witness’s) credibility could not be assessed”]).

More troubling, the undisclosed caller’s narrative of events is controverted by other evidence in the record (see *Matter of Gerald HH.*, 130 AD3d at 1176 [holding that “substantial evidence does not support the challenged determination” because “(s)erious controversy is precisely what surrounds the hearsay evidence”]). ACS introduced into evidence Investigation Progress Notes containing a subsequent interview with the source of the initial OTR. Notably, the undisclosed source did not make the same allegation that Ms. W. was holding C.B. when Mr. B. attacked her. Other witnesses’ description of the brutal attack³ also undermine any possibility that Ms. W. could have been holding C.B., who remained unharmed.⁴

The majority’s finding that Ms. W. exposed C.B. to an im-

police’s call to SCR was not admitted into evidence or included in the record.

3. For instance, the undisclosed source said that Mr. B. “punched [Ms. W.] in the face” and “dragg[ed] [Ms. W.] by her hair.” Ms. W. testified that she was beaten so badly that her “eyes were swollen shut.”

4. The majority’s reliance on *Matter of R.B. v New York State Off. of Children & Family Servs.*, does not convince me that the evidence submitted by

(n. cont’d)

minent risk of harm when she complied with Mr. B.’s demand to bring C.B. to his aunt’s house because she knew he was abusive is unsupported. The majority cites to *Matter of Anonymous v Poole*, but that case is distinguishable because it involved a mother who maltreated her son “when during a domestic dispute she drove down the street with the child, who was being held by the father, on top of her vehicle’s hood” (162 AD3d 598, 598 [1st Dept 2018]). *Matter of Melanie J.A. (Ramon J.)*, is also distinguishable because there, this Court affirmed a finding of neglect against the abusive father based on his “repeated acts of domestic violence committed . . . against the mother” (221 AD3d 421, 421 [1st Dept 2023]). Indeed, there was no finding of neglect or maltreatment against the mother in that case.

OCFS’s imminent risk finding rests exclusively on hearsay that is neither reliable nor probative considering the record as a whole. I would therefore find that OCFS’s determination that Ms. W.’s actions placed C.B. in “imminent risk of severe impairment” was not supported by substantial evidence.

The majority’s conclusion that Ms. W. failed to exercise a minimum degree of care under *Nicholson v Scopetta* (3 NY3d 357 [2004]), is also belied by the record. OCFS failed to adequately consider Ms. W.’s longstanding history of abuse when it determined that her conduct fell below the minimum degree of care required of a parent “under the circumstances then and there existing” (*id.* at 370).

In *Nicholson*, the Court of Appeals held that evidence that a parent allowed a child to witness domestic abuse against them is insufficient, without more, to satisfy the neglect standard under Family Court Act article 10 (3 NY3d at 368). The Court found that “[a]ssuming that actual or imminent danger to the child has been shown, ‘neglect’ also requires proof of the parent’s failure to exercise a minimum degree of care . . . not maximum, not best, not ideal” (*id.* at 370, citing *Matter of Hofbauer*, 47 NY2d 648, 656 [1979]). Where, as here, the mother is a domestic violence survivor, the inquiry is whether she “failed to exercise a minimum degree of care, [and] the focus must be on whether she has met the standard of the reasonable and prudent person in similar circumstances” (*Nicholson*, 3 NY3d at 370-371). The Court noted specific factors that

ACS to support a maltreatment finding here was sufficiently substantial (199 AD3d 429, 430-431 [1st Dept 2021]). That case involved far more detailed documentary evidence than ACS introduced here, including ACS investigation notes, ACS caseworker testimony, and medical records that included “detailed descriptions by the child” who experienced sexual abuse.

should be considered in the neglect analysis, including: “risks attendant to leaving, if the batterer has threatened to kill her if she does; risks attendant to staying and suffering continued abuse; risks attendant to seeking assistance through government channels, potentially increasing the danger to herself and her children; risks attendant to criminal prosecution against the abuser; and risks attendant to relocation. Whether a particular mother in these circumstances has actually failed to exercise a minimum degree of care is necessarily dependent on facts such as the severity and frequency of the violence, and the resources and options available to her” (*id.* at 371).

Courts applying *Nicholson* to neglect proceedings have rejected “a presumption of neglect where a parent had allowed a child to witness domestic violence, holding that this bare allegation did not meet the Family Court Act’s requirements” (*Matter of Afton C. [James C.]*, 17 NY3d 1, 10 [2011]; *see also Matter of Eustace B. [Shondella M.]*, 76 AD3d 428, 429 [1st Dept 2010]; *Matter of Elizabeth B. v New York State Off. of Children & Family Servs.*, 149 AD3d 8, 12 [3d Dept 2017]; *Matter of Chaim R. [Keturah Ponce R.]*, 94 AD3d 1127, 1130 [2d Dept 2012]; *Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166-1167 [4th Dept 2012]; *Matter of Ravern H.*, 15 AD3d 991, 992 [4th Dept 2005], *lv denied* 4 NY3d 709 [2005]). Indeed, in *Matter of R.C. (D.C.—R.R.)* (240 AD3d 33 [1st Dept 2025]), this Court noted that a neglect petition against a mother who allegedly failed to enforce an order of protection against the father before he punched her in the child’s presence was dismissed because it was “directly contrary to” *Nicholson* (*id.* at 35 n 2).

In contravention of *Nicholson* and its progeny, OCFS found that Ms. W. maltreated C.B. “when she left the secure undisclosed domestic violence shelter, remov[ed] the child from safety, and t[ook] her to stay with Mr. B., her known abuser, at one of his family member’s houses, where she subsequently was physically assaulted by Mr. B., while holding infant C.B.” OCFS failed to consider Ms. W.’s detailed testimony concerning how Mr. B.’s longtime abuse impacted her on the day he appeared unexpectedly at the domestic violence shelter. For years, Ms. W. endured horrific acts of violence perpetrated by Mr. B. After Ms. W. finally severed contact with Mr. B. and escaped to a domestic violence shelter for seven months, Mr. B. showed up “in front of” the shelter without warning. Ms. W.’s testimony established that fighting Mr. B. after she tried to escape had historically only placed her at more serious risk of harm. She described numerous times when she had tried to leave Mr. B., only to be beaten by him as retribution. OCFS did not analyze

this cycle of abuse in its decision, even though it acknowledged that Mr. B. had exerted enormous power and control over Ms. W. for years.

On September 7, 2017, Ms. W. learned that Mr. B. had found her at the domestic violence shelter. She testified that she retreated into a state of appeasement, consistent with prior incidents when Mr. B. abused her, and “[she] couldn’t fight” him. She therefore acquiesced to Mr. B.’s “demand[] that [she] get C.B. and bring her with . . . [them] to his aunt’s house.” Given Mr. B.’s documented history of violence, Ms. W. reasonably believed that refusing his demands would place her and her children at a heightened risk of serious harm, as it had numerous times before.⁵ *Nicholson* demands that courts analyze the risks Ms. W. faced if she resisted Mr. B.’s demands when determining whether she exercised the minimum degree of care under the circumstances. I do not agree that OCFS did so here.⁶

The majority overstates the significance of Ms. W.’s “violation of an existing order of protection.” Setting aside that Ms. W. cannot violate an order of protection that was entered to protect both *her* and her child (Family Ct Act § 842),⁷ OCFS’s determination was not based on Ms. W.’s failure to enforce an order of protection against Mr. B. In addition, *Matter of Jasmine A. (Albert G.)* (120 AD3d 1125, 1125 [1st Dept 2014]) and *Matter of Diamond Tyneshia B. (Aisha K.)* (109 AD3d 740 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013], *cert denied* 574 US 845 [2014]) are inapposite. Unlike in those cases, Ms. W.

5. The State argues that these risks “do not apply here” because “[Ms.] W. had already left [Mr. B.] and was in a safe location when they spoke over the phone.” This argument disregards Ms. W.’s testimony that she went through a stage of “appease[ment]” when Mr. B. called her unexpectedly, which was consistent with her reaction to his prior abuse.

6. The undisclosed source who reported to SCR provided a different sequence of events than Ms. W. in their interview with ACS. They said that Ms. W. had stayed at Mr. B.’s great aunt’s home two nights before, Mr. B. and Ms. W. were “trying to work things out,” and Ms. W. was “going to go to Court to drop the Order of Protection against [Mr. B.]” However, these statements appear to be based on information provided to the source by Mr. B. and therefore cannot be credited given that he is Ms. W.’s abuser ([“Mr. B. reported to the source”]; [“during an interview with Mr. B. he informed CPS that Ms. W. contacted him”]). Moreover, ACS did not cross-examine Ms. W. on her account of September 7, and the documents admitted into evidence by ACS do not contradict Ms. W.’s testimony concerning her past abuse and the influence that Mr. B. had over her on that day.

7. Family Ct Act § 842 states that: “The protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate an order issued in his or her favor nor may such protected party be arrested for violating such order.”

did not allow Mr. B. back into her home; rather, Mr. B. found her at a domestic violence shelter, the location of which was supposed to remain confidential but no longer was, and compelled her to comply with his demands after years of prolonged abuse.

Moreover, the majority places significant emphasis on OCFS's finding that Ms. W. "had ample resources and options available to her" when Mr. B. appeared at the shelter on September 7, 2017. This finding essentially ignores the complicated history surrounding Mr. B.'s violence towards Ms. W., as described above. It also ignores Ms. W.'s prior unsuccessful efforts to access external resources, which only placed her in more danger. She testified that she obtained an order of protection against Mr. B., but he ignored the order, forced her to sleep in her hallway because he had her keys, and then took her to California where she was beaten and forced into homelessness.

These factors, coupled with the absence of substantial evidence that Ms. W. was holding C.B. at the time she was beaten, illustrate that Ms. W. exercised the minimum degree of care of a reasonably prudent parent who had been a longstanding survivor of domestic abuse. To hold otherwise would contravene the principles articulated over twenty years ago by Chief Judge Kaye in *Nicholson* by effectively penalizing Ms. W. for her status as a survivor of domestic violence and for the incidental exposure of her child to that abuse.

6 Carnegie House Tenants Corporation et al., Appellants, et al., Plaintiff, v New York State Division of Housing and Community Renewal et al., Respondents. [253 NYS3d 7]—

Parties—Standing—Injury-in-Fact—Deconversion

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered March 31, 2025, which granted defendants' respective motions pursuant to CPLR 3211 (a) (2), (3), and (7) to dismiss the amended complaint, without prejudice, unanimously affirmed, without costs.

Plaintiffs Carnegie House Tenants Corporation (the cooperative) and individual current shareholders commenced this action seeking a declaration that a provision of the Rent Stabilization Code (9 NYCRR) § 2520.11 (l) relating to cooperative deconversion is irrational and ultra vires, a declaration that defendant 57th and 6th Ground LLC, the owner of the land and landlord of the ground lease for the building, caused the deconversion of the cooperative, and an injunction against defendant New York State Division of Housing and Community

Renewal (DHCR) precluding the application of Rent Stabilization Code § 2520.11 (l).

Supreme Court properly determined that plaintiffs do not have standing at this juncture, because they failed to establish that the application of the challenged statute relating to the deconversion of cooperative apartment corporations was imminent rather than hypothetical. When the complaint was filed, the parties had recently renewed the ground lease for a 21-year term, triggering the rent calculation provisions of the ground lease, to be determined by agreement or, if the parties could not agree, by arbitration. After negotiations proved unsuccessful, plaintiffs brought this action, asserting claims arising from their fear that if the arbitration were to result in an unreasonably high rent under the ground lease, the cooperative would be unable to pay the higher rents, default, and then be forced into “deconversion,” at which point the building ownership would revert to defendant owner. Thus, according to plaintiffs, under the provisions of the Rent Stabilization Code which would then apply, the individual plaintiff-shareholders would be forced to accede to the owner’s unilateral demand for rents far above those authorized under the rent laws.

Because deconversion has not yet occurred and may never occur, the amended complaint fails to allege an injury-in-fact “sufficiently concrete and particularized to warrant judicial intervention” (*Matter of Stevens v New York State Div. of Criminal Justice Servs.*, 40 NY3d 505, 515 [2023]). While allegations relating to deconversion fall within the “‘zone of interests,’ or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted”—namely, safeguarding against unreasonably high rent increases—plaintiffs still “must show that it would suffer direct harm, injury that is in some way different from that of the public at large” (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773-774 [1991]). Here, while plaintiffs are understandably upset by the prospect of the cooperative’s deconversion, the application of the challenged Rent Stabilization Code provision remains hypothetical. Plaintiffs urge that there is current, concrete harm arising from the specter of deconversion that resulted in a purported disadvantage in the ground lease rent negotiations. However, even if that were to constitute an injury-in-fact, the prevention of a disadvantageous negotiating position does not fall within the zone of interests protected by the rule, further precluding plaintiffs from establishing standing here.

Plaintiffs’ claim for a declaration that defendant owner

caused the deconversion further reflects that the complaint fails to allege an injury-in-fact. A finding that defendant owner caused the deconversion would permit defendant DHCR to establish the legal regulated rents. Thus, in the event of a deconversion, which has yet to occur, the individual shareholders still would have the option of seeking DHCR's intervention to set the rent under Rent Stabilization Code § 2520.11 (l) (1) (iv), which contradicts plaintiffs' assertion of ripeness and imminent harm now, while deconversion may still be avoided (*see e.g. Matter of Joint Queensview Hous. Enter. v Grayson*, 179 AD2d 434, 436 [1st Dept 1992]). Nor should Rent Stabilization Code § 2520.11 (l) be read to permit the unilateral rent-setting that plaintiffs fear should the shareholders' apartments become subject to rent regulation, further undermining the need for injunctive or declaratory relief at present (*see e.g. Davis v Cole*, 193 Misc 2d 380, 386 [Sup Ct, NY County 2002]). Thus, because deconversion and the ensuing harms envisaged by plaintiffs may never come to pass, dismissal with leave to refile was proper.

We have considered plaintiffs' remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

7 Gonca Tekiner Chelsea et al., Appellants, v Yasemin Tekiner et al., Defendants. Kahn & Goldberg, LLP, et al., Nonparty Respondents. [253 NYS3d 1]—

Disclosure—Protective Order—Information Sought Risked Creating Conflicts of Interest

Order, Supreme Court, New York County (Joel M. Cohen, J.), entered July 30, 2025, which, to the extent appealed from as limited by the briefs, granted in part the motions of nonparties Kahn & Goldberg, LLP, Foley Hoag, LLP, and Parker Ibrahim & Berg, LLP (collectively, the law firms) for a protective order to the extent of ordering that compliance with plaintiffs' subpoenas be deferred until after trial and judgment in a related action, unanimously affirmed, without costs.

In this action, plaintiffs assert claims against defendants for, among other things, breach of fiduciary duty and breach of contract based on a decision to pledge a life insurance trust's assets to finance certain litigation. The law firms represent defendants in this action, and also represent them in a related shareholder action in which they are the plaintiffs. Plaintiffs in this action have issued subpoenas, seeking documents and testimony from the law firms regarding defendant Yasemin Tekiner's affirmative defense that she acted in her capacity as trustee upon the advice of counsel.

Supreme Court providently exercised its discretion in granting the law firms' motions for a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). The record demonstrates that the court considered all parties' interests and reasonably determined that the information sought in the ongoing shareholder action posed a significant risk of creating conflicts of interest that would disqualify the law firms as their clients' counsel under rule 1.7 (a) of the Rules of Professional Conduct (22 NYCRR 1200.0) (see *Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 405-406 [1st Dept 2018]; see also Rules of Prof Conduct [22 NYCRR 1200.0] rule 3.7 [a]).

We reject plaintiffs' contentions that Supreme Court failed to consider their rights by indefinitely delaying their access to discovery and that they will suffer prejudice as a result of the delay. The court issued the protective order after balancing the various interests presented, including the risk of disqualifying the law firms as defendants' counsel in the shareholder action. As to the delay in production of documents, we agree with Supreme Court that this action presents a narrow issue that can be litigated after the trial in the shareholder action. At most, plaintiffs have alleged a delay in resolving their claims in this action, which does not constitute undue prejudice under the circumstances. In any event, the delay is not indefinite, as the trial in the shareholder action is scheduled for April 6, 2026. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

8 In the Matter of N.G., Respondent, v J.C.E., Appellant. [248 NYS3d 208]—

Parent, Child and Family—Support—Collateral Attack on Judgment of Divorce

Order, Family Court, Bronx County (Judith D. Waksberg, J.), entered on or about February 10, 2025, which denied defendant's objections to support orders, same court (Paul Ryneski, S.M.), entered on or about December 3, 2024 and January 8, 2025, determining that he willfully failed to comply with his obligation to pay 60% of the children's educational expenses, unanimously affirmed, without costs.

Family Court correctly denied the father's objections and rejected his attempts to collaterally attack a judgement of divorce rendered by Supreme Court years earlier. A judgment of divorce rendered by a court plainly vested with subject matter and personal jurisdiction "has the effect of determining the

rights of the parties with respect to every material issue that was actually litigated or might have been litigated” (*Rainbow v Swisher*, 72 NY2d 106, 110 [1988]). Generally, “Family Court has no power to review a Supreme Court judgment determining the issue of child support or to determine the issue of child support de novo where the issue already has been determined by the Supreme Court and set forth in a judgment” (*Matter of Byrnes v Javino*, 145 AD3d 718, 719 [2d Dept 2016], quoting *Matter of Perrego v Perrego*, 63 AD3d 1072, 1073 [2d Dept 2009]).

As such, the father’s attempt to collaterally attack the judgment of divorce and incorporated stipulation in a Family Court Act article 4 enforcement proceeding before the Support Magistrate is improper (see *Matter of Savini v Burgaleta*, 34 AD3d 686, 688-689 [2d Dept 2006]; *Matter of Perrego*, 63 AD3d at 1073; see e.g. *Matter of Haber v Strax*, 136 AD3d 911, 912-913 [2d Dept 2016]). Any challenge to the enforceability of the judgment of divorce based on the provisions of the Child Support Standards Act should have been timely brought in Supreme Court. Since the father’s objections do not otherwise dispute the Support Magistrate’s findings with respect to the educational expenses he owes, the support orders were properly upheld (see *Blaikie v Mortner*, 274 AD2d 95 [1st Dept 2000]). Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

9 Georgia Malone & Company, Inc., Respondent, v E&M Associates et al., Appellants. [253 NYS3d 4]—

**Evidence—Admission against Interest—Testimony from Prior Case
Trial—Directed Verdict—Authority to Sign Confidentiality Agreement
Trial—Instructions—Failure to Give Element of Breach of Contract for Each Party**

Judgment, Supreme Court, New York County (Nancy M. Bannon, J.), entered on September 16, 2024, awarding plaintiff the sum of \$6,720,452.05 on its breach of contract cause of action, unanimously reversed, on the law, with costs, the judgment vacated, and the matter remanded for a new trial before a different Justice. Appeals from order, same court and Justice, entered on or about January 18, 2024, which denied the motion by defendants Irving Langer and E&M Associates to preclude plaintiff from introducing certain evidence or relying on a prior order of this Court to establish any fact, without prejudice to raising any appropriate objections at trial; from order, same court and Justice, entered on or about February 6, 2024, which denied the motion by defendants Scott Katz, Aryeh Ginzberg, Estate of Leibel Lederman and several related LLCs

to deem admitted all of the requests in their notice to admit dated December 13, 2023; from order, same court and Justice, entered on or about February 6, 2024, to the extent it denied the motion of defendants Irving Langer, E&M Associates and numerous entities referred to by the parties collectively as the “Langer LLCs,” for a directed verdict; from order, same court and Justice, entered July 24, 2024, which, following a jury trial, ordered the clerk to enter judgment in favor of plaintiff and against corporate defendants in the amount of \$3,400,000 plus interest and costs; and from order, same court and Justice, entered April 7, 2025, which denied the motion by defendants E&M Associates and the Langer LLCs pursuant to CPLR 4404 (a) to set aside the verdict, unanimously dismissed, with costs, as subsumed in the appeal from the final judgment.

The trial court’s preclusion of defendants’ use of documents and evidence from a related action, *Galanter v Georgia Malone*, index No. 650734/2014 (*Galanter*), was in error. Defendants attempted to introduce evidence from *Galanter* to establish that plaintiff had admitted in that case that its commission from its work achieving the Singer portfolio “unwind” was also related to its work selling the portfolio. Preliminarily, the material is properly part of the record before us, because it was at issue before the trial court, and to exclude it would effectively deprive defendants of appellate review. Furthermore, the mere fact that the material was excluded from trial does not render it unreviewable (see *Baer v Anesthesia Assoc. of Mount Kisco, LLP*, 57 AD3d 817, 818 [2d Dept 2008]). On the merits, our previous decision in this case, *Georgia Malone & Co., Inc. v E&M Assoc.* (210 AD3d 472 [1st Dept 2022]), did not preclude defendants’ use of testimony and other documentary evidence by plaintiff’s principal, Georgia Malone, here. While we observed in that decision that plaintiff’s statements in *Galanter* were not a “clear admission” that the commission paid by Singer was based in part on work plaintiff performed as his broker on the sale, we ultimately held that there remained unresolved issues of fact as to whether plaintiff acted as a broker on the sale (210 AD3d at 474). Malone’s statements in *Galanter*, as admissions of a party of a material fact, are competent evidence against plaintiff, and defendants should not have been precluded from using them in their defense of this action (see generally *People v Caban*, 5 NY3d 143, 151 n [2005]; see also *Matter of Newman*, 231 AD3d 12, 22-23 [1st Dept 2024]). Moreover, the information was properly admissible for impeachment purposes (see *Miller v Camelot Communications Group, Inc.*, 203 AD3d 628, 629 [1st Dept 2022]).

It was not error for the court to deny defendants’ request for

a directed verdict on the issue of Michael Langer's authority to sign the confidentiality agreement. This Court previously accepted defendants' argument that they were entitled to dismissal of plaintiff's claims for breach of implied contract, quantum meruit and unjust enrichment on the basis that there is an enforceable contract (see *Georgia Malone & Co., Inc. v E&M Assoc.*, 163 AD3d 176, 188 [1st Dept 2018]). They are estopped from asserting otherwise before us now. We note that the individual defendants were properly dismissed from the action, as "[i]t is well established that officers or agents of a company are not personally liable on a contract if they do not purport to bind themselves individually" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]).

However, it was error for the trial court to direct a verdict on the counterclaims for fraudulent inducement and breach of fiduciary duty asserted against plaintiff by the entities in which the Lederman estate and Aryeh Ginzberg had an interest. Plaintiff's principal admitted at trial that she failed to disclose to Michael Langer and other defendants that plaintiff was already working for the seller of the properties at issue, and because, as discussed above, the improperly excluded *Galanter* evidence could have bolstered those claims.

Defendants also raised compelling arguments that the trial court's jury charge was improper. The trial court posed a single question to the jury on the verdict sheet: "Did the plaintiff prove, by a fair preponderance of the credible evidence, that it was the mutual intent of the signatories to the commission agreement that E&M Associates, along with the successors, assigns and affiliates of E&M Associates, would be bound by the obligation to pay a commission to the plaintiff if those successors, assigns and affiliates purchased the Singer portfolio." The trial court failed to charge the jury as to the elements of a breach of contract claim for each LLC defendant, including the amount of damages that plaintiff was entitled to based in part on evidence adduced at trial that Baruch Singer retained an interest in the portfolio after the sale. The trial court also did not charge the jury on whether Michael Langer, on behalf of E&M Associates, had the authority to bind each of the remaining LLC defendants and whether each of the LLC defendants was bound by the agreement's terms.

Against this backdrop, plaintiff's request for sanctions is denied. The matter should be transferred to a different Justice for trial. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

10 In the Matter of Lloyd Goldman, Appellant, v Icaro Media Group, Inc., et al., Respondents. [248 NYS3d 209]—

Disclosure—Discovery and Inspection—Business Corporation Law—Access to Shareholder Lists

Judgment (denominated an order), Supreme Court, New York County (Paul A. Goetz, J.), entered on or about October 11, 2024, which granted the petition to inspect respondent Icaro Media Group, Inc.’s books and records only to the extent of permitting review of shareholder information under Business Corporations Law § 1315, unanimously affirmed, with costs.

Petitioner Lloyd Goldman, through his limited liability company, LG Asset Management, LLC, is an investor and shareholder in respondent Icaro Media Group, Inc. (Icaro), a Nevada corporation with a principal place of business in New York. Respondent Paul Feller is the Chairman and Chief Executive Officer of Icaro.

Supreme Court correctly granted Goldman’s petition to the extent of requiring disclosure of Icaro’s shareholder information under Business Corporation Law § 1315 (*see Madison Liquidity Invs. 103 v Carey*, 291 AD2d 362, 362 [1st Dept 2002]). As a New York resident shareholder in respondent foreign corporation, petitioner is entitled to inspect the corporations’ shareholder lists (*see id.*; *see also AirTran N.Y., LLC v Midwest Air Group, Inc.*, 46 AD3d 208, 212, 214 [1st Dept 2007]). Access to shareholder lists is a recognized exception to the general rule that “claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation” (*Davis v Scottish Re Group Ltd.*, 138 AD3d 230, 233 [1st Dept 2016], *revd on other grounds* 30 NY3d 247 [2017]; *see Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 338-339 [2024]).

We reject Goldman’s contention that he is entitled to the other categories of documents he requested under the common law, or under Business Corporation Law § 624, which provides broader rights to shareholders of corporations formed in New York State. Such a finding would render Business Corporation Law § 1315 meaningless (*see e.g. Bank of Am., N.A. v Kessler*, 39 NY3d 317, 325 [2023]).

Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

11 Ruchi J. Gulati, Respondent, v Nobel Gulati, Appellant. [252 NYS3d 18]—

Process—Service of Process—Impracticability

Order, Supreme Court, New York County (Michael L. Katz, J.), entered October 28, 2025, which denied defendant husband's motion to stay, vacate, or dismiss the action on the grounds of improper service, lack of personal jurisdiction, failure to satisfy statutory residency requirements, and forum non convenience, unanimously affirmed, without costs.

The husband should have been permitted to raise challenges to the sufficiency of the evidence underlying a CPLR 308 (5) ex parte order directing expedient service without the necessity of bringing a motion under CPLR 2221 (*see e.g. Preza v Sever's Gourmet*, 212 AD2d 765, 765 [2d Dept 1995], *lv denied* 87 NY2d 801 [1995]). However, the court's order directing alternate service of process pursuant to CPLR 308 (5) was a provident exercise of discretion (*see Safadjou v Mohammadi*, 105 AD3d 1423, 1424 [4th Dept 2013]; *Kelly v Lewis*, 220 AD2d 485, 485 [2d Dept 1995]).

The wife was unable to serve the husband after, among other things, sending process servers to multiple addresses at which he might have been found and on multiple days. The process servers not only visited those locations but also remained there for extended periods awaiting his arrival. Contrary to the husband's contention that the wife was required to exhaust every conceivable effort to locate him, impracticability under CPLR 308 (5) does not require an extensive showing of due diligence, nor does it require proof that actual attempts were made under each and every statutory method of service (*see Liebeskind v Liebeskind*, 86 AD2d 207, 210-211 [1st Dept 1982], *affd* 58 NY2d 858 [1983]; *see also Safadjou*, 105 AD3d at 1424). The methods of service authorized by the court, including leaving the documents with the doorman at the husband's residence, along with overnight mailings to the same address and the husband's place of business, and service by email were reasonably calculated to apprise the husband of the action and therefore satisfied due process (*see Safadjou*, 105 AD3d at 1424-1425).

The durational residency requirement is satisfied because the parties, although spending a portion of the statutory relevant period out-of-state, maintained a residence in New York and returned to it with regularity (*see Domestic Relations Law* § 230; *Murjani v Murjani*, 123 AD3d 409, 409 [1st Dept 2014]; *Jindal v Jindal*, 54 AD3d 605 [1st Dept 2008]).

The motion court providently exercised its discretion in denying that branch of the husband's motion which sought dismissal of the action on the ground of forum non conveniens, as the husband failed to demonstrate that New York is an incon-

venient forum (*see Wittich v Wittich*, 210 AD2d 138, 139 [1st Dept 1994]). Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

12 In the Matter of B.H., Appellant, v B.H., Respondent. [248 NYS3d 225]—Order, Family Court, New York County (Stephanie Schwartz, J.), entered on or about April 29, 2025, which, after a fact-finding hearing, found that petitioner failed to establish that a family offense was committed against her and dismissed the family offense petition with prejudice, unanimously affirmed, without costs.

Family Court properly dismissed the petition because petitioner failed to establish by a fair preponderance of the evidence that respondent, her brother, had committed any acts warranting an order of protection in petitioner’s favor (Family Ct Act § 832; *Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]). The court’s credibility determinations are entitled to deference, and, in any event, there is no basis to disturb them (*see Matter of R.H. v M.C.H.*, 239 AD3d 577, 578 [1st Dept 2025]). Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

13 HSBC Mortgage Corporation (USA), Respondent, v Jsang Kei Lau et al., Defendants. Zong Lau et al., Nonparty Appellants. [248 NYS3d 213]—

**Mortgages—Foreclosure—Extension of Time to Conduct Sale
Parties—Death of Party—Foreclosure Action—Judgment Entered Prior to
Death**

Order, Supreme Court, New York County (Francis A. Kahn III, J.), entered July 30, 2024, which granted plaintiff’s motion for an extension of time to conduct a foreclosure sale of the subject premises and denied nonparty appellants’ cross-motion to be substituted as defendants in place of defendant mortgagor Jsang Kei Lau (Jsang Lau), unanimously affirmed, without costs.

The court providently exercised its discretion in granting plaintiff’s motion for an extension of time to conduct a foreclosure sale (*see Bank of Am., N.A. v Cord*, 214 AD3d 934, 935-936 [2d Dept 2023]). The sale was delayed on multiple occasions due to various reasons, including stays obtained by Jsang Lau, bankruptcy actions commenced by Jsang Lau, the executive orders staying foreclosures during the Covid-19 pandemic, and a federal action commenced by appellants, Jsang Lau’s daughters, and later dismissed, as well as other motion practice initiated by appellants. Nor can appellants claim to be prejudiced by the delay caused, in large part, by their own ac-

tions and Jsang Lau's conduct before them (see *Bank of N.Y. Mellon v Adam P10tch, LLC*, 226 AD3d 497, 497-498 [1st Dept 2024], *lv dismissed* 42 NY3d 1046 [2024]). There is no basis for appellants to reargue the issue of standing at this juncture (see CPLR 1018; *Wells Fargo Bank, N.A. v Hudson*, 98 AD3d 576, 577 [2d Dept 2012]).

The court also properly denied appellants' cross-motion to be substituted as defendants in this action. Before Jsang Lau died in 2020, the mortgage was in default, this action had been commenced, and a judgment of foreclosure and sale was entered against him in 2018. Indeed, appellants do not challenge the legitimacy of the judgment, nor do they contend that Jsang Lau predeceased the judgment. Moreover, in July 2024, plaintiff asserted that it was waiving any right to a deficiency judgment against Jsang Lau's estate. Accordingly, Jsang Lau's death did not affect the merits of this action, and a stay of foreclosure was not mandated pending substitution (see *Matter of London*, 200 AD3d 493, 493 [1st Dept 2021]; *Wells Fargo Bank, N.A. v Miglio*, 197 AD3d 776, 777 [2d Dept 2021]; *cf. Nationstar Mtge., LLC v Persaud*, 231 AD3d 842, 844 [2d Dept 2024]).

Even if appellants were substituted in this action, their substitution would not alter or invalidate the judgment or Jsang Lau's underlying pre-death default, which is the sole basis for the judgment (see *Gray v Bankers Trust Co. of Albany, N.A.*, 82 AD2d 168, 170-171 [3d Dept 1981], *lv denied* 58 NY2d 604 [1983]).

We have considered appellants' remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

14 Jones Law Firm, P.C., Appellant, v J Synergy Green, Inc., et al., Respondents. J Synergy Green, Inc., et al., Third-Party Plaintiffs-Respondents, v Jones Law Firm, P.C., et al., Third-Party Defendants-Appellants, et al., Third-Party Defendants. [250 NYS3d 538]—

Pleading—Sufficiency of Pleading—Fraud—Failure to Disclose Close Relationship to Principal

Attorney and Client—Malpractice—Ascertainable Damages—Unfavorable Settlement

Attorney and Client—Misconduct by Attorney—Sufficiency of Pleading

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered March 29, 2024, which denied the motion of plaintiff/third-party defendant and third-party defendant Tanner Jones (together, appellants) to dismiss defendants' claims against them, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 26, 2024, which denied

the motion of plaintiff' and third-party defendant Jones to reargue their motion to dismiss, unanimously dismissed, without costs, as taken from a nonappealable order.

The court properly concluded that the counterclaims and third-party complaint state causes of action for fraud (*see generally Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83, 85 [1st Dept 2017], *affd* 31 NY3d 569 [2018]). Defendants' causes of action allege that at the time defendants signed an engagement agreement with plaintiff in 2021, plaintiff failed to disclose the close relationship its principal, third-party defendant Tanner Jones, had with the arbitration forum chosen to handle fee disputes, third-party defendant Professional Arbitration and Mediation LLC (PAM). Defendants allege that in the fee arbitration plaintiff instituted against them, they had no input in the selection of the arbitrator, third-party defendant David Treyster, Esq. After Treyster rendered a decision awarding plaintiff \$118,796.04 without a hearing, defendants learned that Treyster had a prior relationship with Jones and had been represented by Jones, that Jones had an interest in PAM, and that plaintiff and PAM shared an address in New York. At this pleading stage, appellants have failed to establish that their misrepresentations or omissions were immaterial (*see Roni LLC v Arfa*, 74 AD3d 442, 445 [1st Dept 2010], *affd* 18 NY3d 846 [2011]; *cf. Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 350 [1999]).

Defendants also adequately allege damages, insofar as it can be inferred from the counterclaims that, had they known the truth about the relationship, they would not have hired plaintiff (*cf. Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 538 [1st Dept 2016], *affd* 29 NY3d 137 [2017]). We have considered and rejected appellants' argument that defendants' claims constitute breach of contract damages (*cf. Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]).

Defendants also adequately alleged ascertainable damages in their malpractice claim by alleging that plaintiff's conduct with respect to actions in Nassau County and the Eastern District of New York, as well as in an earlier arbitration before JAMS, exposed them to fee-shifting and rendered them unable to prove damages, forcing them to settle the matters on unfavorable terms (*see generally Dweck Law Firm v Mann*, 283 AD2d 292, 293 [1st Dept 2001]). Whether plaintiff sought to remedy any defects in the arbitration is a question of fact not resolvable at this pleading stage.

Furthermore, defendants sufficiently alleged damages in their Judiciary Law § 487 claims (*Amalfitano v Rosenberg*, 12

NY3d 8, 13 [2009]; *Garanin v Hiatt*, 219 AD3d 958, 958-960 [2d Dept 2023]). A claim under Judiciary Law § 487 must be supported by an allegation of damages proximately caused by an alleged false statement to the court (*Saporito v Branda*, 213 AD3d 588, 589 [1st Dept 2023]). Defendants specifically allege that they suffered damages in the form of legal fees incurred while defending the CPLR article 75 summary proceeding which plaintiff initiated under false pretenses to confirm the PAM arbitration award obtained through plaintiff's deceitful conduct (*Amalfitano*, 12 NY3d at 13; *Garanin*, 219 AD3d at 958-960).

Defendants' collateral estoppel arguments fall outside the scope of the orders appealed from and do not concern the adequacy of their pleadings. Finally, the order denying reargument is not reviewable, as it did not grant reargument or address the arguments on the merits (see *Matter of Quinn, Emanuel, Urquhart & Sullivan, LLP v AVRA Surgical Robotics, Inc.*, 224 AD3d 557, 558 [1st Dept 2024]). Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

15 New Gold Equities Corp., Respondent, v Amguard Insurance Co., Appellant. [249 NYS3d 50]—

Insurance—Disclaimer of Coverage—Additional Insured—Timeliness
Insurance—Disclaimer of Coverage—Scope of Coverage

Order, Supreme Court, Bronx County (Allison Y. Tuitt, J.), entered January 16, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring that plaintiff is entitled to indemnification from defendant as an additional insured in an underlying tort action, unanimously affirmed, with costs.

This is an insurance coverage dispute that follows a separate personal injury action pending in the Bronx. Plaintiff in this action was the owner of the property located at 1 West Fordham Road, and leased the premises to non-party Sweetie Angels of New York, Inc., the primary insured under the relevant insurance policy. Plaintiff in the underlying action, nonparty Winston Jenkins, maintains that he was injured in September of 2019 when he was walking on the sidewalk in front of the premises and fell due to a sidewalk defect. He sued plaintiff, plaintiff's tenant (the primary insured), and the tenant's neighbor.

Plaintiff commenced this action for, among other things, a declaration that defendant insurer has a duty to indemnify it in the underlying tort action pursuant to an additional insured

endorsement contained in the insurance policy. The endorsement provides coverage to plaintiff “only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to” the primary insured.

A threshold issue we are called upon to decide on this appeal is whether defendant timely disclaimed coverage to plaintiff under Insurance Law § 3420. To disclaim coverage under Insurance Law § 3420 (d) (2), an insurer must “give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.” Additional insureds are entitled to the same protections as the named insured, including timely notice of disclaimer (*Sierra v 4401 Sunset Park, LLC*, 101 AD3d 983, 985 [2d Dept 2012], *affd* 24 NY3d 514 [2014]). While Insurance Law § 3420 was enacted to avoid prejudice to an injured claimant who could be harmed by delay in learning the insurer’s position, it was “not intended to be a technical trap that would allow interested parties to obtain more than the coverage contracted for under the policy” (*Excelsior Ins. Co. v Antretter Contr. Corp.*, 262 AD2d 124, 127 [1st Dept 1999]). The failure to comply with section 3420 (d) will “preclude[] denial of coverage based on a policy exclusion” (*Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 189 [2000]).

Contrary to defendant’s assertions, plaintiff—who is specifically listed as an “additional insured” in the relevant policy—established that defendant failed to timely disclaim coverage as required by Insurance Law § 3420 (d). Defendant was on notice of the underlying personal injury action, which was filed in December of 2019, and which had named plaintiff as a defendant. Defendant retained counsel to defend the primary insured in the underlying action. Plaintiff then submitted a tender letter to defendant shortly after the underlying action was filed, in January of 2020. Defendant did not disclaim coverage as to plaintiff until nine months later, in September 2020.

In opposition, defendant failed to raise a triable issue to rebut plaintiff’s showing.

Defendant’s alternative argument—that it was not required to disclaim coverage under the relevant circumstances—is also not persuasive (*Bettenhauser*, 95 NY2d at 188). New York courts have held that a disclaimer pursuant to section 3420 (d) is unnecessary when a claim clearly falls outside the scope of the policy’s coverage (*id.*). In other words, if the insurance policy “does not contemplate coverage in the first instance,” a disclaimer is not required (*id.*). On the other hand, a disclaimer pursuant to section 3420 (d) is necessary when denial of cover-

age is based on a “policy exclusion without which the claim would be covered” (*id.* at 189).

As *Bettenhauser* explains, “drawing the line between a lack of coverage in the first instance (requiring no disclaimer) and a lack of coverage based on an exclusion (requiring timely disclaimer) has at times proved problematic” (*id.*). In drawing this distinction, however, the Court reasoned that where “a relationship” between the carrier and the claimant existed such that coverage of plaintiff was contemplated by the insurance policy, a disclaimer was required (*id.* at 190).

Such is the case here. The policy plainly indicates that plaintiff, as owner, is an additional insured, and that defendant has the obligation to indemnify it, albeit with certain conditions. While we are aware that the failure to disclaim cannot create coverage where “none existed” in the first place, these are not the circumstances here (*Consolidated Edison Co. of N.Y. v Hartford Ins. Co.*, 203 AD2d 83, 85 [1st Dept 1994]). Plaintiff is not seeking the creation of coverage, but rather a declaration as to the coverage to which it is entitled under the plain terms of the policy.

Further, unlike the cases that defendant relies upon, defendant did not establish—before Supreme Court that plaintiff did not fit within the policy’s coverage terms (*see e.g. Three Boroughs, LLC v Endurance Am. Specialty Ins. Co.*, 143 AD3d 480, 481 [1st Dept 2016]; *Harco Constr., LLC v First Mercury Ins. Co.*, 148 AD3d 870, 872 [2d Dept 2017]). We are also unpersuaded by defendant’s argument that a denial based on an “exclusion” in an insurance policy cannot appear on the face of an additional insured endorsement. Thus, as defendant failed to comply with section 3420 (d), it is precluded from denying coverage to plaintiff under the terms of the policy (*Bettenhauser*, 95 NY2d at 188).

Given our holding under Insurance Law § 3420 (d) (2), we need not address defendant’s remaining arguments, which are now academic. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

16 Cindy J. O’Hagan, Appellant, v Christopher C. Robertson, Respondent. [252 NYS3d 20]—

Parent, Child and Family—Support—Stipulation of Settlement—Add-On Expenses

Husband and Wife and Other Domestic Relationships—Counsel Fees—Settlement Agreement—Notice of Default

Order, Supreme Court, New York County (Ariel D. Chesler, J.), entered on or about November 29, 2024, which, to the

extent appealed from, granted defendant husband's motion for an order directing reimbursement of various children's add-on expenses in the amount of \$25,000 and awarded him \$35,000 in counsel fees, and denied plaintiff wife's cross-motion seeking monetary damages for the husband's breach of the joint decision-making provisions of the parties' 2022 so-ordered settlement agreement, unanimously modified, on the law, to vacate the \$35,000 counsel fee award and remand the matter for further proceedings on the issue of reasonable counsel fees, and otherwise affirmed, without costs.

Supreme Court properly interpreted the parties' stipulation of settlement to be unambiguous with respect to the wife's obligation to pay for tutoring and summer programs, and not dependent on her consent. According to the clear terms of the parties' settlement, which is subject to the ordinary principles of contract construction and interpretation, the financial obligations provision required the wife to pay 100% of certain add-on expenses without any language conditioning her obligation on her agreement to specific programs, provided that the expenses fell within the listed categories (*see Keller-Goldman v Goldman*, 149 AD3d 422, 424 [1st Dept 2017], *affd* 31 NY3d 1123 [2018]). The tutoring and summer programs did, in fact, fall within the listed categories.

However, Supreme Court erred in awarding the husband \$35,000 in counsel fees. This amount far exceeded the amount in controversy, and the award included billing entries for work unrelated to the motion (*see Pickett v Gibbs*, 80 AD3d 592, 593 [2d Dept 2011], *lv dismissed* 17 NY3d 790 [2011]). Furthermore, the legal fees provision of the settlement agreement is narrowly worded to permit recovery only where a party incurs fees for bringing a motion where a proper notice of default is provided, and the husband failed to provide the wife with such a notice regarding the summer program and a portion of the tutoring expenses (*see Gottlieb v Such*, 293 AD2d 267, 268 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]). The husband also did not prevail on his request for declaratory relief regarding college tuition payments, which constituted a significant portion of the relief sought and would not have been recoverable in any event. Moreover, the counsel fee award was reduced by less than \$1,000 from the \$36,000 requested. The husband also does not dispute that the matter involved straightforward legal issues and a limited amount in controversy, and he does not give a satisfactory explanation as to why the analysis of discrete issues of default required more than 22 hours to prepare. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

17 The People of the State of New York, Respondent, v Daevon Jones, Appellant. [248 NYS3d 212]—

Crimes—Appeal—Valid Waiver

Crimes—Unlawful Search and Seizure—Double Parking—Approach and Subsequent Search of Vehicle

Crimes—Sentence—Merging of Postrelease Supervision Terms

Judgments, Supreme Court, Bronx County (Alvin M. Yearwood, J., at suppression hearing; Martin Marcus, J., at plea and sentencing), rendered June 23, 2022, as amended March 29, 2023, convicting defendant of criminal possession of a weapon in the second degree and attempted criminal possession of a weapon in the second degree, and sentencing him to consecutive terms of three and one-half years followed by three and one-half years of postrelease supervision, and two and one-half years followed by two and one-half years of postrelease supervision, unanimously affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). The court’s oral colloquy adequately clarified that the right to appeal was “separate and distinct” from the rights automatically forfeited by a plea of guilty (*see id.* at 561-562; *People v Bradshaw*, 18 NY3d 257, 264 [2011]; *People v Correa*, 228 AD3d 409, 410 [1st Dept 2024], *lv denied* 42 NY3d 1079 [2025]). Defendant’s valid waiver forecloses review of his suppression and excessive sentence claims (*see People v Bawa*, 234 AD3d 601, 602 [1st Dept 2025], *lv denied* 43 NY3d 943 [2025]).

As an alternative holding, we find that the court properly denied defendant’s suppression motion (*see People v Walls*, 239 AD3d 485, 485 [1st Dept 2025], *lv denied* 44 NY3d 1029 [2025]). We find no basis to disturb the court’s credibility determinations. In addition, the evidence established that defendant and others were seated in a double-parked car on the road, in violation of Vehicle and Traffic Law § 1202 (a) (1) (a), and the evidence failed to show that any of the limited exceptions permitting temporary double-parking applied; thus, the officers had a lawful basis to approach the vehicle (*see Walls*, 239 AD3d at 485; *People v Omowale*, 83 AD3d 614, 618 [1st Dept 2011], *affd on other grounds* 18 NY3d 825 [2011]). Upon approaching, a police officer observed what appeared to be the butt of a firearm jutting from the rear pocket of the front passenger seat. When another officer entered the car to confirm that observation, he felt a second firearm in a jacket draped over the rear driver’s side seat. Accordingly, both firearms were lawfully recovered (*see People v Blasich*, 73 NY2d 673, 678 [1989]).

We also perceive no basis for reducing the sentence.

Finally, although defendant is correct that his terms of three and one-half years and two and one-half years of postrelease supervision merge by operation of law, resulting in an aggregate term of three and one-half years, and requiring the Department of Corrections and Community Supervision to compute his sentence accordingly (*see* Penal Law § 70.45 [5] [c]), this does not render the sentence illegal, or require action by this Court (*see People v Vidro*, 155 AD3d 501, 501 [1st Dept 2017], *lv denied* 30 NY3d 1109 [2018]). Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

18 The People of the State of New York, Respondent, v Derek Johnson, Appellant. [248 NYS3d 223]—

Crimes—Sex Offenders—Sex Offender Registration Act—Modification of Risk Level

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about October 5, 2023, which denied in part defendant's Correction Law § 168-o (2) petition to modify his sex offender classification, unanimously affirmed, without costs.

Pursuant to defendant's Correction Law § 168-o (2) petition, the court modified defendant's risk level three classification to level two but denied a further modification to level one. Defendant has presented no basis for this Court to exercise its independent discretion to further reduce defendant's risk level to level one. The mitigating factors cited by defendant, including his age, lack of sexual offense convictions since 1988 and criminal convictions since 2009, and community support, when viewed in light of the aggravating factors, including the seriousness of defendant's underlying crime of rape at knife-point, persistent denial that he needs sex offense treatment, conditional remorse, and lack of evidence documenting his sobriety, warrant only a modification to a risk level two adjudication (*see People v Johnson*, 124 AD3d 495, 496 [1st Dept 2015]; *cf. People v Davis*, 179 AD3d 183, 187 [2d Dept 2019]). Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

19 The People of the State of New York, Respondent, v E.R., Appellant. [248 NYS3d 211]—Appeals from judgment, Supreme Court, Bronx County (Steven Hornstein, J.), rendered January 9, 2023, under indictment No. 1478/19, convicting defendant, upon his guilty plea, of criminal possession of a weapon in the third degree, adjudicating him a youthful offender, and sentencing him to five years of probation, and judgment, same court

(Ralph Fabrizio, J.), rendered November 1, 2024, under indictment No. 70235/24, convicting him, upon his guilty plea, of criminal possession of a controlled substance in the seventh degree and attempted criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of two years, unanimously dismissed, as moot.

In light of our determination in *People v E.R.* (242 AD3d 645 [1st Dept 2025]), which modified the December 10, 2024 judgment of resentence under indictment No. 1478/19, to the extent of reducing the sentence of imprisonment to a term of one year, the present appeals are dismissed as moot. Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

20 The People of the State of New York, Respondent, v Elias Ramos, Appellant. [248 NYS3d 215]—

Crimes—Possession of Weapon—Constitutional Challenge to Firearms Licensing Scheme

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered on November 1, 2022, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a jail term of six months and five years of probation, unanimously affirmed.

Defendant validly waived his right to appeal, since “the totality of the circumstances reveals that [he] understood the nature of the appellate rights being waived” (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). Nevertheless, his facial constitutional challenge to New York’s firearms licensing scheme premised on *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) survives the waiver (*see People v Johnson* — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). In any event, defendant has failed to establish that his indictment was unconstitutional, since only the “proper cause” requirement, which was severable, was the subject of *Bruen*, which struck it down, and the remainder of the statutory scheme still stands (*id.*).

As for defendant’s constitutional claim concerning the licensing fees associated with the required license, we find that defendant has failed to establish that the fee requirement is unconstitutional since he has not shown that the fees were exorbitant or designed to prevent gun ownership (*see Mills v New York City, N.Y.*, 758 F Supp 3d 250, 267 [SD NY 2024]). Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

21 The People of the State of New York, Respondent, v Gerard Hines, Appellant. [248 NYS3d 211]—An appeal having

been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Audrey E. Stone, J.), rendered May 15, 2024, 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. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

22 The People of the State of New York, Respondent, v Javien Mazyck, Appellant. [250 NYS3d 67]—

Crimes—Sentence—Probation—Surcharge and Fees

Judgment, Supreme Court, Bronx County (Steven Hornstein, J., on motion; Dineen Riviezzo, J., at plea and sentencing), rendered May 22, 2024, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to five years' probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring him to pay \$375 in surcharge and fees as a condition of his probation, and otherwise affirmed.

Defendant validly waived his right to appeal, which forecloses review of his claim that his sentence is excessive (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). In any event, we perceive no basis for reducing the sentence.

However, defendant's challenge to the condition of probation requiring that he pay the mandatory surcharge and court fees survives his waiver of the right to appeal (*see People v Arias*, 210 AD3d 593, 594 [1st Dept 2022], *lv denied* 39 NY3d 1109 [2023]). Defendant is the full-time caregiver of his and his employed girlfriend's children and is indigent. We find that the imposition of the \$375 sum, comprised of the mandatory surcharge, crime victim's assistance fees, and DNA fees, as a condition of defendant's probation will not assist in ensuring that he leads a law-abiding life and is not reasonably related to his rehabilitation (*see People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]). Accordingly, that condition is stricken. We note that the People do not oppose this relief.

Defendant's challenge to the condition of his probation requiring him to "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people" as unrelated to his rehabilitation is an issue that "implicates the legality of the sentence imposed" (*People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]). Thus, "it survives [his] waiver

of the right to appeal and does not require preservation for appellate review” (*id.* at 620; *see People v Hakes*, 32 NY3d 624, 628 n 3 [2018]). Nevertheless, where defendant was found in possession of a loaded gun and ammunition, the court providently concluded that this condition was “reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so” (Penal Law § 65.10 [1]; *see People v Letterlough*, 86 NY2d 259, 263 [1995]; *People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025]).

Defendant’s valid waiver of his right to appeal forecloses review of his constitutional challenges to the probation conditions (*see Lowndes*, 239 AD3d at 575). In addition, his constitutional claims are unpreserved, and we decline to review them in the interest of justice (*see People v Cabrera*, 41 NY3d 35, 42-51 [2023]; *Lowndes*, 239 AD3d at 575).

Defendant’s Second Amendment challenge to the “good moral character” provision in Penal Law § 400.00 (1) (b) is unpreserved because he failed to raise it in his motion to dismiss the indictment (*see People v Martinez*, 238 AD3d 423, 424 [1st Dept 2025]), and we decline to review it in the interest of justice. As an alternative holding, we find his claim to be unavailing. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

23 The People of the State of New York, Respondent, v Juan Garcia, Appellant. [248 NYS3d 212]—

Crimes—Identification of Defendant—Lineup

Judgment, Supreme Court, Bronx County (Marsha Michael, J., at suppression hearing; Jeanette Rodriguez-Morick, J., at plea and sentencing), rendered November 15, 2021, convicting defendant of manslaughter in the first degree, and sentencing him to a term of 17 years, unanimously affirmed.

Defendant’s valid waiver of his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019], *cert denied* 589 US 1302 [2020]) forecloses review of his claims that he was identified in an unduly suggestive lineup, and that his sentence is excessive (*see People v Bawa*, 234 AD3d 601, 602 [1st Dept 2025], *lv denied* 43 NY3d 943 [2025]). As an alternative holding, we find that the lineup comported with constitutional requirements (*see People v Marshall*, 26 NY3d 495, 506 [2015]), and we perceive no basis for reducing defendant’s sentence. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

24 The People of the State of New York, Respondent, v Louis McDonald, Appellant. [248 NYS3d 210]—An appeal having been

taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Timothy W. Lewis, J.), rendered June 11, 2024, 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. Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

25 The People of the State of New York, Respondent, v Luz Hernandez, Appellant. [248 NYS3d 210]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Kim M. Parker, J.), rendered December 5, 2023, 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. Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

26 The People of the State of New York, Respondent, v Michael Cortes, Appellant. [248 NYS3d 218]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Laurence E. Busching, J.), rendered October 24, 2023, 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. Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

27 The People of the State of New York, Respondent, v Michael Ortiz, Appellant. [248 NYS3d 217]—

Crimes—Possession of Weapon—Constitutional Challenge to Firearm Licensing Scheme—Standing

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered June 26, 2023, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of five years' probation, unanimously affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his excessive sentence claim. In any event, we perceive no basis to reduce defendant's sentence.

Defendant's appeal waiver does not foreclose review of his

constitutional challenge to New York’s firearm licensing statute based on *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). Defendant has standing to raise his facial constitutional challenge to New York’s firearm licensing scheme, notwithstanding that he never applied to obtain a firearm license (see *People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). However, defendant failed to preserve this claim (see *People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review it in the interest of justice. Alternatively, we reject it on the merits (see *People v Guzman*, 237 AD3d 570, 571 [1st Dept 2025], *lv denied* 44 NY3d 993 [2025]). Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

28 The People of the State of New York, Respondent, v Mustafa Barry, Appellant. [248 NYS3d 217]—

Crimes—Evidence—Excited Utterances—Statement Made by Shooting Victim Shortly after Being Shot

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered February 3, 2022, convicting defendant, after a jury trial, of kidnapping in the second degree, assault in the second degree, criminal possession of a weapon in the second and third degrees, unlawful imprisonment in the first degree, and bail jumping in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 22 to 24 years, unanimously affirmed.

The court properly admitted the nontestifying victim’s statement under the excited utterance exception to the hearsay rule (see *People v Hernandez*, 28 NY3d 1056, 1057 [2016]; *People v Johnson*, 1 NY3d 302, 306 [2003]). The declarant made the statement to the officers who arrived on the scene shortly after the shooting at issue (*People v Gantt*, 48 AD3d 59, 71 [1st Dept 2007], *lv denied* 10 NY3d 765 [2008]). The officers also observed him to be limping and in pain, with an open gunshot wound to his leg (see *People v Fratello*, 92 NY2d 565, 570 [1998], *cert denied* 526 US 1068 [1999]). Given the circumstances, the declarant was “under the stress or influence of the excitement caused by the event” and as such, the statement was admissible as an excited utterance (*People v Nieves*, 67 NY2d 125, 135 [1986]; see *Johnson*, 1 NY3d at 306-307).

We perceive no basis for reducing defendant’s sentence. Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

29 The People of the State of New York, Respondent, v Paris Roberts, Appellant. [248 NYS3d 215]—Judgment, Supreme Court,

Bronx County (Marsha D. Michael, J.), rendered December 18, 2019, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, to be served concurrently with terms to which he was sentenced under two separate indictments, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed at sentencing, and otherwise affirmed.

Based on our own interest of justice powers, we vacate the surcharge and fees imposed on defendant at sentencing (*see People v Chirinos*, 190 AD3d 434, 435 [1st Dept 2021]). We note that the People do not oppose this relief. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

30 The People of the State of New York, Respondent, v Steve Darbasie, Appellant. [249 NYS3d 52]—

Crimes—Intimidating Victim or Witness—Sufficiency of Evidence—Social Media Posts

Crimes—Evidence—Police Body Camera Footage Containing Hearsay Statements

Crimes—Jurors—Response to Inquiry—Social Media Posts of Defendant

Judgment, Supreme Court, New York County (Michele S. Rodney, J.), rendered July 29, 2024, convicting defendant, after a jury trial, of intimidating a victim or witness in the third degree (three counts) and tampering with a witness in the third degree (two counts), and sentencing him to concurrent jail terms of six months, unanimously affirmed.

Defendant’s legal insufficiency claim challenging the evidence of his liability as an accomplice is unpreserved, and we decline to review it in the interest of justice (*see People v Gray*, 86 NY2d 10, 20-21 [1995]; *People v Shomo*, 235 AD2d 208, 208 [1st Dept 1997], *lv denied* 89 NY2d 988 [1997]). With respect to defendant’s legal insufficiency claims regarding the evidence that he personally wrongfully compelled the witnesses to refrain from testifying or providing information by instilling a fear of physical injury (*see* Penal Law §§ 215.11 [1]; 215.15 [1]), viewing the evidence in the light most favorable to the People (*see People v Kancharla*, 23 NY3d 294, 302 [2014]), we find the evidence legally sufficient to establish defendant’s guilt of intimidating a victim or witness in the third degree and tampering with a witness in the third degree. Defendant created a new social media account under a false name, and he composed numerous implicitly threatening social media posts, containing misleading and inflammatory edited excerpts of police interviews with the witnesses, characterizing the witnesses as

“pigs,” “rats,” and “snitches,” encouraging other users to spread the videos and share the posts, and tagging individuals mentioned by the witnesses (*see People v Coursey*, 250 AD2d 351, 351 [1st Dept 1998] [“jury was entitled to draw inferences based on the surrounding events”], *lv denied* 92 NY2d 850 [1998]; *see also People v Harris*, 159 AD3d 538, 539 [1st Dept 2018], *lv denied* 31 NY3d 1148 [2018]). Two of the witnesses promptly reported the posts to police, alleging that someone they knew was “harassing and threatening them” online. Even after the witnesses were subjected to vandalism and harassment, and defendant was informed that his posts had potentially “spooked” the witnesses, defendant declined to remove the posts and continued posting about the witnesses’ cooperation with police.

The court providently exercised its discretion by admitting evidence of the vandalism and harassment committed against two of the witnesses by codefendants (*see People v Smith*, 278 AD2d 154, 154 [1st Dept 2000] [“Specifically, we note that the challenged evidence concerning the conduct of a codefendant who had pleaded guilty prior to defendant’s trial was clearly relevant, in context, to defendant’s guilt”]), and the significant probative value of that evidence was not outweighed by any undue prejudice (*see People v Mateo*, 2 NY3d 383, 424-425 [2004], *cert denied* 542 US 946 [2004]).

The court also providently exercised its discretion by admitting police body camera footage containing hearsay statements by one of the witnesses (*see People v Johnson*, 1 NY3d 302, 306 [2003]). The statements were made less than half an hour after one of the codefendants smashed the witness’s car window with a blackjack then ran into a nearby school; the responding officers immediately noted her agitation; and she appeared visibly distressed on the videos while speaking to the officers (*see People v Hernandez*, 28 NY3d 1056, 1057 [2016]; *People v Nosea*, 212 AD3d 511, 511-512 [1st Dept 2023], *lv denied* 39 NY3d 1143 [2023]). The admission of these non-testimonial statements did not violate defendant’s confrontation rights, as they were made to an officer whose primary purpose was to determine what had happened and to ensure the safety of the general public (*see Ohio v Clark*, 576 US 237 [2015]; *People v Nieves-Andino*, 9 NY3d 12, 15-16 [2007]; *People v Gantt*, 48 AD3d 59, 71 [1st Dept 2007], *lv denied* 10 NY3d 765 [2008]).

The court also providently exercised its discretion by admitting surveillance video footage from the underlying homicide case. The video was relevant to material issues, including defendant’s knowledge and intent, as it highlighted the crucial

nature of the witness testimony (see *People v Perez*, 182 AD3d 454, 454 [1st Dept 2020], *lv denied* 35 NY3d 1029 [2020]). Moreover, the court’s limiting instruction, delivered before the video was published to the jury and again during the court’s charge, “minimize[d] any potential undue prejudice from the admission of evidence” (*People v Frumusa*, 29 NY3d 364, 373 [2017]).

The court meaningfully responded to a jury note inquiring whether the comments made on his social media posts could be viewed as “an extension of [defendant]” by advising the jury that this was a factual question for the jury to determine (see *People v Malloy*, 55 NY2d 296, 301 [1982], *cert denied* 459 US 847 [1982]). The court could not direct the jury how to evaluate the facts, so it meaningfully responded to the jury’s question, and it was not required to “marshal the evidence or explain the parties’ theories and proof” (*People v Williams*, 190 AD3d 498, 499 [1st Dept 2021] [internal quotation marks omitted], *lv denied* 36 NY3d 1124 [2021]). Defendant has not demonstrated that he was prejudiced by the court’s response (see *People v Lourido*, 70 NY2d 428, 435 [1987]). The court informed the jury that it could seek additional clarification, but the jury did not ask any further questions about defendant’s social media posts or comments (see *People v Almodovar*, 62 NY2d 126, 132 [1984]; *People v Stokes*, 149 AD3d 510, 511 [1st Dept 2017], *lv denied* 29 NY3d 1087 [2017]). Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

31 The People of the State of New York, Respondent, v Tranell Smalls, Appellant. [248 NYS3d 216]—

Crimes—Possession of Weapon—Constitutional Challenge to Firearm Licensing Scheme

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J., at plea; Ralph A. Fabrizio, J., at sentencing), rendered on June 28, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree, and sentencing him to a term of two years of probation, unanimously affirmed.

Defendant validly waived his right to appeal, since “the totality of the circumstances reveals that [he] understood the nature of the appellate rights being waived” (*People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). Nevertheless, his facial constitutional challenge to New York’s firearms licensing scheme premised on *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) survives the waiver (see *People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528,

*2 [2025]). However, defendant failed to preserve this claim (see *People v Cabrera*, 41 NY3d 35, 45-51 [2023]), and we decline to review it in the interest of justice. As an alternative holding, while defendant has standing to raise his claim, notwithstanding that he never applied for a firearm license (see *Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *2), we reject defendant’s challenge to the “good moral character” provision (Penal Law § 400.00 [1] [b]) on the merits (see *People v Guzman*, 237 AD3d 570, 571 [1st Dept 2025], *lv denied* 44 NY3d 993 [2025]).

Defendant’s claim that his counsel was ineffective for failing to raise a *Bruen* claim is unreviewable on direct appeal “because it involves matters not reflected in the record and, thus, must be raised in a CPL 440.10 motion” (*People v Holder*, 224 AD3d 513, 514 [1st Dept 2024], *lv denied* 41 NY3d 1018 [2024]). In any event, counsel’s failure to raise the *Bruen* claim was not ineffective, since that claim had “little or no chance of success” (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]). Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

32 In the Matter of The People of the State of New York, Respondent, v VDARE Foundation, Inc., Appellant. [248 NYS3d 219]—

Contempt—Civil Contempt—Order Compelling Compliance with Discovery Obligations

Judgment, Supreme Court, New York County (Sabrina Kraus, J.), entered May 20, 2025, bringing up for review an order, same court and Justice, entered on or about October 17, 2024, which held respondent in contempt of prior orders dated January 23, 2023, December 12, 2023, and March 27, 2024, and imposed a fine of \$43,500, with increasing daily fines of \$1,000 per day until respondent submits a certification of compliance with the prior orders, unanimously affirmed, with costs. Order, same court and Justice, entered on or about October 22, 2024, which confirmed the report of the Special Referee requiring respondent to produce wholly unredacted documents for the Referee’s review, redaction, and production to petitioner, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in holding respondent in civil contempt, as petitioner established by clear and convincing evidence that respondent violated lawful, clear mandates of the court, of which it had knowledge, and that the violation resulted in prejudice to petitioner (see *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *60 E. 9th St.*

Owners Corp. v Zihenni, 200 AD3d 587, 587-588 [1st Dept 2021]). Even if respondent's failure to produce wholly unredacted documents to the Referee was not, itself, in contempt of a clear and unequivocal mandate by the court, the court's December 2023 and March 2024 orders properly found respondent's document productions to petitioner to be in clear contempt of the January 2023 order compelling compliance with its discovery obligations under the subpoena issued by petitioner. Moreover, the record establishes that respondent did not, at any time, take any of the requisite steps to purge its contempt that was continuing as of the October 2024 order underlying the judgment.

Respondent failed to preserve its argument that the amount of the contempt fines imposed was excessive and unconstitutional, and that contention, in any event, is unavailing (*see e.g. Matter of People v Trump*, 213 AD3d 503, 504 [1st Dept 2023]).

Finally, the court properly confirmed the Referee's interim report and recommendation, which was within the scope of the reference, substantially supported by the record, and not otherwise improper (*see Sylvan Lawrence Co., Inc. v Downtown/Midtown Props. LLC*, 9 AD3d 257, 257 [1st Dept 2004], *lv dismissed* 3 NY3d 766 [2004]). Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

33 The People of the State of New York, Appellant, v Robert Moore, Respondent. [252 NYS3d 24]—

Crimes—Appeal—Preservation of Issue for Review—Adjudication as Persistent Violent Felony Offender

Judgment of resentence, Supreme Court, New York County (Juan M. Merchan, J.), rendered September 13, 2024, resentencing defendant, as a second violent felony offender, to a term of four years, affirmed.

The People's argument that defendant should have been adjudicated a persistent violent felony offender because *Erlinger v United States* (602 US 821 [2024]) does not apply to the instant case is unpreserved as the prosecutor declined to make that argument at resentencing. "[A] reviewable question of law exists only if it was presented to the trial court in the first instance" (*People v Cabrera*, 41 NY3d 35, 42 [2023]). Moreover, a party may not "sit[] idly by while error is committed, thereby allowing the error to pass into the record uncured, and yet claim the error on appeal" (*People v Bailey*, 32 NY3d 70, 78 [2018] [internal quotation marks and brackets omitted]). The People, like any other litigant, are subject to the preservation requirement (*see People v Tabarez*, 69 NY2d 663, 665 [1986])

[where “(t)he People did not argue” that the defense of extreme emotional disturbance was inapplicable to attempted murder, they did not “preserve() the issue for review”], citing *People v Villani*, 59 NY2d 781, 783-784 [1983]).

The People “did not argue” in the resentencing letter or the resentencing hearing that *Erlinger’s* holding is inapplicable to the instant case (*Tabarez*, 69 NY2d at 665), nor did they not object when the court confirmed that they were not arguing the *Erlinger* issue (see *Bailey*, 32 NY3d at 78). The People stated in their resentencing letter that, “[a]lthough there is an argument that *Erlinger’s* holding does not apply here at all, the People continue to recommend, in an excess of caution, that this Court exercise its inherent power to convene a jury to determine defendant’s predicate status.” At the resentencing hearing, the court stated its understanding that the People were not arguing the *Erlinger* issue and the People agreed. The People confirmed to the court that the primary argument they were making was that the court should empanel a jury to make the relevant tolling determinations pursuant to CPL 400.16 (2). Alternatively, the People argued that the court should sentence defendant as a second violent felony offender. Therefore, the People failed to preserve the issue for our review.

The dissent would find that the People sufficiently presented the issue of *Erlinger’s* applicability to the sentencing court in two different respects. First, the People requested that the court empanel a jury to make the relevant tolling determinations necessary to sentence defendant as a predicate violent felony offender. Second, the People alerted the court to the existence of the *Erlinger* issue and set forth the reasoning supporting the view that *Erlinger* is inapplicable.

While these facts are true, neither demonstrates that the People sufficiently presented the issue of *Erlinger’s* applicability to the sentencing court. In *Cabrera*, the Court of Appeals explained that the preservation requirement “helps ensure that errors are avoided or corrected at the earliest possible opportunity” and that it “gives the parties an essential opportunity to probe relevant factual and legal issues, thereby ensuring that the record before this Court reflects a full airing of the points that bear upon an ultimate merits determination” (41 NY3d at 42-43 [citations omitted]). The Court further cautioned against reaching the merits of a claim “on an underdeveloped record and without the benefit of . . . careful consideration by the courts and the parties below” (*id.* at 51).

Contrary to the dissent’s conclusion, the purpose of the preservation requirement was not served here. By expressly declin-

ing to argue that *Erlinger* does not apply, the People deprived defendant and the court of the opportunity to “probe [the] relevant . . . legal issues” regarding *Erlinger*’s applicability (*id.* at 42-43). This resulted in a record that does not “reflect[] a full airing of the points that bear upon an ultimate merits determination” because defendant could not further develop his position on *Erlinger* where the People did not argue against its applicability (*id.* [emphasis added]). Moreover, contrary to the dissent’s claim that the sentencing court concluded that *Erlinger* applied to the relevant tolling determinations, the court did not rule on the *Erlinger* issue at all because the People declined to argue it. Therefore, making a determination regarding the *Erlinger* issue on this appeal would require us to do so under the precise circumstances the Court of Appeals cautioned against in *Cabrera*.

The dissent also claims that, by declining to reach the merits of the People’s appeal, our decision will “extend[] the disruption of New York’s sentencing system for recidivist felons and potentially depriv[e] the public of the enhanced protection from habitual felony offenders that the system is intended to provide.” It goes on to argue that, because the appellant in this case is seeking to vindicate the constitutionality of a statute, any doubt concerning the preservation of the constitutional issue should be resolved in favor of reviewability. There is, however, no exception to the preservation requirement based on the existence of an important public policy issue (*see Cabrera*, 41 NY3d at 42) and the dissent cites no precedent to support the proposition that any doubt concerning the preservation of a constitutional issue should be resolved in favor of reviewability. We note that the Court of Appeals has already once declined to reach the same *Erlinger* issue on the basis that it was not properly preserved, signaling the importance of adhering to the preservation requirement with regard to this specific issue even if doing so would result in potentially undesirable policy consequences (*see People v Hernandez*, 43 NY3d 591, 597 [2025]).

We note that the court, as the People urge, could not have simply empaneled a jury to make the relevant fact-findings regarding tolling pursuant to its inherent authority under Judiciary Law § 2-b (3). A court’s discretion under that statute is limited to devising new procedures in “unusual circumstances” and “exceptional case[s],” which do not exist here (*see People v Krieg*, 139 AD3d 625, 626 [1st Dept 2016], *lv denied* 28 NY3d 932 [2016]).

We further note that a jury was not required to make the

findings necessary to sentence defendant as a second violent felony offender based on his 2008 conviction of attempted rape in the first degree, because the interval between that conviction and defendant's commission of the instant offense was less than 10 years, and so no tolling calculation was involved. Concur—Kern, J.P., Rodriguez, Pitt-Burke, Rosado, JJ.

Friedman, J., dissents in a memorandum as follows: This appeal by the People places at issue the viability of New York's enhanced sentencing scheme for recidivist felons, the application of which generally depends on whether the defendant was convicted of one or more qualifying felonies within a lookback period of 10 years (or, in certain cases, 15 years) before the commission of the crime for which he or she is being sentenced (*see* Penal Law § 70.04 [1] [b] [iv] [10 years for second violent felony offender]; Penal Law § 70.06 [1] [b] [iv] [10 years for second felony offender]; Penal Law § 70.07 [3] [15 years for second child sexual assault felony offender]; Penal Law § 70.08 [1] [b] [10 years for persistent violent felony offender, incorporating by reference the criteria of Penal Law § 70.04 (1) (b)]). In each case, the lookback period is extended by the exclusion of "any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony" (Penal Law § 70.04 [1] [b] [v]; Penal Law § 70.06 [1] [b] [v]; *see also* Penal Law § 70.07 [3] [incorporating by reference the criteria of Penal Law § 70.06 (1) (b)]; Penal Law § 70.08 [1] [b] [incorporating by reference the criteria of Penal Law § 70.04 (1) (b)]). The exclusion of periods of incarceration from the lookback period is commonly referred to as tolling.

The primary question on this appeal is whether, under the United States Supreme Court's recent decision in *Erlinger v United States* (602 US 821 [2024]), the Fifth and Sixth Amendments' guarantee of a jury trial extends to the calculation of periods of tolling in measuring the lookback period used in determining whether a defendant is subject to enhanced sentencing as a recidivist felon—in this case, as a persistent violent felony (PVF) offender, to whom a 10-year lookback period applies (*see* Penal Law § 70.08 [1] [b] [incorporating by reference the criteria of Penal Law § 70.04 (1) (b)]).¹ If it is constitutionally required that a jury determine the tolling, New York's procedure for making persistent violent felony offender determinations will be substantially disrupted, as Crim-

1. The Fifth and Sixth Amendments to the United States Constitution are made applicable to the states through incorporation into the Fourteenth Amendment.

inal Procedure Law (CPL) § 400.15 (7) (a) (addressing second violent felony offenders, but made applicable to PVF offenders by CPL 400.16 [2]) provides that such determinations “must” be made at a hearing “before the court without jury.”² The impact on New York’s criminal justice system—which, according to the amicus curiae, held in custody approximately 13,500 second felony offenders and approximately 1,500 persistent felony offenders as of January 1, 2021, collectively accounting for approximately 43.8% of all state prisoners—would be grave.

In my view, as more fully discussed below, the sentencing court erroneously concluded that *Erlinger* applied to the tolling determination required to bring one of defendant’s two prior violent felony convictions within the 10-year lookback period.³ Because the court correctly concluded that it had no power under the CPL to empanel a jury to make a tolling determination, it sentenced defendant as a second violent felony offender, based solely on his more recent violent felony conviction, which was within the lookback period without the need for a tolling determination.⁴ The People appeal to us from the court’s application of *Erlinger*, seeking to have the sentence vacated and the matter remanded so that defendant can be resentenced as a PVF offender.

Unfortunately, the majority avoids addressing the merits of the People’s appeal—thereby extending the disruption of New York’s sentencing system for recidivist felons and potentially depriving the public of the enhanced protection from habitual felony offenders that the system is intended to provide—on the ground of lack of preservation. While I very much agree that the People, like any other litigant, are bound by the rule that “a reviewable question of law exists only if it was presented to the trial court in the first instance” (*People v Cabrera*, 41 NY3d 35, 42 [2023]), in this case, it is a fact that the question of *Erlinger*’s applicability to tolling determinations under our

2. The same issue arises with adjudications of second child sexual assault felony offenders (*see* CPL 400.19 [6] [a]) and second felony offenders (*see* CPL 400.21 [7] [a]).

3. An adjudication as a PVF offender requires that the defendant have two prior violent felony convictions within the 10-year lookback period, as extended by any tolling for periods of incarceration (*see* Penal Law § 70.08 [1] [a], [b]).

4. An adjudication as a second violent felony offender requires that the defendant have one prior violent felony conviction within the 10-year lookback period, as extended by any tolling for periods of incarceration (*see* Penal Law § 70.04 [1] [a], [b] [iv]-[v]).

enhanced sentencing scheme was presented to the sentencing court.⁵ This is true in two respects.

First, as more fully discussed below, the People unquestionably took the position before the sentencing court that defendant should be sentenced as a PVF offender. Even though they supported the request for such sentencing on an erroneous legal theory—namely, that the court could empanel a jury to make the tolling determination—the issue of defendant’s eligibility for PVF offender status was undeniably placed before the court.⁶ The majority cites no authority holding that the question of a party’s entitlement to relief is not preserved for review if the party requests the relief but bases the request on an erroneous legal theory. That the People requested the empanelment of a jury to make the PVF offender adjudication should not bar them from arguing on appeal for their entitlement to such an adjudication on an alternative basis that they had placed before the sentencing court.

Second, as more fully described below, the People plainly brought to the sentencing court’s attention that it is an open issue whether *Erlinger* applies to tolling determinations in recidivist sentencing cases, and that, as of the time of the sentencing (in September 2024), at least one other Justice of Supreme Court, New York County, had concluded that *Erlinger* does not apply in this context. Not only did the People alert the court to the existence of this unresolved issue, they set forth the reasoning supporting the view that *Erlinger* is inapplicable. Moreover, before the court had decided how it would proceed, the People presented to it a revised predicate statement supporting PVF status, together with the supporting documentation, instead of waiting to present such materials to a jury. The presentation of these materials to the court before the empanelment of a jury would have had no purpose unless the People intended to offer the court the opportunity to make the tolling determination itself, if it concluded that such a course would not offend *Erlinger*. True, perhaps out of a misguided “excess of caution” (as stated in their response to defendant’s resentencing memorandum), the People did not take

5. Contrary to the majority’s implication, I do not claim that there is any “exception” to the preservation requirement for issues of great public importance.

6. The majority mischaracterizes my position as being that the People preserved the *Erlinger* issue by “request[ing] that the court empanel a jury to make the relevant tolling determinations necessary to sentence defendant as a predicate violent felony offender.” My position is that the People preserved the issue by seeking to have defendant adjudicated as a persistent violent felony offender, not by requesting the empanelment of a jury.

a position before the court on the question of *Erlinger*'s applicability, but they plainly did “present[] [that question of law] to the trial court in the first instance” (*Cabrera*, 41 NY3d at 42-43), thereby preserving it for our review on appeal.

I now turn to the facts relevant to this appeal. After a jury trial, defendant was found guilty of one count of persistent sexual abuse (Penal Law § 130.53) based on an incident alleged to have occurred on August 21, 2018. Using the predicates of defendant's May 18, 1984 conviction for burglary in the second degree and his October 8, 2008 conviction for attempted rape in the first degree, the court adjudicated him a PVF offender and sentenced him to a prison term of four years to life. Upon defendant's appeal, however, the People conceded that his adjudication as a PVF offender had been erroneous, as the predicate felony statement on which the adjudication was based omitted certain periods of tolling for incarceration that were necessary to extend the ten-year look-back period to encompass the 1984 burglary conviction. Given this concession, this Court, while otherwise affirming the conviction, vacated the sentence and remanded the matter to Supreme Court for further sentencing proceedings (*People v Moore*, 228 AD3d 491, 491, 493 [1st Dept 2024], *lv denied* 42 NY3d 972 [2024], *cert denied* 604 US —, 145 S Ct 1203 [2025]).⁷

After our remand, but before defendant was resentenced, the United States Supreme Court issued its *Erlinger* decision. *Erlinger* concerned a prosecution under the federal Armed Career Criminal Act of 1984 (ACCA), which, as described by the principal dissent in that case, “imposes a minimum sentence on a defendant who previously was convicted of at least three violent felonies committed on different occasions—and who then, after the three prior violent felony convictions, unlawfully possessed a firearm” (*Erlinger*, 602 US at 851 [Kavanaugh, J., dissenting]). *Erlinger* did not disturb the longstanding rule, recognized in *Almendarez-Torres v United States* (523 US 224 [1998]), that the Sixth Amendment “permits a judge to find what [prior] crime, with what elements, the defendant was convicted of” (*Erlinger*, 602 US at 839 [internal quotation marks omitted]; *see also Apprendi v New Jersey*, 530 US 466, 490 [2000] [while holding that a jury must determine the defendant's motivation for committing the charged offense for purposes of enhancing the penalty under a hate crime stat-

7. On the present appeal, defendant does not dispute that all three of the offenses at issue (persistent sexual abuse, burglary in the second degree and attempted rape in the first degree) are violent felonies for purposes of the PVF offender statute.

ute, the Court recognized that “the fact of a prior conviction” may be found by the court for purposes of sentence enhancement)). The *Erlinger* majority held, however, that the defendant in that case “was entitled to have a jury resolve ACCA’s occasions inquiry unanimously and beyond a reasonable doubt,” notably adding that “we decide no more than that” (*id.* at 835; *see also id.* at 852 [Kavanaugh, J., dissenting] [“the Court today concludes that only a jury may make the different-occasions determination”])).

After *Erlinger* was issued, defendant, through his resentencing memorandum, demanded that he not be resentenced as a PVF offender. He pointed out that any adjudication under Penal Law § 70.08 would require a tolling calculation to determine whether the 1984 burglary conviction could be brought within the 10-year look-back period under Penal Law § 70.04 (1) (b) (iv).⁸ Defendant argued that, under *Apprendi*, *Erlinger* and other United States Supreme Court decisions construing the constitutional right to a jury trial, the determination of his total time of incarceration between the 1984 conviction and the commission of his 2018 offense could be made only by a jury, which was not provided for by the CPL.

In their responding letter, the People continued to seek a PVF offender adjudication, noting that they had filed and served an amended predicate felony statement that included the periods of incarceration that had been mistakenly omitted from the original predicate felony statement, along with supporting documentation. However, in light of *Erlinger*’s extension of the right to a jury trial to “facts pertaining to a defendant’s prior criminal convictions,” they took the position, “out of an abundance of caution,” that the factual question of the amount of time defendant had been incarcerated since the 1984 conviction “must be resolved at a jury trial.” Accordingly, the People “ask[ed] the Court to empanel a jury under Judiciary Law § 2-b (3) and conduct a jury trial on the issue of whether defendant qualifies for sentencing as a persistent violent felony offender.” In the alternative, the People requested that the court “sentence defendant as a second violent felony offender” under Penal Law § 70.04, for which the October 2008 conviction—an offense that qualified as a predicate without any tolling calculation, as previously noted—would be sufficient.

While the People, “in an excess of caution,” asked for relief based on the conservative assumption that the *Erlinger* hold-

8. No tolling issue arises with respect to the October 2008 attempted rape conviction, which was entered less than 10 years before the commission of the August 2018 offense charged in this proceeding.

ing applied to the tolling calculation in this case, they brought to the court's attention that "there is . . . an argument that *Erlinger*'s holding does not apply here at all." The People wrote in their letter:

"On the other hand, we note that on July 24, 2024, in the case of *People v Desmond Smith* (NY Co Ind. No. 2755/2018), Justice Maxwell Wiley determined that sentencing courts are still permitted to make the simple factual findings of periods of incarceration relevant to tolling despite *Erlinger*. Notably, *Erlinger* itself did not involve a judicial determination of such elementary facts; rather, the finding that the Supreme Court held must be reached by the jury was a complicated and judgment-laden determination of whether a defendant's past crimes occurred 'on multiple occasions' In cases pre-dating *Erlinger*, the Court likewise held that juries were required to resolve similarly challenging factual determinations about a defendant's past criminality None of these cases thus involved a factual determination as basic as whether, with 'tolling' defendant's prior crimes come within the statutory timeframe, which requires only determination of length of time defendant was incarcerated—information [that] can be conclusively determined by unimpeachable government records."

At the resentencing hearing on September 13, 2024, the People confirmed to the court that they were seeking empanelment of a jury to decide the tolling issue arising in connection with an adjudication of defendant as a PVF offender, and that, in the alternative, they asked that he be sentenced as a second violent felony offender, which would not require any tolling calculation. Defense counsel agreed that *Erlinger* required a jury determination on tolling but objected to the empanelment of a jury on the ground that it "would actually be contrary to what the statute provides." The court declined to empanel a jury and sentenced defendant, as a second violent felony offender, to a term of four years of incarceration (*see* Penal Law § 70.04 [3] [d] [as in effect on Sept. 13, 2024]).⁹ The People have taken an appeal from the judgment.

As discussed above, it is my view that the People's request

9. At the resentencing hearing, defense counsel also objected, "for the purpose of preserving [defendant's] rights in the future," to his being sentenced as a second violent felony offender "on the basis of any prior convictions," on the ground that *Erlinger*, as counsel read it, "forecasted, . . . pretty strongly that [the Supreme Court] is likely to overrule [*Almendarez-Torres* [the Supreme Court decision approving judicial determination of the fact of a prior conviction] in the near future." However, defendant has not taken an appeal from his resentencing.

for a PVF adjudication, by itself, was enough to preserve for our review the issue of *Erlinger*'s applicability to the tolling issue in this case, given that the People's request for empanelment of a jury to make a determination on tolling could not be granted. In any event, I believe that the People's resentencing letter, by alerting the court to the point of view that *Erlinger* does not apply to tolling determinations in the context of New York's recidivist felon sentencing scheme, and offering a sufficiently detailed discussion of the basis for that point of view, preserved the issue of *Erlinger*'s applicability for our review on appeal. Far from "sitting idly by while error is committed" (*People v Bailey*, 32 NY3d 70, 78 [2018] [internal quotation marks and brackets omitted]), the People presented the sentencing court "in the first instance" (*Cabrera*, 41 NY3d at 42) with precisely the issue they seek to have resolved on appeal. At the resentencing, the People fully presented the position on the *Erlinger* issue they now urge upon us on appeal, offering the court "a full airing of the points that bear upon an ultimate merits determination" (*id.* at 43).

The only step the People failed to take was, having brought their present position to the court's attention, adopting that position as their own at the resentencing hearing. Still, the court was fully aware of the issue and had an opportunity, if it saw fit, to adopt the position for which the People now advocate. The defense, too, was alerted to the fact that *Erlinger*'s applicability was an open issue, was informed of the support for that position, and had an opportunity to refute that position.¹⁰ Since the People had presented to the court the correct view of *Erlinger*'s applicability, the defense could have—and should have—offered any refutation it deemed appropriate, and the court could have—and should have—considered and adopted that position, whether or not the People themselves had formally adopted it. The purpose of the preservation requirement—that the parties be given "an essential opportunity to probe relevant factual and legal issues" (*id.* at 43)—was fully served here, inasmuch as the issue was purely legal in nature (no factual issue bears on the question of whether *Erlinger* applies to a tolling determination) and the parties had an opportunity to air it fully before the court. Although the People's manner of proceeding in this instance was not ideal, it sufficed, in my view, to preserve the issue for our review.

10. Thus, I reject the majority's claim that the defendant and the court were "deprived . . . of the opportunity to probe the relevant legal issues regarding *Erlinger*'s applicability" (internal quotation marks, ellipsis and brackets omitted).

Notably, in *Cabrera*, the Court of Appeals observed that the requirement of preservation is most strictly enforced where the appellant is challenging the constitutionality of “duly enacted legislation” (*Cabrera*, 41 NY3d at 43 [internal quotation marks omitted], quoting *People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006]). Here, it is the appellant that is seeking to vindicate the constitutionality of a statute (specifically, CPL 400.15 [7] [a], which requires that a hearing on a defendant’s status as a second or persistent violent felony offender be conducted “before the court without jury”), and—while I agree with the majority that the standard for reviewability does not turn on whether the appellant seeks to overturn or to preserve a statute—any doubt concerning the preservation of the constitutional issue should be resolved in favor of reviewability.

The majority’s reliance on *People v Hernandez* (43 NY3d 591 [2025]) is misplaced. In *Hernandez*, the Court of Appeals held that the defendant (who had been sentenced as a PVF offender years before *Erlinger* was decided) could not raise an *Erlinger* issue concerning the determination of tolling on appeal because, “[a]s a threshold matter, defendant did not contest his criminal history, including the relevant periods of incarceration” before he was adjudicated (*id.* at 597; see CPL 400.15 [3], [4], [5] [incorporated by reference in CPL 400.16 (2)]; see also *People v Gomez*, 236 AD3d 603, 604-605 [1st Dept 2025], *lv denied* 43 NY3d 1045 [2025] [same]). Thus, the *Hernandez* defendant failed to preserve an *Erlinger* issue because he failed to raise the underlying factual issue of the accuracy of the allegations of the People’s predicate statement.¹¹ This holding has no relevance to the People’s preservation of the *Erlinger* issue in the present case, in which they sought not only a PVF offender adjudication, but also brought to the court’s attention the legal argument that *Erlinger* does not apply to tolling determinations in the enhanced sentencing context, albeit without adopting that position themselves at that juncture.

Turning to the substance of the People’s argument, I agree with them that the holding of *Erlinger* has no application to the present case. Although the majority opinion in *Erlinger* makes a number of broad statements concerning the limitations on a court’s ability to make findings of fact in a sentenc-

11. Notably, in the present case, defendant also failed to controvert the allegations in the People’s predicate PVF offender statement but, as pointed out in the amicus brief, this was because the court “short-circuited the statutory process by ruling that, under *Erlinger*, it could not make a tolling determination,” which “put the cart before the horse.” However, the People apparently did not object to this manner of proceeding and do not seek reversal on this ground.

ing proceeding, the specific holding of the case is that a sentencing court cannot constitutionally make a factual determination that characterizes the defendant's past criminal conduct. Thus, *Erlinger* held that it was unconstitutional for a sentencing court to "decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard" (602 US at 825). In reaching this conclusion, the *Erlinger* decision stressed that the "separate occasions" inquiry under ACCA, the relevant federal statute, was of an "intensely factual nature," involving "a range of facts, including whether the defendant's past offenses were committed close in time, whether they were committed near to or far from one another, and whether the offenses were similar or intertwined in purpose and character" (*id.* at 828 [internal quotation marks omitted]; see also *id.* at 834 ["deciding whether those past offenses occurred on three or more different occasions is a fact-laden task"]; *id.* at 840-841 ["a sensible ACCA occasions inquiry" may often require "a qualitative assessment about the character and relationship of the offenses" (internal quotation marks omitted)]). *Erlinger* also cautions judges against taking it upon themselves "to decide what the defendant . . . actually did, or the means or manner in which he committed his offense in order to increase the punishment to which he might be exposed" (*id.* at 839-840 [internal quotation marks and brackets omitted]).

Indeed, as the amicus argues, if defendant's present position on this issue were correct, it is difficult to understand why it was not asserted until *Erlinger* was decided, since even Justice Gorsuch, the author of the majority opinion, denied that he was breaking any new ground. "Really," Justice Gorsuch wrote in *Erlinger*, "this case is as nearly on all fours with *Apprendi* and *Alleyne* [*v United States* (570 US 99 [2013])] as any we might imagine" (602 US at 835). *Apprendi*, as previously noted, concerned the determination of the motivation of the defendant's criminal conduct under a hate crime statute. *Alleyne* concerned the determination of whether the defendant had brandished, or merely carried, a firearm in the course of committing his offense. Thus, *Apprendi* and *Alleyne*—like *Erlinger* and completely *unlike* this case, as discussed below—each concerned a factual inquiry seeking to characterize, describe or evaluate the defendant's criminal conduct. This being the case, there is no justification for departing from the many Court of Appeals decisions over the last 25 years that have upheld New York's recidivist sentencing scheme against challenges launched under *Apprendi* (see e.g. *People v Porto*, 16 NY3d 93, 102 [2010]; *People v Bell*, 15 NY3d 935, 935-936 [2010], *cert denied* 563 US 979 [2011]).

In stark contrast to *Erlinger*, the issue committed to the court by CPL 400.15 (7) with which we are concerned here—the determination of the amount of time a defendant spent incarcerated between a previous conviction and the commission of the charged offense—is an essentially rote arithmetic calculation to be made based on certified public records. This determination does not involve any assessment of a defendant’s conduct or culpability. The only relevant information are the records of the official actions of the government vis-à-vis defendant—the date on which an institution took custody of him, the date on which it released him, and the number of days in between. This exceedingly narrow inquiry is of a piece with the determination of the fact of a prior conviction and the elements of the underlying offense, which *Erlinger* expressly left in the hands of the courts, where they had been placed by the Supreme Court in *Almendarez-Torres*. Requiring juries to make findings on such objective, cut-and-dried facts concerning when and where a defendant was incarcerated would do nothing to further the principle that a jury of a defendant’s peers should assess “the truth of every accusation” against him or her (*Apprendi*, 530 US at 477 [internal quotation marks and emphasis omitted])—inasmuch as no accusation is at issue. Defendant cites no case in which such a bland, ministerial determination was held to be constitutionally committed to a jury.

For the foregoing reasons, I would reach the merits of the People’s appellate argument and reject defendant’s argument that *Erlinger* forbids a sentencing court from itself making a tolling determination in calculating the 10-year lookback period upon a defendant’s adjudication as a PVF offender.¹² I would therefore reverse the judgment, vacate the sentence imposed on defendant as a second violent felony offender, and remand the matter for defendant’s resentencing as a persistent violent felony offender.

Accordingly, I respectfully dissent from the majority’s affirmation of the judgment.

12. I note that, in a very similar case, a California appellate court reached the same conclusion, holding that *Erlinger* did not prevent a sentencing judge from making a finding, based on certified records, that the defendant had served a prison term for a prior conviction, which was an aggravating factor under California law (see *People v Lark*, 2024 WL 4523469, *11, 2024 Cal App Unpub LEXIS 6600, *30 [3d Dist, Oct. 18, 2024, No. C097702] [“The concern in *Erlinger* was that a court may not engage in factfinding as to the details of the means or manner of commission of a defendant’s prior conviction. We have no such concern here”]).

Motion by the District Attorneys Association of the State of New York for permission to file an amicus brief, granted.

34 Kelvin Perdomo, Respondent, v 361 East Realty Associates LLC et al., Defendants, and G.F. Enterprise LLC et al., Appellants. G.F. Enterprise LLC et al., Third-Party Plaintiffs-Appellants, et al., Third-Party Defendant. [252 NYS3d 22]—

Disclosure—Scope of Disclosure—Amount and Source of Litigation Funding

Order, Supreme Court, New York County (Dakota D. Ramseur, J.), entered April 9, 2025, which denied the motion of defendants/third party plaintiffs G.F. Enterprise LLC and GFE E. Fordham Road LLC (together, GF) to compel plaintiff's production of funding documentation and lien information related to his treatment by various medical providers, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying GF's motion to compel discovery of documents related to litigation funding, as GF has not shown why the funding documents are material and necessary to a defense of this action (*see* CPLR 3101 [a]; *Worldview Entertainment Holdings, Inc. v Woodrow*, 204 AD3d 629 [1st Dept 2022]). The amount and source of litigation funding is not a subject of plaintiff's claims for damages, and GF has not explained how discovery of funding documents would support or undermine any particular claim or defense (*cf. Smartmatic USA Corp. v Fox Corp.*, 2023 NY Slip Op 30886[U], *3 [Sup Ct, NY County 2023] [discovery of litigation funding agreements proper where the issue of plaintiffs' motivation to sue defendants was an element of defendants' anti-SLAPP counterclaim]). GF also offers no basis for its theory that litigation funding documents would shed light on plaintiff's motivation for bringing the action, and it is otherwise unclear how those documents would be of assistance in revealing any improper motive (*cf. Lituma v Liberty Coca-Cola Beverages LLC*, 243 AD3d 504, 505 [1st Dept 2025] [the defendants established that information regarding litigation funding was "material and necessary" because it could reveal a financial motive for fabricating the accident]).

In addition, because litigation funding is in the form of a loan that plaintiff is obliged to repay, it does not qualify as a collateral source on which GF is entitled to discovery under CPLR 4545. To the extent that GF is entitled to information regarding whether plaintiff is actually under an enforceable obligation to repay, that information may be obtained through interrogatories or depositions. Nor has GF presented any evidence to support its assertion that a litigation funding company

may, as an interested lienholder, have veto power over any potential settlement and therefore could impede a resolution of the action.

Any assertion that the litigation funding is affected by fraud is speculative. Although GF states that the doctors and facilities that treated plaintiff were named in various civil RICO actions alleging fraudulent treatment and billing practices, GF has presented no evidence of misconduct by plaintiff's doctors or his attorneys in this action, nor does GF state which of plaintiff's medical providers were named in the RICO actions. In addition, contrary to GF's assertion otherwise, the fact that almost none of plaintiff's treatment costs were billed to Medicaid even though he is a Medicaid recipient does not suggest that plaintiff and his treatment team have engaged in fraud. In fact, it is entirely plausible that plaintiff elected to obtain treatment from medical providers that did not accept Medicaid and that he was willing to pay the borrowing costs of funding for that treatment.

We have considered GF's remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

35 Karl C. Reeves, Respondent, v The Foundation for the Child Victims of the Family Courts et al., Appellants. [253 NYS3d 9]—

Civil Rights—Strategic Lawsuits against Public Participation—Actual Malice—Criminal Charges and Award of Custody

Libel and Slander—Actionable Words—Accusations of Domestic Violence and Child Abuse

Libel and Slander—Truth—Criminal Charges for Domestic Violence, Gun Possession, and Harassment

Order, Supreme Court, New York County (Judy H. Kim, J.), entered November 4, 2024, which, to the extent appealed from, denied defendants' motion to dismiss the defamation claim, unanimously affirmed, without costs.

This action arises from a contentious divorce and custody dispute between plaintiff and his nonparty ex-wife. Plaintiff alleges that during this custody dispute the wife engaged defendants, who posted five "ethics complaints" to their website, each of which contained allegedly false statements about plaintiff. Plaintiff brings suit against defendants for defamation in connection with these complaints.

Initially, this action involves public petition and participation within the scope of the New York anti-SLAPP statute (Civil Rights Law § 76-a [1] [a] [1]). We recently held that "the 2020 amendments' broadened definition of public petition and

participation in section 76-a applies to actions continued beyond the statute's effective date," even if, like here, they were commenced prior to such date (*Isaly v Garde*, 241 AD3d 1085, 1086-1089 [1st Dept 2025]).

As such, "damages may only be recovered if the plaintiff . . . shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false"—i.e., actual malice (*see* Civil Rights Law § 76-a [2]). "Clear and convincing evidence" is the burden of proof at trial. On a motion to dismiss in an action involving public petition and participation, a plaintiff need only demonstrate that the claim "has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law" (*see* CPLR 3211 [g] [1]). The evidence before Supreme Court—particularly, the letter from the District Attorney's Office outlining the disposition of the criminal charges against plaintiff, in conjunction with the undisputed fact that Family Court awarded plaintiff temporary sole custody of the child prior to publication of at least the fifth ethics complaint—was sufficient to demonstrate a substantial basis for plaintiff's allegations that the defamatory statements were made with actual malice. The outcomes of the criminal and Family Court cases should have given defendants, who purported to be intimately familiar with these proceedings, serious reason to doubt the veracity of the allegations against plaintiff and suggest that they recklessly disregarded the possibility that these allegations were false when they chose to publish them.

In view of our disposition of this issue, we need not reach the parties' arguments with respect to the adequacy of the scienter allegations in the event the anti-SLAPP law did not apply.

The fair report privilege does not apply to the ethics complaints at issue here because they do not purport to summarize the allegations in the Family Court proceedings, nor would the ordinary reader interpret them as doing so (*see Corporate Training Unlimited, Inc. v National Broadcasting Co., Inc.*, 868 F Supp 501, 508-509 [ED NY 1994]; *see generally* Civil Rights Law § 74; *Gottwald v Sebert*, 40 NY3d 240, 255 [2023]; *Greenberg v Spitzer*, 155 AD3d 27, 43 [2d Dept 2017]).

Even if some of the statements made in the ethics complaints are properly characterized as opinion, many statements are factual in nature, including the accusations of domestic violence and child abuse. Moreover, even the opinions are either implicitly based on undisclosed facts or are based on

disclosed facts that were allegedly false, and thus actionable (see *Davis v Boenheim*, 24 NY3d 262, 269-270 [2014]; *Kurland & Assoc., P.C. v Glassdoor, Inc.*, 205 AD3d 545, 546 [1st Dept 2022]).

The truth of the statements made in the ethics complaints is not clear as a matter of law (see *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). While defendants submitted documentary evidence demonstrating that plaintiff was criminally charged in connection with several incidents of alleged domestic violence, gun possession, and harassment, this does not prove that plaintiff in fact committed all the acts of which he is accused in the ethics complaints, and other evidence tends to undermine this conclusion.

Finally, it is sufficiently clear that the ethics complaints were “of and concerning” plaintiff, as two of them identify plaintiff by name and plaintiff’s identity is readily discernible from other information disclosed in the remaining complaints and from the similarity of the accusations therein (see *Zervos v Trump*, 171 AD3d 110, 130 [1st Dept 2019], *appeal dismissed* 36 NY3d 1083 [2021]; see also *Three Amigos SJJ Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 86-87 [2016]). Concur—Moulton, J.P., Friedman, González, O’Neill Levy, Chan, JJ.

36 Rudy Rivera, Respondent, v Khimson Masola, Appellant. [248 NYS3d 221]—

Motor Vehicles—Collision—Electric Scooter—Entering Roadway from Sidewalk at Curb Cut

Order, Supreme Court, Bronx County (Fidel E. Gomez, J.), entered on or about March 7, 2025, which, to the extent appealed from as limited by the briefs, denied defendant’s motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Court is directed to enter judgment accordingly.

Defendant established his prima facie entitlement to summary judgment by showing that his vehicle was lawfully proceeding in the right lane of travel, within the speed limit. Plaintiff, who was traveling on an electric scooter that was subject to the same duties as a motor vehicle, entered the roadway from the sidewalk at a curb cut without stopping or yielding the right of way in violation of Vehicle and Traffic Law §§ 1143, 1281, 1284 (1), (3) (see *Soto-Bay v Prunty*, 115 AD3d 586, 586 [1st Dept 2014]).

In opposition, plaintiff failed to raise an issue of fact. Plaintiff’s theory that defendant failed to exercise due care and

violated Vehicle and Traffic Law § 1128 because he was merging into the parking lane to make a right turn at the next corner is unsupported by the evidence. Both plaintiff and defendant testified that the accident occurred in the right lane. There is also no evidence that defendant failed to exercise reasonable care. Defendant, who had the right of way, “was entitled to assume that plaintiff would obey the traffic laws and not [cross] until it was safe to do so” (*Eltosam v Darling Ingredients Inc.*, 235 AD3d 404, 404 [1st Dept 2025]). Moreover, plaintiff admitted that less than one second had passed from the time he left the sidewalk until the accident occurred, leaving defendant insufficient time to react even if he had seen the scooter (*id.*). Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

37 Amidou Sanogo, Appellant, v Eugene Giacomini et al., Respondents. [248 NYS3d 220]—

Motor Vehicles—Collision—Expert Report

Order, Supreme Court, Bronx County (John A. Howard-Algarin, J.), entered December 10, 2024, which granted defendants’ motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff commenced this personal injury action alleging that a vehicle owned by defendant United Parcel Service Inc. and operated by defendant Eugene Giacomini struck the side of plaintiff’s vehicle while attempting to pass him. Plaintiff was double parked on a one-way street at the time of the accident.

In support of their motion for summary judgment defendants submitted the report of an expert, who opined that the damage to plaintiff’s vehicle was caused by plaintiff’s vehicle moving forward while defendants’ vehicle was stopped or nearly stopped. The expert relied upon photos of the accident site and post-accident photos of the accident scene and plaintiff’s vehicle, as well as data obtained from inspections of the accident site and defendants’ truck. The report was consistent with Giacomini’s testimony that he had to “ride the brake” and that his foot was not on the gas pedal when the vehicles made contact. Plaintiff failed to raise a triable question of fact in opposition.

Plaintiff now contends that defendants’ expert’s report should never have been considered because it was unsworn and unsupported by a proper evidentiary foundation. However, plaintiff never argued before Supreme Court that the expert’s report was unsworn, based on unauthenticated photographs and measurements or otherwise inadmissible. Thus, plaintiff’s evidentiary

challenges to defendants' expert's findings are unpreserved, and we decline to review them in the interest of justice (*see Borges v Rose*, 187 AD3d 594, 595 [1st Dept 2020], *lv denied* 37 NY3d 902 [2021]). In any event, we find them unavailing. Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ. **[Prior Case History: 84 Misc 3d 1241 (A), 2024 NY Slip Op 51661(U).]**

38 Michael Scanlon, Respondent-Appellant, v South Street Seaport Limited Partnership et al., Respondents, and Plaza Construction, LLC, Appellant-Respondent/Third-Party Defendant-Appellant/Second Third-Party Plaintiff-Appellant. South Street Seaport Limited Partnership et al., Third-Party Plaintiffs-Respondents, v Kenvil United Corp. et al., Third-Party Defendants-Respondents. Kenvil United Corp. et al., Second Third-Party Defendants-Respondents. [251 NYS3d 84]—

Labor—Safe Place to Work—Elevation-Related Hazard—Inability to Describe How Injury Occurred Immediately after Accident

Labor—Safe Place to Work—Elevation-Related Hazard—Sole Proximate Cause Motions and Orders—Timeliness of Motion—Interest of Justice

Order, Supreme Court, New York County (Nicholas W. Moyne, J.), entered on or about October 2, 2024, which, to the extent appealed, denied plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim and denied the cross-motion of defendant Plaza Construction LLC for summary judgment dismissing plaintiff's common law and Labor Law § 200 claims against it and on its contractual indemnification claim against third-party defendant Kenvil United Corp., unanimously modified, on the law, to grant Plaza summary judgment dismissing plaintiff's common law and Labor Law § 200 claims against it and on its claim for contractual indemnity against Kenvil, and otherwise affirmed, without costs.

That plaintiff could not describe how his injury occurred immediately after the accident does not bar recovery under his Labor Law § 240 (1) claim. His account of the accident did not lack credibility, and indeed, the record establishes that he showed physical manifestations of an injury and was rendered incoherent, evidently because of an accident (*see Groves v Land's End Hous. Co.*, 80 NY2d 978, 980 [1992]; *Jones v West 56th St. Assoc.*, 33 AD3d 551, 552 [1st Dept 2006]). Moreover, none of the people on site at the time of plaintiff's incident offered any alternative version of the accident or any facts inconsistent with his falling off a ladder.

Nevertheless, summary judgment on the claim was properly denied because questions of fact exist as to whether plaintiff

was the sole proximate cause of his accident (*see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Although the defense of sole proximate causation does not apply where an employer provides a defective device for use on a job site, the record contains contradictory evidence as to whether plaintiff's employer, Kenvil, provided the ladder at issue. We further note that plaintiff described it as "common knowledge" that it is unsafe to use a separated extension ladder. There is also evidence in the record that there were other safe, readily available means of access to the worksite.

While Plaza's cross-motion for summary judgment against plaintiff dismissing his common-law negligence and Labor Law § 200 claims was untimely, Supreme Court providently exercised its discretion in considering the cross-motion in the interest of justice. As Supreme Court noted, the cross-motion sought substantially the same relief as that sought by defendants South Street Limited Partnership and Seaport Management Development Company, LLC (*see Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008]; *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]).

On the merits, the court should have granted the cross-motion. The accident arose out of the contract work, triggering the indemnity provision, and Plaza did not exercise any control over the means or methods of the work being performed at the time of the accident such it can be said to have been responsible for the accident (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]). Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

39 Marjana Sekosan, Respondent, v A Bronx Woman's Medical Pavillion P.C. et al., Appellants. [248 NYS3d 220]—

Judgments—Default Judgment—Vacatur—Failure to Tender Timely Payment under Stipulation of Settlement

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about January 14, 2025, which denied defendants' motion to vacate a default judgment entered against them and to restore the case to the calendar, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying defendants' motion to vacate the default judgment (*see* CPLR 5015 [a] [1]; *Commonwealth Land Title Ins. Co. v Sky Abstract, LLC*, 242 AD3d 447, 447 [1st Dept 2025]). Defendants failed to provide any basis for vacating the judgment in light of their default under the parties' stipulation of settle-

ment (*see Taboola, Inc. v Newsweek Media Group, Inc.*, 171 AD3d 510, 511 [1st Dept 2019]). Defendants failed to provide a reasonable excuse for not timely tendering payment to plaintiff. Defendants also failed to establish a meritorious defense to the action by establishing that they sent plaintiff a check for the amount owed within five days of receiving plaintiff's notice to cure, as required by the parties' stipulation of settlement.

The fact that plaintiff cashed all 10 of the previous checks defendants sent to her pursuant to their stipulation of settlement and that defendant Brian E. Park claims that he immediately issued a check to plaintiff in the amount owed after receiving plaintiff's notice to cure, does not establish that the check was ever mailed or received by plaintiff, nor does it establish that plaintiff refused to deposit the check so that she could demand \$17,500 in monetary damages, as defendants suggest. Requiring literal enforcement of the terms of the stipulation of settlement is not unjust (*see McKenzie v Vintage Hallmark*, 302 AD2d 503, 504 [2d Dept 2003]). Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

40 In the Matter of Tender Touch Health Care Services Inc. et al., Respondents, v Tnuzeg LLC et al., Respondents, and Vistacare LLC, Appellant. [253 NYS3d 13]—

Fraudulent Conveyances—Transfer in Fraud of Creditors—Constructive Fraud

Contempt—Civil Contempt—Award of Fees

Judgment, Supreme Court, New York County (Joel M. Cohen, J.) entered on November 4, 2024, awarding petitioners the total amount of \$1,134,343.42, and bringing up for review an order, same court and Justice, entered on or about November 30, 2023, which held that a previously confirmed arbitration award was enforceable against respondent Vistacare LLC, unanimously affirmed, without costs. Order, same court and Justice, entered on or about June 18, 2025, which granted, in part, petitioners' application for attorneys' fees and awarded them \$131,330.98, unanimously affirmed, without costs.

This appeal arises from petitioner Tender Touch Health Services, Inc.'s protracted efforts to obtain payment from respondents for therapy services it provided at a long-term nursing facility in New Jersey. Tender Touch initially proceeded before a Rabbinical Court and was awarded \$710,000 against respondents Tnuzeg LLC and New Vista Nursing. At some point around the time of the Rabbinical Court proceeding, ownership of the skilled nursing facility was transferred to respondent Vistacare LLC. Vistacare did not participate in the Rabbinical Court proceeding.

On December 3, 2021, Supreme Court confirmed the arbitration award against Tnuzeg and New Vista Nursing, and ordered further proceedings against Vistacare to determine if the award should be enforced against it as well as transferee of all the assets of Tnuzeg and New Vista Nursing. Supreme Court's decision was affirmed by this court.

In the November 2024 order on appeal, Supreme Court held that the Rabbinical Court's award was enforceable against Vistacare. The court found that Vistacare was the recipient of the fraudulent transfer of the long term nursing facility in violation of Debtor and Creditor Law §§ 273 and 275, and that Vistacare was also "liable under the continuity of business or de facto merger doctrine as the successor to Tnuzeg because it is operating the same New Vista business." Judgment was entered in favor of petitioners in the amount of \$1,134,343.

Respondents thereupon embarked on a series of actions to avoid paying the judgment. Tender Touch moved to hold Vistacare in contempt. After motion practice Supreme Court issued the second decision on appeal, which awarded Tender Touch \$131,330.98 in attorneys' fees as contempt sanctions.

Vistacare's principal brief did not challenge the finding that the transfer was a continuation of Tnuzeg and New Vista's business and/or a de facto merger. Vistacare's belated effort to address the issue in its reply brief was insufficient (*see Center for Independence of the Disabled v Metropolitan Transp. Auth.*, 184 AD3d 197, 209 [1st Dept 2020]). Thus, it abandoned that branch of the appeal, which by itself would support affirmance of the judgment.

Affirmance is also warranted based upon the issue of fraudulent conveyance. Vistacare was plainly liable for the Award as a fraudulent transferee under various sections of the Debtor and Creditor Law. CPLR 5225 (b) allows judgment creditors to use a special proceeding to reach the assets of a judgment creditor's prior transferee "where it is shown that . . . the judgment creditor's rights to the property are superior to those of the transferee" (CPLR 5225 [b]; *see Gelbard v Esses*, 96 AD2d 573, 575 [2d Dept 1983]). The record before the court amply demonstrates the absence of adequate consideration, and that the transfer was not made in good faith, allowing for a finding of constructive fraud under Debtor and Creditor Law § 273-a (*see Sardis v Frankel*, 113 AD3d 135, 141 [1st Dept 2014]). In addition to the inadequacy of consideration, the timing of the transactions and the intrafamilial ownership of the various entities provide more than sufficient "badges of fraud" to establish liability under Debtor and Creditor Law § 276 (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528-529 [1st Dept 1999]).

Vistacare has identified no basis to disturb Supreme Court's order awarding fees for its contemptuous conduct. The court properly limited its award to fees incurred that were directly related to its contemptuous conduct (*see Matter of Gonnard v Guido*, 141 AD3d 649, 650 [2d Dept 2016]). This included not only the instant contempt motion, but the various other motions petitioners were forced to make to address Vistacare's contempt (*see e.g. Bell v White*, 77 AD3d 1241, 1244-1245 [3d Dept 2010], *lv dismissed* 16 NY3d 888 [2011]; *see also Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 173 AD3d 401, 401-402 [1st Dept 2019], *lv dismissed* 34 NY3d 1152 [2020]).

We have considered Vistacare's remaining arguments and find them unavailing. Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

41 In the Matter of F.S.W., a Child Alleged to be Permanently Neglected. Lutheran Social Services of NY, Respondent, v A.F.M., Appellant. [251 NYS3d 87]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Diligent Efforts of Agency

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Parent's Failure to Complete Programs or Visit Child Consistently

Appeal from order of fact-finding and disposition (one paper), Family Court, New York County (Grace Obama-Layat, J.), entered on or about February 20, 2025, which, upon a fact-finding determination that respondent mother had permanently neglected the subject child pursuant to Social Services Law § 384-b, terminated her parental rights as to the child and transferred custody and guardianship to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed as to the fact-finding determination, and the appeal therefrom otherwise dismissed, without costs.

As to the fact-finding portion of the order, the finding that the mother permanently neglected the child is supported by clear and convincing evidence (*see* Social Services Law § 384-b [7] [a]). The evidence shows that the agency demonstrated that it made diligent efforts to encourage and strengthen the parental relationship by, among other things, scheduling regular visitation, developing a plan for appropriate services for the mother, referring her for domestic violence counseling, mental health counseling, substance abuse treatment, a psychiatric evaluation, providing her with information about an online parenting program, regularly meeting with her to discuss her progress with her service plan, and assisting her to obtain an emergency housing voucher (*see* Social Services Law § 384-b

[7] [a], [c], [f]; *Matter of Nelson M.L. [Nilsa L.]*, 195 AD3d 504, 505 [1st Dept 2021]; *Matter of Felicia Malon Rogue J. [Lena J.]*, 146 AD3d 725, 726 [1st Dept 2017]; *cf. Matter of K.Y.Z. [W.Z.]*, 44 NY3d 657, 662 [2025]).

The record also shows that, despite the agency's diligent efforts, the mother failed to comply with the agency's referrals for services, complete necessary programs, and gain insight into the reasons for the child's placement into foster care within the statutorily relevant period (*see* Social Services Law § 384-b [7] [a], [b]; *see Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545, 546 [1st Dept 2014]). The mother also failed to visit the child consistently, which alone supports the finding of permanent neglect (*see Matter of Angelica S. [Cynthia C.]*, 144 AD3d 484, 485 [1st Dept 2016], *lv denied* 28 NY3d 1128 [2017]).

The mother failed to preserve her claim that the agency's progress notes were inadmissible without an adequate testimonial foundation and did not prove a *prima facie* case of permanent neglect against her, and we decline to review it in the interest of justice (*see Matter of Isaiah R.*, 35 AD3d 249, 249 [1st Dept 2006]).

To the extent Family Court did not allow the mother to cross-examine the foster father about his possible prejudice and motive to lie, such line of questioning would not have been a basis for the court to alter its determination given the clear and convincing evidence supporting the finding that the mother permanently neglected the child.

The mother's contention that the attorney for the child improperly substituted her judgment for the child's wishes is not preserved for our review because she failed to make a motion to remove the attorney for the child (*see Matter of Muriel v Muriel*, 179 AD3d 1529, 1530 [4th Dept 2020], *lv denied* 35 NY3d 908 [2020]).

Finally, no appeal lies from the dispositional portion of the order of fact-finding and disposition because the mother defaulted at the dispositional hearing (*see Matter of Arianna-Samantha Lady Melissa S. [Carissa S.]*, 134 AD3d 582, 582-583 [1st Dept 2015], *lv dismissed* 27 NY3d 952 [2016]).

We have considered the mother's remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., Kapnick, Pitt-Burke, Higgitt, Rosado, JJ.

42 In the *Matter of J.W., Appellant, a Person Alleged to be a Juvenile Delinquent*. [248 NYS3d 222]—

Crimes—Verdict—Sufficiency of Evidence—Sexual Abuse
Crimes—Juvenile Offender—Typographical Error in Petition

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about September 23, 2024, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that appellant committed acts which, if committed by an adult, would constitute the crimes of criminal sexual act in the first and third degrees; sexual abuse in the first, second, and third degrees; sexual misconduct; and endangering the welfare of a child, and ordered a conditional discharge for a period of 12 months, unanimously modified, on the law, to the extent of amending the fact-finding and dispositional orders to reflect that the second count of the petition charged a violation of Penal Law § 130.65 (1) rather than Penal Law § 130.65 (3), and otherwise affirmed, without costs.

Family Court's findings comported with the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The victim, age 12 at the time of the incident, provided a detailed account of the conduct leading to the sexual abuse, and her account was corroborated by her largely identical statements to medical professionals at the hospital. In addition, the victim's seven-month delay in reporting the incident was satisfactorily explained. There is no basis for disturbing the court's credibility determinations (*see Matter of Trevor McK. [Teanja N.T.]*, 120 AD3d 416, 417 [1st Dept 2014]).

The petition contained a typographical error to the extent that it listed Penal Law § 130.65 (3) (sexual abuse when the other person is less than 11 years old) rather than Penal Law § 130.65 (1) (sexual abuse by forcible compulsion) as the second count. However, the text of that count clearly alleged that respondent subjected the victim to sexual contact by forcible compulsion, and the supporting deposition contained the requisite factual allegations, which were consistent with conduct proscribed by Penal Law § 130.65 (1). Moreover, the petition correctly charges first-degree criminal sexual act, which also requires forcible compulsion, and Family Court found sufficient proof to support that charge (former Penal Law § 130.50 [1]). Appellant cites no prejudice from the typographical error in the petition. Accordingly, we modify the orders of fact-finding and disposition (*see Matter of Jonathan F.*, 290 AD2d 385, 386 [1st Dept 2002]). Concur—Moulton, J.P., Friedman, González, O'Neill Levy, Chan, JJ.

43 In the Matter of Jimmy Wagner, Petitioner, v New York City Department of Education, Respondent. [248 NYS3d 224]—Upon remittitur from the Court of Appeals (44 NY3d 93 [2025]), the order entered December 5, 2023 (222 AD3d 420 [1st Dept 2023]), insofar as appealed, unanimously reversed, with costs,

and the matter remanded to the New York City Board of Education for further proceedings in accordance with *Matter of Wagner v New York City Dept. of Educ.* (44 NY3d 93). Concur—Kern, J.P., Moulton, Kennedy, Gesmer, Higgitt, JJ.

44 Kenrick Altidor, Appellant, v Medical Knowledge Group LLC, Respondent. [248 NYS3d 549]—

Civil Rights—Discrimination in Employment—Discrimination Based on Race—Termination

Civil Rights—Discrimination in Employment—Discrimination Based on Race—Failure to Promote

Order, Supreme Court, New York County (Dakota D. Ramseur, J.), entered on or about February 24, 2025, which, to the extent appealed from, granted defendant's motion to dismiss plaintiff's claims of discriminatory non-promotion and termination under the New York State Human Rights Law (State HRL) and the New York City Human Rights Law (City HRL), unanimously reversed, on the law, without costs, defendant's motion denied as to plaintiff's claims of discriminatory termination and discriminatory non-promotion under the State HRL and City HRL, and those claims reinstated.

Plaintiff's allegation that he, an African American, was terminated from his job by defendant, his employer, after making one mistake while two of his white coworkers who made similar mistakes were neither reprimanded nor terminated was sufficient to state a claim for discriminatory termination under the broad protections of the State and City HRLs (*see e.g. Serrano v City of New York*, 226 AD3d 575 [1st Dept 2024]; *Vig v New York Hairspray Co., L.P.*, 67 AD3d 140 [1st Dept 2009]). Plaintiff specifically alleged that one of the white coworkers was an IT Help Desk Technician, the same position he held, and that the coworker performed substantially similar work under similar working conditions. He further alleged that he helped fix some of the mistakes that this coworker had made in the past. These allegations were sufficient at the pleading stage (*see Pelepelin v City of New York*, 189 AD3d 450, 452 [1st Dept 2020]).

In support of his cause of action for failure to promote, plaintiff alleges that his coworker was promoted to a job that he was already performing, and that the position was not posted prior to it being filled. These allegations are sufficient to meet plaintiff's pleading burden as this Court has previously held that it is unnecessary for a plaintiff to allege that he applied for a promotion where he has alleged that promotions were typically made unannounced and unsolicited (*id.*) or

where defendant failed to advertise the position (*Uwoghiren v City of New York*, 148 AD3d 457, 458 [1st Dept 2017]). Concur—Manzanet-Daniels, J.P., González, Shulman, Pitt-Burke, Chan, JJ.

(February 19, 2026)

1 AG1 DOE, Respondent, v George Morris, Appellant, et al., Defendants. [252 NYS3d 39]—

Limitation of Actions—Revival of Time-Barred Claims—Child Victims Act—Due Process

Limitation of Actions—Revival of Time-Barred Claims—Child Victims Act—Equal Protection

Amended order, Supreme Court, New York County (Alexander M. Tisch, J.), entered on or about December 11, 2024, which, to the extent appealed from as limited by the briefs, denied the motion of defendant George Morris to dismiss the sexual battery and negligence causes of action against him pursuant to CPLR 3211 (a) (5) and (7), unanimously modified, on the law, to dismiss the negligence cause of action as against him, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 1, 2024, unanimously dismissed, without costs, as abandoned.

Contrary to Morris’s argument, the revival provision of the Child Victims Act (CVA) (*see* CPLR 214-g) does not violate the due process and equal protection clauses of the New York State and United States Constitutions. “[T]he revival of civil claims and causes of action pursuant to the CVA was a reasonable response to remedy the injustice to child sexual assault survivors caused by application of the relevant statute of limitations,” and thus satisfied the constitutional requirements of due process (*Forbes v Poly Prep Country Day Sch.*, 220 AD3d 750, 752 [2d Dept 2023]). Nor is CPLR 214-g unconstitutional as applied to Morris in this action, as there is nothing “unusual” about the factual allegations to warrant such determination (*see Matarazzo v CHARLEE Family Care, Inc.*, 218 AD3d 941, 944 [3d Dept 2023]).

To the extent Morris argues that CPLR 214-g violates his constitutional right to the equal protection of the law by subjecting him to potential liability for conduct alleged to have occurred more than 40 years ago, after the statute of limitations expired, the Legislature specifically considered these concerns as it relates to all parties (*see id.*). “Indeed, the extensive legislative history of the CVA—which includes sup-

port from victims who raise claims that temporally eclipse those alleged here—provides that a justification for passing the CVA was that the current law required a victim to file a civil action ‘long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average’ ” (*id.* [citations omitted]).

Thus, Supreme Court properly denied Morris’ motion to dismiss the sexual battery claim against him. However, because the negligence cause of action is premised on the same alleged conduct underlying the sexual battery cause of action, it must be dismissed insofar as against Morris as there is no such thing as “negligent assault” (*see Trott v Merit Dept. Store*, 106 AD2d 158, 159-160 [1st Dept 1985]), and therefore the negligence cause of action was not adequately pleaded (*cf. Brown v Riverside Church in the City of N.Y.*, 231 AD3d 104, 111 [1st Dept 2024]).

We have considered Morris’ remaining arguments and find them unavailing. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

2 Oscar Alvarado, Appellant, v Local 1549—N.Y.C. Clerical Administrative Employees et al., Respondents. [253 NYS3d 27]—

**Labor—Hours and Wages—Severance Pay—Private Right of Action
Labor Unions—Action against Union—Failure to Plead Authorization or Rati-
fication by Union Membership—Contract and Quasi-Contract Claims**

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about April 7, 2025, which granted defendants’ motion to dismiss the complaint, unanimously affirmed, without costs.

In this action for unpaid wages, plaintiff alleges that he was “hired by Local 1549 under the purview of [defendant DC 37] and AFSCME as a Coordinator of Strategic Planning and Special Projects,” and that “[d]efendants terminated [p]laintiff without explanation and refused to pay him any severance pay.”

Plaintiff alleges that he was a member of DC 37’s professional employees’ union, the Federation of Field Representatives (FFR), “which has a [CBA] with . . . DC 37.” The CBA provides that “[s]everance pay shall be paid to an employee . . . who is discharged,” and that employees hired after 2005 “accrue severance pay of one week’s pay for every 12 months of service.” Plaintiff further alleges that the DC 37 Employee Manual similarly states that “[s]everance pay shall be paid to employees who are discharged” and “shall amount to one week’s pay for each full year of service.” Plaintiff specifically alleges

that his “employment relationship” with defendants “was governed by [the] Employee Manual with DC 37 and a Union Contract [i.e., the CBA] between DC 37, AFSCME, and [FFR].” In his complaint plaintiff asserts causes of action for violation of New York Labor Law § 198-c, breach of contract, implied contract, promissory estoppel, and quantum meruit.

Plaintiff’s cause of action pursuant to Labor Law § 198-c was properly dismissed because that specific provision of the Labor Law does not create a private right of action (*see e.g. Stoganovic v Dinolfo*, 92 AD2d 729, 729 [4th Dept 1983], *affd* 61 NY2d 812 [1984]). In any event, the claim pursuant to section 198-c is preempted by the federal Employee Retirement Income Security Act of 1974 (*see Gilbert v Burlington Indus., Inc.*, 765 F2d 320, 327-328 [2d Cir 1985]).

We affirm the dismissal of plaintiff’s contract and quasi-contract claims “for reasons other than those stated by the motion court” (*J. Remora Maintenance LLC v Efromovich*, 103 AD3d 501, 501 [1st Dept 2013], *lv denied* 21 NY3d 862 [2013]). While the court did not reach defendants’ argument based on the unions’ status as unincorporated associations, we affirm on that ground. Plaintiff was required to, but did not, plead “that the entire membership authorized and later ratified [defendants’] actions” (*Dowlah v American Arbitration Assn.*, 221 AD3d 426, 427 [1st Dept 2023], *lv denied* 41 NY3d 910 [2024]), as required by *Martin v Curran* (303 NY 276, 280 [1951]) (*see Paladino v CNY Centro, Inc.*, 23 NY3d 140, 146 [2014]). Plaintiff’s contract and quasi-contract claims against his union employer do not fall within the “narrow exception to the *Martin* rule” for “suit[s] by a union member against a union arising from wrongful expulsion” (*id.* at 147-148).

We have considered plaintiff’s additional arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

3 In the Matter of D.B., Appellant, v S.P., Respondent. [253 NYS3d 25]—

Parent, Child and Family—Custody—Uniform Child Custody Jurisdiction and Enforcement Act—Retention of Jurisdiction over Petitions

Parent, Child and Family—Visitation—Modification Due to Change of Circumstances—Move out of State

Order, Family Court, Bronx County (Jacyn Sherman, Ref.), entered on or about February 7, 2025, which granted petitioner father’s petition seeking to modify the custody order dated September 19, 2022 to the extent of designating new exchange locations and denied the father’s enforcement petition with prejudice, unanimously affirmed, without costs.

Contrary to the mother's contentions, Family Court properly retained jurisdiction over the father's modification and enforcement petitions because the child moved to Connecticut only a year before the petitions were filed, and he continued to have a significant connection to New York, including monthly visits with the father and the paternal grandmother in the Bronx (see Domestic Relations Law § 76-a [1] [a]; *Matter of Helmeyer v Setzer*, 173 AD3d 740, 742-743 [2d Dept 2019]). Accordingly, the court properly exercised jurisdiction over the petitions at issue but declined to exercise continuing exclusive jurisdiction over the matter.

There is a sound and substantial basis for Family Court's determination that the mother's move to Connecticut with the child constituted a change of circumstances warranting modification of the prior order with respect to the father's visitation (see *Matter of Nava v Kinsler*, 85 AD3d 1186, 1186-1187 [2d Dept 2011], *lv denied* 17 NY3d 714 [2011]; see also *Skidelsky v Skidelsky*, 279 AD2d 356, 356 [1st Dept 2001]). Furthermore, the court's directive that visitation exchanges would begin in Norwalk, Connecticut and end at the paternal grandmother's home in the Bronx is in the child's best interests (see *Jeffrey P. v Alyssa P.*, 202 AD3d 1409, 1412-1413 [3d Dept 2022]; see also *Matter of David V. v Roseline W.*, 217 AD3d 1112, 1115 [3d Dept 2023], *lv denied* 40 NY3d 905 [2023]).

The parties' arguments opposing the order reflect that their primary concern is their own convenience rather than what is in the child's best interests (see *Jeffrey P.*, 202 AD3d at 1413). The father's argument that the court failed to adequately consider the mother's intransigence and noncompliance with its orders is also unavailing, as the court's primary concern is the child's best interests, and its role is not to punish one parent or the other for poor behavior (see *Matter of Tropea v Tropea*, 87 NY2d 727, 742 [1996]).

Family Court properly denied the father's enforcement petition, as he failed "to establish, by clear and convincing evidence, that there was a lawful court order in effect with a clear and unequivocal mandate, that [the mother] had actual knowledge of the order's terms and that [the mother's] willful actions impaired [the father's] rights under the prior order" (*Matter of Angelica CC. v Ronald DD.*, 214 AD3d 1091, 1092 [3d Dept 2023] [internal quotation marks omitted], *lv denied* 39 NY3d 915 [2023]). The order stated that the father "may have additional visitation with the child in New York, from Friday at 6:00 p.m. until Sunday at 6:00 p.m., upon 2 weeks' notice to the mother in writing." The mother's apparent refusal to facili-

tate visitation did not constitute a willful violation of the order, which was permissive not mandatory (*see Matter of Hoglund v Hoglund*, 234 AD2d 794, 796 [3d Dept 1996]). Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

4 Joel Oswaldo Ruiz Carreno, Respondent, v Chelsea Leaf South Housing Development Fund Corporation et al., Appellants. Chelsea Leaf South Housing Development Fund Corporation et al., Third-Party Plaintiffs-Appellants, v Flatiron Construction Corporation, Third-Party Defendant-Respondent. [251 NYS3d 610]—

Labor—Safe Place to Work—Elevation-Related Hazard—Fall from Dumpster while Securing Tarp to Sides
Indemnity—Contractual Indemnification—Construction Project—Delegation of Authority to Monitor Performance of Subcontractors

Order, Supreme Court, New York County (Lori S Sattler, J.), entered on or about June 18, 2024, which, to the extent appealed from, granted plaintiff's cross-motion for partial summary judgment on his Labor Law § 240 (1) claim, denied the motion of defendants Chelsea Leaf South Housing Development Fund Corporation, Eight and Seventh GP LLC, and Chateau GC LLC (collectively, defendants) for summary judgment dismissing the Labor Law § 240 (1) claim, and denied the branch of defendants' motion for summary judgment on their contractual indemnification claim against the third-party defendant Flatiron Construction Corporation (Flatiron), unanimously modified, on the law, to deny plaintiff's cross-motion for partial summary judgment on his Labor Law § 240 (1) claim, to grant defendants' motion for contractual indemnification against Flatiron to the extent of granting defendants conditional contractual indemnification on the claim, and otherwise affirmed, without costs.

Appeal from order, same court and Justice, entered on or about December 6, 2024, which, in effect, granted defendants' motion for leave to renew and reargue, and upon reargument, adhered to its prior determination, unanimously dismissed, without costs, as academic.

Plaintiff, a laborer on a construction project, climbed atop of an 8-foot by 14-foot dumpster, which measured approximately 4 to 4½ feet in height, to place a tarp over it and to secure the tarp on the dumpster's sides using wire. According to plaintiff while standing atop the dumpster and stretching the tarp out over the dumpster, a gust of wind caught the tarp, and plaintiff was propelled over the side of the dumpster. Plaintiff landed on the ground and was injured.

Although Supreme Court correctly denied defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim, it should have also denied plaintiff's cross-motion for partial summary judgment on that claim. Plaintiff did not establish as a matter of law that the task he was engaged in at the time of his accident involved an elevation-related hazard as that work was intended or supposed to be performed (see *S.V.L. v PBM, LLC*, 191 AD3d 564, 566 [1st Dept 2021]). Plaintiff testified at his deposition that he had been directed by an unknown individual to stand atop the dumpster to cover it with a tarp, and that he also followed the example of other co-workers who, in the past, had stood atop the dumpster while spreading a tarp over it. However, given deposition testimony from other individuals working on the construction project that the standard procedure for covering the dumpster involved several laborers working jointly at ground level to spread the tarp over the dumpster, factual issues exist as to whether placing the tarp on the dumpster required work to be done at an elevated differential (see *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339-340 [2011]; *S.V.L. v PBM, LLC*, 191 AD3d at 566; see also *Broggy v Rockefeller Group, Inc.*, 8 NY3d 675, 681 [2007]).

For the above stated reasons, Supreme Court properly denied defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim. Moreover, the record is devoid of any evidence to show that plaintiff ignored directives that he use available safety devices, or even that safety devices were actually made available to the plaintiff, rendering the argument that plaintiff was the sole proximate cause of his accident unavailing (see *Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020]).

Defendants did, however, establish prima facie entitlement to conditional contractual indemnification from Flatiron, the construction manager. Defendant Chelsea Leaf South and nonparty Eighth and Seventh LP, of which defendant Eighth GP is the sole general partner, owned the property. The agreement between Flatiron and nonparty Eighth and Seventh LP contains a broad indemnification clause. While the duty imposed by the Labor Law may not be delegated, the burden may be shifted to the party actually responsible for the accident by contractual language requiring indemnification (see *Allen v Cloutier Constr. Corp.*, 44 NY2d 290, 301 [1978]). Here, the indemnification provision at issue provided that Flatiron would indemnify the owners and their "affiliates" from "any and all claims . . . asserted against [the owners and their af-

filiates] by reason of . . . (ii) any act or failure to act on the part of [Flatiron] in connection with the performance of the services hereunder which is in violation of the terms of this Agreement.” The agreement with Flatiron, as construction manager, delegated authority to Flatiron to monitor the subcontractors’ performance of the work, including their compliance with their safety obligations. Flatiron was compensated for the retention of a “Safety Coordinator” to “secure safety,” and Flatiron was authorized to stop the work if it determined the work was not being done safely in accordance with the subcontract. Moreover, the subcontract agreement entered into by plaintiff’s employer required the employer to adopt and carry out any reasonable suggestions by the owners’ designated representatives (i.e., Flatiron) so as to ensure safety on the work site. Additionally, Flatiron representatives acknowledged during their depositions Flatiron’s duty to oversee safety on the project and to stop the work if warranted. A grant of conditional contractual indemnification is therefore appropriate (*see generally Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

Motion to stay the trial, denied.

5 Quevarda Cummings, Appellant, v City of New York et al., Respondents. [251 NYS3d 91]—

Civil Rights—Discrimination in Employment—Discrimination Based on Gender—Sufficiency of Pleading—Hostile Work Environment

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about July 3, 2024, which, to the extent appealed from as limited by the briefs, granted defendants’ motions to dismiss the first, second, fourth, and fifth causes of action pursuant to CPLR 3211 (a) (7), unanimously reversed, on the law, without costs, the motion denied, and the causes of action reinstated.

The court correctly observed that employment discrimination cases are generally reviewed under notice pleading standards (*see Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). Indeed, a “plaintiff alleging employment discrimination need not plead specific facts establishing a prima facie case of discrimination but need only give fair notice of the nature of the claim and its grounds” (*id.* [internal quotation marks and brackets omitted]). In an action brought under the New York City Human Rights Law (NYCHRL) and the New York State Human Rights Law (NYSHRL), “[f]air notice is all

that is required to survive at the pleading stage” (*Petit v Department of Educ. of the City of N.Y.*, 177 AD3d 402, 403 [1st Dept 2019]).

The NYSHRL was amended in 2019 to “put in place a more lenient standard of liability that has been likened to that of the NYCHRL” (*Yost v Everyrealm, Inc.*, 657 F Supp 3d 563, 578 [SD NY 2023]). The court found, under the current statutory schemes, that plaintiff alleged facts from which it could be inferred that she was treated less well, at least in part, because of her protected status as a woman (*see Suri v Grey Global Group, Inc.*, 164 AD3d 108, 114 [1st Dept 2018], *appeal dismissed* 32 NY3d 1138 [2019]; *Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 110 [2d Cir 2013]).

Although a “single, isolated comment” or “stray remark” will not always suffice to sustain a discrimination or hostile work environment claim (*see Suri*, 164 AD3d at 111), “a single comment that objectifies women being made in circumstances where that comment would, for example, signal views about the role of women in the workplace” could be actionable (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 n 30 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]; *see Tulino v City of New York*, 2016 WL 2967847, *4, 2016 US Dist LEXIS 66012, *11-14 [SD NY, May 19, 2016, No. 15-CV-7106 (JMF)]). Here, where plaintiff alleged that her supervisor implied that she only received high evaluation scores because she was engaging in sexual relations with higher-ups, the alleged remarks and attendant hostile conduct were more than “petty slights and trivial inconveniences” (*cf. Lent v City of New York*, 209 AD3d 494, 495 [1st Dept 2022], *lv dismissed* 39 NY3d 1118 [2023]).

We have considered the parties’ remaining claims and find them unavailing. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

6 Cindy Frey, Respondent, v Steven Itzkowitz et al., Appellants. [251 NYS3d 621]—

Physicians and Surgeons—Malpractice—Failure to Order Immediate Colectomy

Order, Supreme Court, New York County (Kathy J. King, J.), entered April 2, 2025, which denied defendants’ motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Supreme Court correctly found that defendants made out a prima facie showing of entitlement to summary judgment through the expert affidavits of a gastroenterologist, infectious disease specialist, and critical care specialist, all of whom

opined that the course of treatment of plaintiff's decedent's medical condition comported with good and appropriate standards of care and did not cause or contribute to the diagnosis of pneumonia or death (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Matter of Colletti v Schiff*, 98 AD3d 887, 888 [1st Dept 2012]). While the affirmations did not employ the verbiage of CPLR 2106, this issue is unpreserved because plaintiff did not raise this issue until oral argument, depriving defendants of the opportunity to cure the defect (*see Poivan-Traub v Chaglassian*, 187 AD3d 653, 653 [1st Dept 2020]; *Stewart v Goldstein*, 175 AD3d 1214, 1215 [1st Dept 2019]).

The court was also correct in finding that plaintiff's expert raised questions of fact that are for a jury to decide (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Cregan v Sachs*, 65 AD3d 101, 108-109 [1st Dept 2009]). Specifically, plaintiff's expert gastroenterologist opined that the course of treatment was not within the standard of care and departed from good and acceptable medical practice because defendants failed to order an immediate colectomy and failed to inform decedent of the risks and alternatives of continuing the medication as opposed to doing the colectomy. The affirmation detailed, based on medical records, why that care was a deviation and opined that the failure to perform immediate surgery deprived decedent of a chance at recovery. Defendants' argument that plaintiff's expert is not qualified to opine that surgery should have been performed is unpersuasive. The expert is a gastroenterologist opining on the treatment of defendant gastroenterologist, not on any particular surgical technique (*see Johnson v Harlem Hosp.*, 238 AD3d 412, 413 [1st Dept 2025]).

Furthermore, defendants are correct that the court mistakenly stated, during oral argument, that plaintiff had a lack of informed consent cause of action, however, this mistake does not warrant reversal because the allegations being discussed were nevertheless valid in connection with plaintiff's medical malpractice cause of action. Concur—Manzanet-Daniels, J.P., Friedman, Chan, Hagler, JJ.

7 In the Matter of A.M.G. and Another, Children Alleged to be Abused and/or Neglected. Erika G., Appellant; Administration for Children's Services of the City of New York, Respondent, et al., Respondent. [251 NYS3d 89]—

Parent, Child and Family—Abused or Neglected Child—Sexual Abuse
 Parent, Child and Family—Abused or Neglected Child—Derivative Abuse and Neglect—Sexual Abuse

Order of disposition, Family Court, Bronx County (E. Grace

Park, J.), entered on or about September 24, 2024, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about September 20, 2024, which found that respondent mother abused her daughter and derivatively abused and neglected her son, unanimously affirmed, and the appeal from the order of disposition otherwise dismissed, without costs, as taken from a nonappealable order.

A preponderance of the evidence supports Family Court's determination that respondent mother abused her daughter or allowed her daughter to be sexually abused, and derivatively abused and neglected her son (*see* Family Ct Act §§ 1012 [e] [iii] [a]; 1046 [b] [i]; *Matter of J.L. [J.A.L.]*, 228 AD3d 474, 474 [1st Dept 2024]). The daughter's certified medical records indicating that she tested positive for chlamydia established a prima facie case of abuse, creating a rebuttable presumption that the mother was responsible, even if the evidence was insufficient to demonstrate that she committed or had actual knowledge of the abuse (*see Matter of Philip M.*, 82 NY2d 238, 245-246 [1993]; *Matter of Magnolia A.*, 272 AD2d 115, 116 [1st Dept 2000], *lv dismissed* 95 NY2d 902 [2000]). There is no basis for disturbing Family Court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]), including its rejection of the mother's testimony offering for the first time the explanation that the child had symptoms of vaginal discharge and yellow eyes at birth and again when she was about two years old (*see Matter of Jasmin O.*, 222 AD2d 240 [1st Dept 1995]). The mother also failed to rebut petitioner's showing that she had access to her daughter, and that the child was in her care at the time her daughter's condition was diagnosed.

The finding of derivative abuse and neglect against the mother for her son was appropriate. Although a finding that the daughter was sexually abused does not, in and of itself, establish that the son has been derivatively abused and neglected (*see Matter of Abigail S.*, 21 AD3d 380, 381 [2d Dept 2005]), here, the mother's abuse of her daughter or in allowing that child to be sexually abused evinced a flawed understanding of a parent's duties and impaired parental judgment sufficient to support Family Court's findings of derivative abuse and neglect as to her son (*see Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]). That the son was unaware that his sister was being sexually abused does not require a different result (*see Matter of Karime R. [Robin P.]*, 147 AD3d 439, 441 [1st Dept 2017]).

To the extent the mother seeks to challenge the court's disposition, which, among other things, placed the children in the

custody of the Commissioner of Social Services of Bronx County until the completion of the next permanency hearing, directed her to comply with services, and abide by the order of protection issued on behalf of the children, the appeal is dismissed as the mother concedes in her brief that she consented to that order, which has expired (*see Matter of Markeith G. [Deon W.]*, 152 AD3d 424, 425 [1st Dept 2017]). Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

8 Chih-Chen Ma et al., Appellants, v Wei Li Wang, Respondent, et al., Defendants. [253 NYS3d 95]—

Religious Corporations and Associations—Elections—Ecclesiastical Abstention Doctrine—Holding Self out as Officer Pending Election Outcome

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered December 20, 2024, which denied plaintiffs' motion for a preliminary injunction to enjoin defendant Wei Li Wang from holding herself out and acting as Grandmaster, trustee, officer, or member of nominal defendant China Buddhist Association (CBA), among other conduct, unanimously modified, with costs, on the law, to grant plaintiffs' motion to the extent of conforming with this Court's March 13, 2025 order enjoining Wei Li Wang from holding herself out as Grandmaster, officer, or trustee of the CBA pending an election consistent with Article 13 of the CBA's bylaws, and otherwise affirmed, without costs. Order, same court and Justice, entered June 2, 2025, which found plaintiffs to be in civil contempt of the court's January 2025 order, unanimously affirmed, without costs.

The motion court should not have denied plaintiffs' motion for a preliminary injunction to prohibit defendant Wei Li Wang (defendant) from holding herself out as Grandmaster, officer, or trustee of nominal defendant CBA pending the outcome of an election to confer that status upon defendant by vote of CBA's members and trustees under its bylaws. Contrary to defendant's contention, the ecclesiastical abstention doctrine does not apply where, as here, the corporate bylaws speak directly to the dispute (*see Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286 [2007]).

Plaintiffs sufficiently made their prima facie showing that the succession to Grandmaster falls within article 13 of the CBA bylaws, which establish a neutral principle of law, requiring that the former Grandmaster's chosen successor be confirmed by a vote of the members and the trustees. Because the process for selecting a Grandmaster with a vote of approval by the membership and the trustees is expressly set forth in article 13 of CBA's bylaws, no application or interpretation of

religious principles is required (*cf. Matter of Ming Tung v China Buddhist Assn.*, 124 AD3d 13, 20 [1st Dept 2014], *affd* 26 NY3d 1152 [2016], *cert denied* 580 US 1049 [2017]). Defendant's contention that the bylaws were not properly amended to add article 13 is unpersuasive, as she presents no evidence in support of this contention, and she acknowledges that she was not a member when these amendments were enacted (*see Ciment v Spantran, Inc.*, 155 AD3d 494 [1st Dept 2017]).

Nothing in the Religious Corporations Law contradicts this outcome. Although Religious Corporations Law § 5 precludes a religious corporation's trustees from removing a religious leader, that section also requires adherence to the religious corporation's bylaws. Defendant's challenge to article 13 of the bylaws under Religious Corporations Law § 195 does not call for a different result, as that section does not expressly preclude the enactment of a more robust voting threshold under the religious corporation's bylaws (*see e.g. Matter of Thompson v Bruce*, 65 AD3d 1245, 1246 [2d Dept 2009]). Thus, plaintiffs established a likelihood of success on the merits of the claims arising from defendant's allegedly unauthorized assumption of the role of Grandmaster before the membership and trustees had voted on her succession to Grandmaster.

Supreme Court correctly observed that there is no dispute that the loss of control over CBA constitutes irreparable harm, as both parties sought injunctive relief on that basis (*see e.g. Asprea v Whitehall Interiors NYC, LLC*, 206 AD3d 402, 403 [1st Dept 2022]). Because injunctive relief precluding defendant from acting as Grandmaster, officer, or trustee preserves the status quo, as this Court's March 13, 2025 order reflects, the equities balance in favor of plaintiffs (*see e.g. Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 432 [1st Dept 2016]). Accordingly, we modify the court's order to conform to this Court's March 13, 2025 order and preliminarily enjoin defendant from holding herself out as Grandmaster, officer, or trustee of CBA pending the outcome of an election to confer any of those statuses upon defendant by vote of CBA's members and trustees under its bylaws, and to otherwise maintain the status quo by placing the officers and trustees in control of CBA's day-to-day management until the election.

Supreme Court properly found plaintiffs in contempt of the court's January 14, 2025 order (*see Matter of Gallagher v Old Guard of the City of N.Y.*, 172 AD3d 609, 610 [1st Dept 2019]). The clear and convincing evidence supports the conclusion that plaintiffs violated the court's order directing the parties to abide by the December 5, 2022 board resolution until this Court's March 13, 2025 order was entered.

The court's January 14, 2025 order, of which plaintiffs were undeniably aware, expressly and unequivocally provided that, because the court's December 2024 order conflicted with the board's December 2022 resolution, the board's resolution controlled until the next election. Thus, plaintiffs' refusal to allow defendant access to the books, records, and bank accounts as provided in the December 2022 board resolution was a violation of that unequivocal mandate. Plaintiffs' contention that the other language in the order acknowledging that the governance of the CBA properly rested with the officers and trustees does not excuse their failure to abide by the court's unequivocal mandate (*see e.g. Matter of Samaritan-Compass VI Hous. Dev. Fund Corp. v 1293-95 Rodman LLC*, 217 AD3d 589 [1st Dept 2023]). As this Court's March 13, 2025 order reflects, plaintiffs knew the proper means to challenge what they viewed as an incorrect adjudication and failed to avail themselves of that process until defendant sought to hold them in civil contempt. Under these circumstances, Supreme Court also providently exercised its discretion to require plaintiffs to provide defendant with an operable key to allow her free access to her home.

We have considered the remaining contentions and find them unavailing. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

9 Anthony Markman et al., Appellants, v New York-Presbyterian Healthcare System, Inc., Doing Business as New York Presbyterian Hospital-Columbia University Medical Center, et al., Respondents. [251 NYS3d 624]—

Physicians and Surgeons—Malpractice—Cardiologist—Treatment of Sacral Wound

Hospitals—Malpractice—Pressure Ulcers

Witnesses—Expert Witness—Medical Malpractice—Qualifications

Order, Supreme Court, Bronx County (Alicia Gerez, J.), entered on or about January 18, 2024, which granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to deny the motions of defendants New York-Presbyterian Healthcare System, Inc, Hiro Takayama, M.D., Elizabeth Wist, P.A., and Metropolitan Jewish Homecare, Inc. for summary judgment, and otherwise affirmed, without costs.

Supreme Court properly dismissed the complaint as against defendant Kung-Ming Jan, M.D. Doctor Jan established prima facie entitlement to summary judgment dismissing the complaint as against him by showing that he was a cardiologist, not a wound care specialist, and therefore owed no inde-

pendent duty to assess the course of treatment for a sacral pressure ulcer that was implemented and monitored by other providers (*see Burtman v Brown*, 97 AD3d 156, 161 [1st Dept 2012]).

In opposition to Dr. Jan's showing, plaintiffs failed to raise a triable issue of fact sufficient to defeat Dr. Jan's motion. Although plaintiff testified that he recalled speaking with Dr. Jan about his sacral wound and asking for a referral to a wound care specialist, he also testified that Dr. Jan never made that referral. In the interim, however, plaintiff was able to secure an appointment for treatment of that wound with another health care facility. In addition, although Dr. Jan made a recommendation for treatment of the sacral wound, it was never implemented and plaintiff was under the care of others for wound care during the remainder of Dr. Jan's treatment of him. As a result, Dr. Jan had no duty to treat plaintiff's sacral wound (*see id.* at 164).

As to the remaining defendants, they established prima facie entitlement to summary judgment through their submission of expert affidavits from board-certified physicians with expertise in geriatric medicine. Both experts addressed the applicable standards of care, concluding that defendants' treatment of plaintiff fell within good and accepted standards of care and that no departure from the applicable standard of care proximately caused plaintiff's injuries.

However, the affidavits in opposition from plaintiffs' experts—a nursing expert and an internal medicine hospitalist expert—were sufficient to raise issues of fact precluding summary judgment with respect to these defendants. Plaintiffs' experts outlined their familiarity with identification and care of pressure ulcers and the treatment of patients who suffered from them. Further, each expert offered individualized evidence as to defendants' alleged departures from the accepted standard of nursing or medical care with respect to defendants' treatment of plaintiff's sacral wound, and the internal medicine expert opined that each of the defendants' deviations from the accepted standard of care caused or contributed to the injuries that plaintiff allegedly suffered. The expert affidavits therefore provide a sufficient foundation for the experts to opine on whether defendants deviated from the standard of care (*see Limmer v Rosenfeld*, 92 AD3d 609, 609 [1st Dept 2012]).

Defendants' assertions that plaintiffs' experts did not have the requisite credentials, skills, or training to opine as to the standard of care with respect to a cardiothoracic surgeon or a cardiothoracic surgeon's physician assistant are meritless.

Challenges to an expert witness's qualifications affect the weight to be accorded the expert's views, not their admissibility (*Rodriguez v Isabella Geriatric Ctr. Inc.*, 227 AD3d 485, 486 [1st Dept 2024]). An expert need not be a specialist in a particular field if they nevertheless possess the requisite knowledge necessary to opine on the issues presented, and once the expert professes such knowledge, the issue of the expert's qualifications is for the factfinder to determine (see *Limmer*, 92 AD3d at 609).

We have considered the remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

10 Sheryl Menkes, Appellant-Respondent, v Beth Abraham Health Services, Respondent-Appellant. [253 NYS3d 39]—

Attorney and Client—Disqualification—Attorney as Fact Witness—Pro Se Representation for Estate

Attorney and Client—Disqualification—Acrimony and Incivility Toward Party

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about August 13, 2025, which, insofar as appealed from, denied defendant's motion to preclude plaintiff Sheryl Menkes from pro se representation of the Estate of Dita Menkes, to dismiss the action pursuant to CPLR 3216, and/or for sanctions pursuant to 22 NYCRR 130-1.1, unanimously affirmed, without costs. Orders, same court and Justice, entered on or about April 11, 2025, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to strike defendant's answer due to spoliation of evidence and fraud upon the court, and denied plaintiff's motion to disqualify defense counsel Neil B. Ptashnik and his firm from acting as counsel in this matter, unanimously affirmed, without costs.

In denying defendant's disqualification motion, Supreme Court providently exercised its discretion in declining to restrict Menkes from representing the Estate other than at trial (see e.g. *Matter of Rovner v Rantzer*, 145 AD3d 1016, 1016 [2d Dept 2016]).

In 2015, the Supreme Court ordered, on Menkes's consent, that she would be precluded from acting as pro se counsel at trial for the Estate given that she was to serve as a fact witness. For the last ten years, Menkes, without objection from defendant or the Estate's other beneficiaries, has continued to make various filings as the pro se representative of the Estate. Separate trial counsel has been retained for the upcoming trial.

Defendant's reliance on cases barring a non-attorney administrator from representing an estate where there are

other beneficiaries is misplaced (see e.g. *Martins v Memorial Sloan Kettering Cancer Ctr.*, 215 AD3d 474, 475 [1st Dept 2023]; *Alaina Simone Inc. v Madden*, 200 AD3d 589, 590-591 [1st Dept 2021]; see also *Martins v Liu*, 216 AD3d 762, 763 [2d Dept 2023]). These cases concern the prohibition of appearances by non-attorneys on behalf of others (see e.g. *Guest v Hansen*, 603 F3d 15, 20 [2d Cir 2010]). Thus, the restrictions on pro se representation of an estate do not apply to Menkes, a licensed attorney specializing in the area of nursing home abuse litigation, even where the Estate has other beneficiaries (*id.*).

The court properly denied plaintiff's motion to strike defendant's answer due to spoliation of evidence and fraud upon the court. Plaintiff has not adequately shown that due to defendant's alleged misconduct of withholding key wound culture evidence and its false attestations that such evidence did not exist, plaintiff has suffered and will suffer prejudice in these proceedings.

The court also properly denied the motion to disqualify defense counsel based on allegations of his prior and current personal abuse of and animus towards plaintiff (see *Ferolito v Vultaggio*, 99 AD3d 19, 27 [1st Dept 2012]). While the record confirms plaintiff's claims of acrimony and incivility, the failure to disqualify did not constitute an abuse of discretion (compare *Smith v Rudolph*, 151 AD3d 58, 63 [1st Dept 2017] [disqualification of counsel proper where "improprieties permeated the entire trial, in a continuing pattern of misconduct"]; *Maraviglia v Lokshina*, 92 AD3d 924, 924-925 [2d Dept 2012]).

For the reasons explained above, we also decline to dismiss plaintiff's appeals on the ground that Menkes lacked the proper authority to assert them on behalf of the Estate. Menkes, a licensed attorney, is properly representing the Estate in this action for all matters other than at trial. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, JJ.

11 Mark Penske et al., Appellants, v National Holding Corp. et al., Respondents. [251 NYS3d 98]—

Trial—Right to Jury Trial—Contractual Jury Waiver Clause—Challenge to Underlying Agreement—Equitable Defense and Counterclaim

Order, Supreme Court, New York County (Andrea Masley, J.), entered on or about March 6, 2025, which denied plaintiffs' motion to strike defendants' jury demand, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiffs commenced this action against defendants in connection with an alleged failure to pay money owed under a

Stock Purchase Agreement (SPA). As relevant here, the SPA contained the following jury waiver provision: “EACH SUCH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY.”

In answering the complaint, defendants asserted a counterclaim for costs and reasonable attorneys’ fees under the SPA, should they prevail. However, following discovery, defendants moved for leave to amend their answer to add counterclaims for fraudulent inducement to enter the SPA, fraud in connection with a separate side letter agreement between the parties, non-occurrence of a condition precedent in the SPA and side letter, and breach of the SPA/breach of the covenant of good faith and fair dealing. In connection with their claims for fraudulent inducement and fraud, defendants sought rescission of the SPA and side letter, respectively, or “[i]n the alternative,” compensatory and punitive damages. Supreme Court ultimately granted the motion to amend.

While defendants’ motion for leave to amend was pending, plaintiffs filed a note of issue, and defendants subsequently filed a demand for jury trial. Plaintiffs then moved to strike defendants’ jury demand, arguing that defendants expressly waived a jury trial as part of the SPA. Supreme Court denied plaintiffs’ motion to strike. Supreme Court explained that the SPA’s waiver provision did not apply because defendants’ counterclaim challenged the very existence of the contract, and “they seek rescission, not contractual damages, for their fraudulent inducement.”

Initially, based on the allegations supporting defendants’ counterclaims, the SPA’s waiver of the right to a jury trial is not applicable to defendants’ fraud-based counterclaims. “In cases where . . . fraudulent inducement allegations, if proved, would void the agreement, including the jury waiver clause, the party is entitled to a jury trial on the claim” (*J.P. Morgan Sec. Inc. v Ader*, 127 AD3d 506, 507 [1st Dept 2015]). Here, a close review of the counterclaims establishes that “the primary claim is fraudulent inducement and the validity of the entire contract is clearly being challenged” (*International Bus. Machs. Corp. v GlobalFoundries U.S. Inc.*, 235 AD3d 22, 26 [1st Dept 2024]; see also *Ader*, 127 AD3d at 507; *MBIA Ins. Corp. v Credit Suisse Sec. [USA], LLC*, 102 AD3d 488, 488 [1st Dept 2013]; *Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 102 AD3d 487, 487-488 [1st Dept 2013]).

Nevertheless, defendants are not entitled to a jury trial on their counterclaims. Generally, a party asserting a fraudulent inducement claim may pursue a jury trial, notwithstanding the existence of a jury waiver clause, when that party primarily seeks money damages (*see Ader*, 127 AD3d at 508; *Credit Suisse*, 102 AD3d at 488; *DLJ Mtge.*, 102 AD3d at 487-488). Here, by contrast, defendants' counterclaims seek rescission of the contract and side letter agreement, with damages only sought in the alternative. As the Court of Appeals has held, "[a]ll issues pertaining to [an] equitable defense and counterclaim, whether matters of fact or of law, [are] to be determined by the court under CPLR 4101" (*Mercantile & Gen. Reins. Co. v Colonial Assur. Co.*, 82 NY2d 248, 253 [1993]; *see also* CPLR 4101) and "[r]escission claims, of course, are equitable in nature" (*Mercantile & Gen. Reins. Co.*, 82 NY2d at 251; *see also Board of Mgrs. of the Soundings Condominium v Foerster*, 138 AD3d 160, 164 [1st Dept 2016]). Accordingly, defendants' counterclaims must be tried by the court, not a jury, by virtue of the equitable relief they seek. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

12 The People of the State of New York, Respondent, v Angel Nieves, Appellant. [253 NYS3d 29]—

Crimes—Endangering Welfare of Child—Enlargement of Alleged Time Frame to Conform to Period Delineated at Trial

Crimes—Proof of Other Crimes—Past Sex Crime

Judgment, Supreme Court, New York County (Althea Drysdale, J.), rendered January 29, 2021, convicting defendant, after two jury trials, of two counts of sexual abuse in the first degree, and endangering the welfare of a child, and sentencing him to consecutive terms of six years on each of the sexual abuse counts and a concurrent term of 364 days on the endangering the welfare of a child count, unanimously modified, on the law, to the extent of vacating the convictions of sexual abuse in the first degree, the matter remanded for a new trial on those counts, and otherwise affirmed.

By indictment, defendant was charged with predatory sexual assault against a child (Penal Law § 130.96), course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]), and endangering the welfare of a child (Penal Law § 260.10 [1]). At the conclusion of the evidence, the People moved to dismiss the charges of predatory sexual assault (Penal Law § 130.96) and course of sexual conduct (Penal Law § 130.75 [1] [a]), conceding that there was insufficient evidence to support those charges. The People also moved to amend the

fifth count of the indictment charging defendant with endangering the welfare of a child to the extent of “expanding the time frame.” Supreme Court granted the People’s motion, over defendant’s objections. Defendant was found guilty of endangering the welfare of a child. However, the jury deadlocked on the sexual abuse counts. In the second trial, defendant was found guilty of two counts of sexual abuse.

Supreme Court did not impermissibly enlarge the time frame set forth in the endangering the welfare of a child count of the indictment to conform to the period that the complainant was able to delineate at trial (*see People v Sinha*, 84 AD3d 35, 44 [1st Dept 2011], *affd* 19 NY3d 932 [2012]). The amendment did not change the People’s theory of the case (*see* CPL 200.70 [1]; *Sinha*, 84 AD3d at 44-45), and the request for the amendment, although it occurred after the People rested, was timely under the statute.

Prior to the commencement of jury selection for the second trial, the People made a *Molineux* application to allow the complainant to testify about an alleged prior oral sexual encounter with defendant. The People argued, *inter alia*, that this evidence was “inextricably intertwined” with the complainant’s testimony as to the charges of sexual abuse, provided relevant background, and put the complainant’s testimony “into a believable context.” Supreme Court granted the People’s motion. The court concluded that the proposed testimony was “inextricably woven [in]to the narrative.” While acknowledging that the issues “resembled” those in *People v Leonard* (29 NY3d 1, 4 [2017]), it stated that it would “[fo]llow the constructs of *Leonard* and issue a limit[ing] instruction should the testimony be elicited.” The court shared its proposed limiting instruction with the parties. Neither party objected to the language of the proposed instruction.

Supreme Court erred in granting the People’s *Molineux* application. Even if the People established some non-propensity basis for introducing this evidence, “the prejudicial nature of that evidence far outweighed any probative value” (*Leonard*, 29 NY3d at 4). While the People argue that “the court’s limiting instructions [in this case] are, by themselves, enough to render *Leonard*, on which defendant heavily relies, distinguishable”, there is nothing in *Leonard* which suggests that a proper curative instruction would have cured the prejudice of admitting testimony about a past sex crime with little or no legitimate relevance to a non-propensity purpose.

Because the challenged *Molineux* ruling occurred just before the second trial, defendant’s conviction of endangering the

welfare of a child, pursuant to the verdict at the first trial, is unaffected.

The court properly denied defendant's CPL 330.30 motion because defendant failed to demonstrate the probability of a more favorable outcome if evidence that the victim had been sexually abused by a cousin sometime after the alleged incidents in this case had been timely received (*see People v Wainwright*, 285 AD2d 358, 360 [1st Dept 2001]).

Since we are remanding for a new trial on the sexual abuse in the first degree counts, we do not address defendant's excessive sentence claim. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

13 The People of the State of New York, Respondent, v Anonymous, Appellant. [248 NYS3d 553]—

Crimes—Right to Counsel—Effective Representation—Absence during Proffer Session

Order, Supreme Court, New York County (Juan Merchan, J.), entered on or about February 16, 2021, which, to the extent it denied defendant's motion to vacate the judgment of conviction pursuant to CPL 440.10, unanimously reversed, on the law, the judgment of conviction vacated, and the matter remanded for further proceedings. Appeal from that part of the aforesaid order as denied defendant's motion pursuant to CPL 440.20 to set aside his sentence, and from the judgment, same court and Justice, rendered September 13, 2017, convicting defendant, after a nonjury trial, of three counts of burglary in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent prison terms of 16 years to life, unanimously dismissed as academic.

Supreme Court erred in finding that defendant failed to satisfy his burden of establishing that he received ineffective assistance of counsel when his counsel absented himself from a proffer session midway through the session. Absent an express waiver from defendant, counsel had an obligation to be present during the session and to "be alert to, and to avert if he could, the possibility that defendant's cooperation would hurt rather than help him" (*People v Johnson*, 24 NY3d 639, 645 [2014]). Under the circumstances, where counsel advanced no sound strategic reason behind his decision to leave the proffer session, his absence deprived defendant of meaningful representation at a critical stage in the proceeding (*see id.*; *People v Benevento*, 91 NY2d 708, 711-712 [1998]). Defendant was prejudiced by counsel's absence, because a statement defendant made during the proffer session implicating himself in the

burglaries for which he was ultimately tried and convicted for, was successfully used by the prosecution to impeach defendant's credibility at the trial (*see People v Caban*, 5 NY3d 143, 155-156 [2005]).

In view of the foregoing, we need not reach defendant's remaining contentions. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

14 The People of the State of New York, Respondent, v Deric McArn, Appellant. [248 NYS3d 554]—

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Jeffrey Rosenbluth, J.), rendered May 4, 2023, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of five years of probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring him to refrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation, and otherwise affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]), foreclosing review of his excessive sentence claim. In any event, there is no basis to reduce the sentence.

Defendant's challenges to two of his probation conditions as unrelated to his rehabilitation do not require preservation and survive his appeal waiver (*see People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]). The court providently found that the condition of defendant's probation requiring him to "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and [t]o not consort with disreputable people," was "reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so" (Penal Law § 65.10 [1]), given his possession of a loaded pistol and his admission to the Department of Probation that he associated with "horrible peers" (*see People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]).

However, the probation condition requiring defendant to "[r]efrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation" should be stricken, as there is no evidence that defendant's crime was connected to any gang activities or that he has any history of gang member-

ship or gang affiliation (*People v Holguin*, 243 AD3d 419, 420 [1st Dept 2025]).

Defendant's facial constitutional challenges survive his waiver of appeal (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]). However, they are unpreserved, and we decline to review them in the interest of justice (*see People v Cabrera*, 41 NY3d 35, 51 [2023]). Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

15 The People of the State of New York, Respondent, v Elvin Pacha, Also Known as Elvin Fernandez, Appellant. [249 NYS3d 463]—

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered November 14, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to three years of probation, unanimously modified, on the law, to the extent of striking the conditions of probation requiring him to pay the mandatory surcharge and associated fees and directing him to “refrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation,” and otherwise affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his excessive sentence claim (*see People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]). In any event, we perceive no basis to reduce his sentence.

Defendant's challenge to four conditions of his probation as unrelated to his rehabilitation survives his waiver of the right to appeal and does not require preservation (*see id.*). Condition seven, which requires defendant to “avoid injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and [t]o not consort with disreputable people,” was properly imposed as it is related to defendant's rehabilitation from a conviction stemming from an alleged drug sale involving accomplices (*see People v Vasquetelles*, 241 AD3d 1208, 1209 [1st Dept 2025], *lv denied* 44 NY3d 1054 [2025]). Defendant's constitutional challenge to condition seven is unpreserved (*see Lowndes*, 239 AD3d at 575), and we decline to review it in the interest of justice. As an alternative holding, we find the constitutional claim to be unavailing (*see People v Carrasquillo*, 242 AD3d 424, 425 [1st Dept 2025]).

Condition 11, which admonishes defendant to “not possess or purchase a firearm,” is properly designed to help “ensure that he will lead a law-abiding life” (*People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]) since he is not eligible to possess or purchase a firearm under both federal and state law (*see* 18 USC § 922 [g] [1]; Penal Law § 400.00 [1] [c]).

However, conditions 10 and 24 of defendant’s probation should be stricken as not reasonably related to his rehabilitation or necessary to ensure he leads a law-abiding life (Penal Law § 65.10 [1]). Condition 10, which requires defendant to pay charges and fees associated with his conviction, will not help to ensure that he leads a law-abiding life and is not reasonably related to his rehabilitation (*see People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]). We note that the People do not oppose this relief. Additionally, condition 24, which concerns gang affiliation, is not related to defendant’s rehabilitation as “there is no evidence that defendant’s crime was connected to any gang activities or that he has any history of gang membership or gang affiliation” (*People v Holguin*, 243 AD3d 419, 420 [1st Dept 2025]). We are not persuaded by the People’s contention that defendant’s position with respect to condition 24 is not ripe for review. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

16 The People of the State of New York, Respondent, v Francisco DeLaRosa, Appellant. [248 NYS3d 555]—

Crimes—Rape—Sufficiency and Weight of Evidence

Crimes—Witnesses—Cross-Examination of Rape Victim—Prior Sexual Assault Accusation

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered June 29, 2017, as amended August 7, 2017, convicting defendant, after a jury trial, of rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, and petit larceny, and sentencing him, as a second felony offender, to an aggregate prison term of 23 years, followed by 15 years of postrelease supervision, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]; *see also People v Baque*, 43 NY3d 26 [2024]). We find no basis for disturbing the jury’s credibility determinations. There was ample evidence supporting the conclusion that defendant physically attacked the victim and used force to make both vaginal and anal sexual contact with

her, and then took property from her. The victim's detailed account was largely corroborated by video evidence. The victim's account was also corroborated by medical and forensic evidence and outcry testimony, all of which was largely consistent with her account.

Supreme Court providently exercised its discretion in prohibiting defendant from cross-examining the victim about a prior sexual assault accusation against another person. Defendant failed to show that the other complaint had a significant probative relation to the charges against him, nor did he make a factual showing of the likelihood that the allegations in the prior unrelated complaint were false (*see Matter of Rolando L.*, 137 AD3d 637, 637 [1st Dept 2016]; *People v Catalan*, 204 AD3d 1240, 1243-1244 [3d Dept 2022], *lv denied* 38 NY3d 1132 [2022]).

Moreover, the court providently exercised its discretion in declining to give a missing witness charge concerning the victim's cousin (*see People v Smith*, 33 NY3d 454, 458-459 [2019]). The cousin's proposed testimony would have been cumulative, as multiple other witnesses testified about either the victim's statements or her physical condition.

We perceive no basis to reduce the sentence. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

17 The People of the State of New York, Respondent, v Jamal Brown, Appellant. [248 NYS3d 550]—

Crimes—Sentence—Probation—Mandatory Surcharge and Court Fees

Judgment, Supreme Court, Bronx County (Steven J. Hornstein, J.), rendered September 5, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a firearm and sentencing him to five years of probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring him to pay \$375 in surcharge and fees as a condition of his probation, and otherwise affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his challenge to the denial of his motion to controvert a search warrant and review of his claim that his sentence is excessive (*see People v Hines*, 237 AD3d 549 [1st Dept 2025], *lv denied* 44 NY3d 1052 [2025]; *People v Samuels*, 195 AD3d 570, 570-571 [1st Dept 2021], *lv denied* 37 NY3d 1148 [2021]). As an alternative holding, we find that the warrant was based on probable cause (*see People v Griminger*, 71 NY2d 635, 639 [1988]; *see also Spinelli*

v United States, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]), and did not lack particularity. We also perceive no basis for reducing the sentence.

However, defendant’s challenge to the condition of probation requiring that he pay the mandatory surcharge and court fees survives his waiver of the right to appeal (*see People v Arias*, 210 AD3d 593, 594 [1st Dept 2022], *lv denied* 39 NY3d 1109 [2023]). Defendant, the caregiver for his disabled brother, works at construction when able but remains indigent. We find that the imposition of the \$375 sum, comprised of the mandatory surcharge, crime victim’s assistance fees, and DNA fees, as a condition of defendant’s probation will not assist in ensuring that he leads a law-abiding life and is not reasonably related to his rehabilitation (*see People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]). Accordingly, that condition is stricken. We note that the People do not oppose this relief.

We decline to grant defendant’s request for a certificate of relief from disabilities. As indicated by the sentencing court, defendant may reapply for a certificate of relief from disabilities if he “does well on probation for an appropriate period of time.” Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

18 The People of the State of New York, Respondent, v Jordan Hernandez, Appellant. [252 NYS3d 41]—

Crimes—Sentence—Probation—Conditions

Crimes—Appeal—Valid Waiver—Foreclosure of Review of Constitutional Challenges

Judgment, Supreme Court, New York County (Althea Drysdale, J.), rendered August 20, 2024, convicting defendant, upon his plea of guilty, of criminal possession of a forged instrument in the third degree and aggravated unlicensed operation of a motor vehicle in the second degree, and sentencing him to concurrent terms of two years of probation and a \$1,000 fine, unanimously modified, on the law, to the extent of striking the condition of probation prohibiting defendant from wearing or displaying gang paraphernalia or having any association with a gang or members of a gang if directed by the Department of Probation, and otherwise affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his excessive sentence claim (*see People v Nunez*, 220 AD3d 597, 597 [1st Dept 2023], *lv denied* 41 NY3d 1004 [2024]). In any event, defendant seeks a reduction in fines and court fees, to which defendant would be

entitled if he can establish that he is unable to pay the fine because of indigency (*see* CPL 420.10 [5]; *People v Toledo*, 101 AD3d 571, 571 [1st Dept 2012], *lv denied* 21 NY3d 947 [2013]).

Defendant's challenge to specific conditions of his probation as not reasonably related to his rehabilitation under Penal Law § 65.10 (1) survives his valid waiver of his right to appeal and does not require preservation (*see People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]; *People v Arias*, 210 AD3d 593, 594 [1st Dept 2022], *lv denied* 39 NY3d 1109 [2023]; *see also People v Hakes*, 32 NY3d 624, 628 n 3 [2018]). The condition requiring that he "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people" (Penal Law § 65.10 [2] [a], [b]) was providently imposed as reasonably necessary to ensure that defendant "will lead a law-abiding life or to assist him to do so," given his possession of forged motor vehicle records here and his lengthy criminal history, which included drug-related and weapon-possession convictions (Penal Law § 65.10 [1]; *see People v Pointdexter*, 243 AD3d 421, 422 [1st Dept 2025]).

However, the probation condition requiring defendant to "[r]efrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation" should be stricken as not reasonably related to his rehabilitation or necessary to ensure that he leads a law-abiding life (*see* Penal Law § 65.10 [1]) since there is no evidence that defendant's actions were connected to gang activity or that he had a history of gang membership (*see People v Vasquetelles*, 241 AD3d 1208, 1209 [1st Dept 2025], *lv denied* 44 NY3d 1054 [2025]).

Defendant's valid waiver of his right to appeal forecloses review of his as-applied constitutional challenges to the probation conditions under the First Amendment and the vagueness doctrine of due process under the Fifth and Fourteenth Amendments (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]; *People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]). In any event, these claims are unpreserved (*see People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review them in the interest of justice. Were we to do so, we would find them unavailing. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

19 The People of the State of New York, Respondent, v Manuel Vega, Appellant. [251 NYS3d 613]—

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Matthew Grieco, J., at search warrant application; Ralph A. Fabrizio, J., on motion to controvert the search warrant and at plea and sentencing), rendered July 26, 2024, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a five-year term of probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring him to pay \$375 in surcharge and fees as a condition of probation, and otherwise affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his suppression and excessive sentence claims (*see People v Bawa*, 234 AD3d 601 [1st Dept 2025], *lv denied* 43 NY3d 943 [2025]). As alternative holdings, our in camera review of the warrant and underlying materials demonstrates that the warrant was supported by probable cause (*see People v Griminger*, 71 NY2d 635, 639 [1988]; *see also Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]), adequately described the premises and property to be seized, and was not premised on stale information.

We perceive no basis for reducing defendant's sentence.

Defendant's challenges to specific conditions of his probation as not reasonably related to his rehabilitation under Penal Law § 60.35 (1) survive his voluntary waiver of the right to appeal, and does not require preservation, because "th[e] issue implicates the legality of the sentence imposed" (*People v Alvarez*, 233 AD3d 619 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]). However, the court providently imposed condition 7, which tracked the language of Penal Law § 65.10 (2) (a), (b), and required that defendant "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people," given that when the police searched defendant's apartment, they recovered a loaded gun, 18 rounds of ammunition, more than half an ounce of crack cocaine, a holster, and a ballistic vest.

Defendant's facial challenge to Penal Law § 65.10 (2) (a), (b) survives a valid waiver (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]), however, defendant's claim is unpreserved (*see* — NY3d at —, 2025 NY Slip Op 06528, *3) and we decline to reach it in the interest of justice. In any event, we reject it on the merits.

Defendant was injured and consequently is unable to find

employment. The imposition of the mandatory surcharge, crime victim's and DNA fees, as a condition of defendant's probation will not assist in ensuring he leads a law-abiding life and is not reasonably related to his rehabilitation (*see People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]). We note the People do not oppose this relief. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

20 The People of the State of New York, Respondent, v Mohamed Qatabi, Appellant. [251 NYS3d 617]—

Crimes—Right to be Present at Trial—Waiver—Voir Dire Sidebars

Crimes—Rape—Sufficiency and Weight of Evidence—Physically Helpless—Sleep

Crimes—Right to Counsel—Effective Representation—Failure to Request Specific Response to Jury Note

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered August 2, 2022, as amended February 23, 2023, convicting defendant, after a jury trial, of rape in the first degree, burglary in the second degree as a sexually motivated felony, and sexual abuse in the first degree, and sentencing him to an aggregate term of 20 years, unanimously affirmed.

Defendant validly waived his right to be present during voir dire sidebars (*see People v Antommarchi*, 80 NY2d 247, 250 [1992]). Counsel confirmed after the court's first juror sidebar conference that defendant did not wish to participate in voir dire sidebar conferences (*see People v Wilkins*, 37 NY3d 371, 377-378 [2021]), and both counsel and defendant reaffirmed that defendant did not wish to participate after the court's second juror sidebar conference (*see People v Montada*, 249 AD2d 72, 72 [1st Dept 1998], *lv denied* 92 NY2d 856 [1998]). The court did not deprive defendant of his right to counsel by explaining that he could not talk to anyone if he did join the sidebars (*see People v Saverino*, 270 AD2d 146, 146 [1st Dept 2000], *lv denied* 95 NY2d 857 [2000]).

The People presented legally sufficient evidence of the first-degree rape and first-degree sexual abuse counts (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, those convictions were not against the weight of the evidence (*see Danielson*, 9 NY3d at 348; *see also People v Baque*, 43 NY3d 26 [2024]). The victim testified that she was in a state of sleep when defendant raped her. Even if the victim was semi-conscious, the evidence was sufficient to establish that she was physically helpless (*see Penal Law* § 130.00 [7]; *People v Fay*, 170 AD3d 404, 404-405 [1st Dept 2019], *lv denied* 34 NY3d 930 [2019]).

Defendant's claim that counsel was ineffective is "unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record," and defendant did not raise his claim in a CPL 440.10 motion (*People v Khan*, 237 AD3d 585, 587 [1st Dept 2025], *lv denied* 44 NY3d 1028 [2025]). In any event, counsel was not ineffective for failing to request that the court respond to a jury note about the definition of "incapable of consent" by specifying that the definition was limited to third-degree rape to prevent the jury from finding defendant guilty of first-degree rape without finding that the victim was physically helpless. The court's supplemental instruction provided "appropriate guidance," and therefore, defendant's ineffective assistance claim fails (*People v Lindsay*, 68 AD3d 549, 549 [1st Dept 2009], *lv denied* 14 NY3d 802 [2010]). Defendant fails to show that any "single error" was "sufficiently egregious and prejudicial as to compromise . . . defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]).

The court did not commit a mode of proceedings error under *People v O'Rama* (78 NY2d 270 [1991]). The court read the jury's note verbatim, and thus counsel had "all the knowledge required to make an objection . . . to the court's response" (*People v Mack*, 27 NY3d 534, 542 [2016]). The court also did not prevent counsel from responding to the jury note (*cf. People v Cook*, 85 NY2d 928, 930-931 [1995]).

Defendant failed to object to any alleged variance between the indictment and the trial proof and therefore failed to preserve his claim that his burglary conviction unlawfully varied from the indictment (*see People v Jackson*, 192 AD3d 486, 487 [1st Dept 2021], *lv denied* 37 NY3d 957 [2021]). Defendant's legal insufficiency challenge to that conviction and his challenge to the court's response to the jury note asking whether "dwelling" referred to the victim's apartment or the apartment building are also unpreserved (*see People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Moalawi*, 195 AD3d 523, 524 [1st Dept 2021], *lv denied* 37 NY3d 994 [2021]), and we do not reach them in the interest of justice. In any event, defendant's contention that the court's response to the note differed from what the court told the parties is based on a misapprehension of the record. Additionally, the People did not impermissibly vary from the indictment. The People's theory in the grand jury and at trial was that defendant trespassed by entering the victim's apartment, not by entering the apartment building, and the defense proceeded under the same theory. Accordingly, "defendant was not deprived of fair notice of what the People

would attempt to prove” (*People v Grega*, 72 NY2d 489, 496 [1988]). Counsel was not ineffective for failing to object to the alleged variance because that argument had “little or no chance of success” (*Caban*, 5 NY3d at 152). For the same reasons, the burglary conviction was supported by legally sufficient evidence and was not against the weight of the evidence (see *Danielson*, 9 NY3d at 348; see also *Baque*, 43 NY3d 26).

The indictment was not duplicitous. The court clarified that for the purposes of the burglary charge, the dwelling was the apartment, and the court did not submit alternative theories to the jury (cf. *People v Retti*, 224 AD2d 333, 333-334 [1st Dept 1996], *lv denied* 88 NY2d 940 [1996]).

We perceive no basis for reducing the sentence. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

21 The People of the State of New York, Respondent, v R.R., Appellant. [248 NYS3d 227]—Judgment, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered October 16, 2017, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree under indictment No. 2088/2014, and of possession of prison contraband in the first degree under indictment No. 1923/2017, and sentencing him to an aggregate term of three years, unanimously modified, on the law, to the extent of vacating the sentence on the attempted robbery conviction and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, defendant is entitled to be resentenced on the attempted robbery conviction with an express youthful offender determination (see CPL 720.10 [3]; 720.20 [1] [a]; *People v Middlebrooks*, 25 NY3d 516, 524-525 [2015]; *People v Rudolph*, 21 NY3d 497, 501 [2013]; *People v C.D.C.*, 235 AD3d 505, 506 [1st Dept 2025]). Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

22 The People of the State of New York, Respondent, v Zion Holley, Appellant. [251 NYS3d 93]—

Crimes—Appeal—Valid Waiver

Crimes—Appeal—Constitutional Challenge to Weapon Possession Conviction

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, Bronx County (Seth Steed, J.), rendered October 2, 2024, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a jail term of six months and five years of probation, unanimously modified, on the law, to the extent of striking the condition of probation requiring

defendant to pay the surcharge and fees imposed at sentencing, and otherwise affirmed.

Defendant validly waived his right to appeal, as Supreme Court’s colloquy regarding the waiver tracked the model colloquy that has been endorsed by the Court of Appeals (*see People v Thomas*, 34 NY3d 545, 559, 567 [2019], *cert denied* 589 US 1302 [2020]). In addition, defendant acknowledged that he spoke with counsel and reviewed the written waiver before signing it (*see People v Rosario*, 242 AD3d 527, 527 [1st Dept 2025]; *see also People v Yizar*, 240 AD3d 416, 416 [1st Dept 2025], *lv denied* 44 NY3d 985 [2025]). In any event, we perceive no basis for reducing the sentence.

Defendant’s Second Amendment claim is not properly before us because he has not served the Attorney General with notice of his constitutional challenge in accordance with Executive Law § 71 (*see People v Castillo*, 234 AD3d 557, 558 [1st Dept 2025], *lv denied* 43 NY3d 1006 [2025]). As an alternative holding, we find that defendant’s challenge to the “good moral character” licensing requirement under Penal Law § 400.00 (1) (b) is unpreserved for our review, as he did not raise it before the motion court in support of his broader challenge to his conviction under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) (*see People v Martinez*, 238 AD3d 423, 424 [1st Dept 2025]; *People v Cabrera*, 41 NY3d 35, 42 [2023]), and we decline to review it in the interest of justice. In any event, we reject the challenge on the merits (*see People v Guzman*, 237 AD3d 570, 571 [1st Dept 2025], *lv denied* 44 NY3d 993 [2025]). We also reject defendant’s contention that he received ineffective assistance of counsel as a result of his failure to notify the Attorney General under Executive Law § 71, as his challenge to the “good moral character” licensing requirement was unavailing and counsel cannot be ineffective for failing to raise an argument that had “little or no chance of success” (*People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant’s challenges to two of his probation conditions as unrelated to his rehabilitation do not require preservation and survive his waiver of the right to appeal (*see People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]). Upon our review of those challenges, we find that the court providently imposed the condition of probation requiring defendant to “[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people” as “reasonably necessary to [e]nsure that the defendant will lead a law-abiding life or to assist him to do so,” given that he was found in possession of

loaded pistol and admitted to the Probation Department that he used marijuana on a daily basis and was a gang member (Penal Law § 65.10 [1], [2]; *see e.g. People v Rivera*, 242 AD3d 421, 422 [1st Dept 2025]; *People v Lombard*, 241 AD3d 1126, 1126 [1st Dept 2025]). Defendant's constitutional challenges to this condition are unpreserved (*see People v Rivera*, 242 AD3d 421, 422 [1st Dept 2025]; *People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review them in the interest of justice.

However, we strike the condition requiring defendant to pay the surcharge and fees imposed at sentencing as a condition of his probation, as that condition is not reasonably related to defendant's rehabilitation or necessary to ensure that he will lead a law-abiding life (*see e.g. People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]). We note that the People do not oppose this relief. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

23 People of the State of New York, Respondent, v Richmond Capital Group LLC et al., Appellants, et al., Respondents. [253 NYS3d 31]—

Usury—Usurious Transaction—Merchant Cash Advances—Characterization as Loan

Attorney General—Enjoining Fraudulent or Illegal Acts—Repeated or Persistent Fraud

Judgment, Supreme Court, New York County (Andrew Borrok, J.), entered April 11, 2024, in favor of petitioner and jointly and severally against respondents in the amount of \$77,289,631 plus interest, and bringing up for review an order, entered on or about September 15, 2023, which granted petitioner's motion for a summary determination of the petition pursuant to Executive Law § 63 (12) and denied respondents' cross-motions for a summary determination dismissing the petition, unanimously modified, on the law, to vacate the monetary aspect of the judgment, remand for further proceedings in accordance with this order, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about July 25, 2024, which, insofar as appealed from as limited by the briefs, denied without prejudice respondents Richmond Capital Group, LLC and Robert Giardina's motion to amend the judgment to reduce the amount thereof, unanimously dismissed, without costs, as moot.

The People bring this special proceeding pursuant to Executive Law § 63 (12), alleging predatory lending practices by respondents, who funded over 3,000 transactions styled as merchant cash advances, governed by purported merchant cash advance agreements (MCAs), but which are alleged to have been fraudulent, usurious loans-in-disguise.

Supreme Court properly found respondents liable for violation of Executive Law § 63 (12). Respondents engaged in repeated or persistent illegal acts within the meaning of Executive Law § 63 (12)—specifically, usury. New York usury law was properly applied in determining illegality because Executive Law § 63 (12) empowers the New York Attorney General to bring enforcement actions against New York-based businesses engaging in fraudulent or illegal acts in New York—even if the victims of those acts reside in other states (see *People v H & R Block, Inc.*, 58 AD3d 415, 417 [1st Dept 2009]; *Matter of People v Telehublink Corp.*, 301 AD2d 1006, 1009-1010 [3d Dept 2003]; *New York v Feldman*, 210 F Supp 2d 294, 303 [SD NY 2002]).

The subject agreements, although styled as MCAs, are properly characterized as loans subject to restrictions on usury (see *Davis v Richmond Capital Group, LLC*, 194 AD3d 516, 517 [1st Dept 2021]; *Fleetwood Servs., LLC v Richmond Capital Group LLC*, 2023 WL 3882697, *2, 2023 US App LEXIS 14241, *3-4 [2d Cir, June 8, 2023, No. 22-1885-cv]; see generally *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 665-666 [2d Dept 2020]). Although the MCAs have mandatory reconciliation provisions, no reconciliation was performed in practice, even though it was supposed to be performed on a monthly basis, and daily payments were fixed and did not represent a good faith estimate of receivables; there is no persuasive evidence of any ad hoc incidents of reconciliation (upon a merchants' request), which were subject to respondents' "sole discretion," and there is evidence that such requests were denied; bankruptcy was an express event of default in some of the MCAs, but even where it was not, repeated nonpayment was, as was breach of the MCAs, which was the case where a merchant "interrupt[ed], suspend[ed], dissolve[d] or terminate[d]" its business; and in the event of any of these circumstances, the full uncollected amount became due and respondents were empowered to enforce the personal guarantees they required the merchants to provide.

Usurious intent is also clear as a matter of law, as, absent reconciliation, the usurious interest rates can readily be calculated based on the information provided on the face of the MCAs (see *Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 183 [1st Dept 2013]).

Respondents also engaged in repeated or persistent fraud within the meaning of Executive Law § 63 (12). There is ample evidence of material misrepresentations in the record, both to merchants and to courts in affidavits filed to obtain judgments against merchants. The latter category of statements is not

protected by the *Noerr-Pennington* doctrine because it falls within the sham exception thereto (*see Matter of People v Northern Leasing Sys., Inc.*, 169 AD3d 527, 530 [1st Dept 2019]).

The MCAs were also procedurally and substantively unconscionable (*see generally Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-12 [1988]). Substantive unconscionability is clear from the MCAs' exorbitant and criminally usurious interest rates, among other things. As to procedural unconscionability, it is not dispositive that many, although not all, of the merchants were sophisticated businesspeople and all had prior experience with MCAs, and respondents misrepresented the terms and nature of the MCAs and used other high-pressure tactics.

Joint and several liability was appropriate with respect to respondents RAM Capital Funding LLC and Tzvi Reich because they participated in a common enterprise with the other respondents. Reich claims to have been merely a broker, but the record (and his own admissions) reflects that he was sometimes involved in funding, servicing, and collecting on the MCAs, as well as sharing an office space with the other respondents related to MCAs originated by RAM Capital Funding LLC.

Personal and joint and several liability was also appropriate with respect to respondent Robert Giardina because the evidence reflects that he personally participated in MCA negotiations and funding decisions, directed the wrongful withdrawal of payments on holidays, executed fraudulent judgment affidavits, oversaw respondent Jonathan Braun, and otherwise participated in a common enterprise with the other respondents. An adverse inference may also be drawn from Giardina's invocation of the Fifth Amendment (*see Republic of Haiti v Duvalier*, 211 AD2d 379, 386 [1st Dept 1995]).

Further proceedings are, however, necessary with respect to the amount of the monetary judgment. Judgment against the defendants is appropriate to the extent it is in the form of restitution that will make the victims whole, without creating a windfall (*see e.g. Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 124-125 [2008]; *see also People v Trump*, — AD3d —, 2025 NY Slip Op 04756 [1st Dept 2025]). The People are not entitled under the facts of this case to the additional remedy of disgorgement (*id.*).

However, the People failed to meet their initial burden with respect to the amount of damages insofar as they made no attempt to exclude repayments of principal from their proposed

calculation (see generally *People v Tzitzikalakis*, 8 NY3d 217, 220-222 [2007]; *Trump*, — AD3d at —, 2025 NY Slip Op 04756, *1; cf. *People v Greenberg*, 27 NY3d 490, 497-498 [2016]). This failure was due, at least in part, to respondents' failure to provide appropriate documentation. Some attempt by the People must, however, be made (even if imprecise) to reduce the total amount respondents received from merchants to account for the portion that was for the repayment of principal.

The Supreme Court must also consider the issue of offsets in the first instance, including (but not limited to) the amounts paid by the defendants in the settlement of the claims brought against them by the merchants. Double recovery is impermissible, and flies in the face of the notion of restitution by providing a windfall (see eg *EEOC v Waffle House, Inc.*, 534 US 279, 297 [2002]; *Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 124-125 [2008]). Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

24 The People of the State of New York, Respondent, v Naquon Brockington, Appellant. [248 NYS3d 227]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marisol Martinez Alonso, J.), rendered May 30, 2024, 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. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

25 The People of the State of New York, Respondent, v Kelvin Valdez, Appellant. [248 NYS3d 225]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (April A. Newbauer, J.), rendered December 7, 2023, 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. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

26 The People of the State of New York, Respondent, v T.D., Appellant. [252 NYS3d 44]—

Crimes—Appeal—Preservation of Issue for Review—Validity of Guilty Plea—Statements Made for Presentence Report

Crimes—Sentence—Harsh or Excessive Sentence—Mental Illness

Judgment, Supreme Court, New York County (Laura A.

Ward, J.), rendered October 30, 2023, convicting defendant, upon her plea of guilty, of arson in the second degree, and sentencing her to a term of eight years in prison, to be followed by five years of postrelease supervision, modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to five years, and otherwise affirmed.

We do not find an abuse of discretion by the sentencing judge. However, we reduce defendant's sentence under our interest of justice powers, giving due consideration to the seriousness of defendant's offense, but finding that further incarceration would be unduly harsh in light of defendant's significant mental health issues and moderate intellectual disability.

Defendant T.D. was charged with arson in the second degree (Penal Law § 150.15) in connection with a March 13, 2022 incident in which she set fire to a mattress in her apartment and quickly left the building without alerting other residents. The resulting fire caused significant damage to defendant's apartment, as well as other apartments in the building.

After being indicted, and by order dated March 22, 2022, defendant was referred for a CPL article 730 examination and underwent two evaluations to determine if she was fit to proceed to trial. During her evaluations, defendant reported, inter alia, that she has "heard voices 'all her life'" and that the music artist Cardi B. implanted "a rat into her stomach," performed "voodoo" on her, messaged her through reality TV, and that her feud with "Cardi B was responsible for the instant offense." The forensic evaluators diagnosed defendant with "[u]nspecified schizophrenia spectrum and other psychotic disorder," and found her unfit to proceed pursuant to CPL article 730 because her "mental disease or defect prevent[ed] her from rationally appreciating the charges against her."

In light of defendant's CPL article 730 examination results, and by order dated May 13, 2022, Supreme Court adjudicated defendant incapacitated and ordered that she be committed to the custody of the Commissioner of the New York State Office of Mental Health (OMH). Approximately one year later, on or about April 24, 2023, OMH filed a notification of defendant's fitness to proceed based on evaluations conducted by two CPL article 730 forensic evaluators. The OMH report noted that defendant still had auditory hallucinations and continued delusions but found that they did not directly interfere with her ability to think clearly and rationally about her case and appreciate the possible courses of action in her defense. Specifically, the report found that defendant understood the charges against her and was capable of consulting with her counsel with "a reasonable degree of rational understanding."

Thereafter, in May 2023, a mental health counselor from CASES recommended defendant be placed in an alternative to incarceration residential community to continue outpatient psychiatric care. That same month, two forensic psychiatric evaluators issued a report detailing defendant's personal history and diagnosing her with "schizoaffective disorder, post-traumatic stress disorder, and a moderate intellectual disability." The forensic psychiatric report found that defendant still suffered from delusions, was "in need of significant, ongoing mental health treatment," and recommended that she be placed in a residential community-based mental health treatment program due to the severity of her psychological issues.

At defendant's October 2, 2023 plea proceeding, defense counsel submitted the above-mentioned CASES letter and the psychological evaluations. Counsel noted that the parties met in chambers prior to the plea proceeding to discuss defendant's mental health history and that the People recommended a 10-year sentence and proposed an alternative disposition; a not-guilty-by-reason-of insanity (NGRI) plea. Counsel then sought a five-year sentence for defendant, as she did not want to pursue the NGRI disposition.

After considering defendant's mental health and criminal history, Supreme Court indicated it was willing to impose an eight-year sentence, despite the People's objection. Defendant accepted the court's proposed disposition and pleaded guilty to arson in the second degree (Penal Law § 150.15), in exchange for a promised prison sentence of eight years, followed by five years of postrelease supervision.*

During the plea proceeding, the court conducted a comprehensive colloquy in which defendant affirmed her understanding of her trial rights, executed a written waiver of her right to appeal, and admitted that on or about March 13, 2022, she intentionally damaged a building that was occupied by others by starting a fire inside of it.

Prior to sentencing, defendant was interviewed by the Department of Probation. During her presentence interview, she admitted guilt for the offense, stating: "I set my bed on fire. I was listening to the voices that were in my head. I admit my guilt. There were no other occupants in my home. I feel terrible for what I did because other people could have been hurt or killed. I was high on weed at the time."

* During the plea proceeding, counsel confirmed he did not have any trouble speaking with defendant and that defendant was competent to proceed with the plea. Defendant affirmed that she had received enough time to discuss the plea and sentence with her counsel and that her medications did not affect her ability to understand what was happening.

At sentencing, Supreme Court noted defendant's statement in the presentence report and its implication that a possible defense could have been raised. The court then asked defendant if she "underst[ood] that by pleading guilty, [she was] giving up the right to raise [that she was hearing voices] as a defense." Defendant responded in the affirmative but now contends her plea should be vacated because Supreme Court was required to inquire further into her defense to ensure that her plea was knowing and voluntary (*see People v Lopez*, 71 NY2d 662, 666 [1988]). Defendant concedes that her claim that the plea was involuntary was not preserved. However, she contends that her plea allocution falls within the narrow exception to the preservation requirement (*id.*).

This Court has "repeatedly held that the *Lopez* exception does not apply to statements in presentence reports" (*People v Grant*, 203 AD3d 477, 478 [1st Dept 2022], *lv denied* 38 NY3d 1033 [2022]; *People v Vasquez*, 227 AD3d 417, 417 [1st Dept 2024], *lv denied* 42 NY3d 930 [2024]; *People v Rojas*, 159 AD3d 468, 468 [1st Dept 2018], *lv denied* 31 NY3d 1086 [2018]). However, as the People concede, once a defendant's statement raising a possible defense is addressed at sentencing, "regardless of where and how it was originally expressed, it becomes a part of the actual sentencing proceeding," triggering a court's duty to inquire further (*People v Dupree*, 235 AD3d 120, 125 [1st Dept 2025] [internal quotation marks omitted]).

Contrary to our dissenting colleague's assertion, this case presents a rare instance where the narrow exception to the preservation requirement applies (*see Lopez*, 71 NY2d at 666). At sentencing, Supreme Court made a sua sponte on the record inquiry into the statements defendant made to the Department of Probation during her presentence interview. While the court further addressed defendant's statements, the sentence was imposed immediately after this exchange, rendering defendant with a "practical inability to move to withdraw" the plea (*People v Conceicao*, 26 NY3d 375, 382 [2015]; *People v Rosa*, 135 AD3d 434, 434-435 [1st Dept 2016], *lv denied* 27 NY3d 968 [2016]).

Although there is no "precise scope of [a] court's required inquiry," once alerted on the record to a statement by a defendant that casts doubt on their guilt or raises any defense, psychiatric or otherwise, the court must go beyond asking "general questions" to ensure the validity of the plea (*Dupree*, 235 AD3d at 126). Here, at sentencing, the court—confronted with defendant's statement to the Department of Probation raising a possible defense—inquired further to confirm that defendant understood that by pleading guilty, she was giving up her abil-

ity to raise a potentially viable insanity defense (see *People v Mox*, 20 NY3d 936, 938-939 [2012]; *Lopez*, 71 NY2d at 666; *People v Serrano*, 15 NY2d 304, 310 [1965]). While a more detailed factual inquiry could have been conducted, defendant's mental health was central to the plea negotiations and the presentence interview statements addressed by the court did not raise the possibility of this defense for the first time. Based on these circumstances, Supreme Court's inquiry was sufficient to ensure defendant's guilty plea was knowing and voluntary.

The dissent asserts that no purpose is served in holding that a court is obligated to conduct a further inquiry when, at sentencing, it addresses a defendant's statement in a presentence report that indicates a possible defense. While the dissent expresses the alleged disutility of our holding by contending that defendant's mental health condition and the substance of the statement in the presentence report had been well known and thoroughly explored throughout the pendency of this matter, "[t]he fact remains, . . . that, before accepting a plea of guilt where the defendant's story does not square with the crime to which [s]he is pleading, the court should take all precautions to assure that the defendant is aware of what [s]he is doing" (*Serrano*, 15 NY2d at 310). Once the court placed defendant's presentence interview statements on the record, ensuring that defendant adequately understood the possibility of an insanity defense was the reason a further inquiry was required.

Notwithstanding the above findings, this Court has the authority to reduce a sentence that is unduly harsh or severe as a matter of discretion in the interest of justice, even where the sentencing court did not abuse its discretion and in the absence of extraordinary circumstances (see *People v Brisman*, 43 NY3d 322, 324 [2025]; *People v Delgado*, 80 NY2d 780, 783 [1992]). Such exercise of interest of justice authority is warranted here, as defendant's eight-year sentence is unduly harsh when considering her mental health history and personal circumstances (see *People v Farrar*, 52 NY2d 302, 305-306 [1981]).

As noted above and acknowledged by the dissent, the record, which includes defendant's CPL article 730 examinations and forensic-psychiatric evaluations, unequivocally demonstrates the substantial mitigation present in this case, including defendant's documented history of severe mental illness, intellectual disability, and trauma since her childhood (see *People v Sparks*, 232 AD3d 168, 172 [1st Dept 2024]; *People v Watt*, 189 AD3d 637, 638, 640 [1st Dept 2020]; *People v Reyes*, 89 AD3d

401, 402-403 [1st Dept 2011]), auditory hallucinations, severe depression (see *People v Jeffries*, 160 AD2d 406, 406-407 [1st Dept 1990]), numerous psychiatric diagnoses (see *Watt*, 189 AD3d at 639; *Reyes*, 89 AD3d at 402), substance use (see *People v Mitchell*, 168 AD3d 531, 532 [1st Dept 2019]; *People v Walsh*, 101 AD3d 614, 614 [1st Dept 2012]), and frequent psychiatric hospitalizations. The record also clearly establishes that defendant's mental illness contributed to the commission of the offense and continues to present circumstances which render her continued eight-year incarceration pursuant to her plea agreement unduly harsh and severe.

Against this backdrop, defendant's criminal history does not preclude a determination that her sentence is unduly harsh (see *Mitchell*, 168 AD3d at 532; *Walsh*, 101 AD3d at 614), nor does the seriousness of her crime (see *Watt*, 189 AD3d at 638-639 [concurrent 14-year sentences reduced to 10 years for defendant diagnosed with multiple behavioral and cognitive disorders and convicted of attempted murder in the second degree and robbery in the first degree]; *Reyes*, 89 AD3d at 402-403 [11-year sentence reduced to 8 years for defendant, who had been diagnosed with schizophrenia and convicted of attempted murder in the second degree, based on mitigating factors]; see also *People v Hamlett*, 235 AD3d 432 [1st Dept 2025], *lv denied* 43 NY3d 1046 [2025]; *People v Garcia*, 177 AD3d 432 [1st Dept 2019], *lv denied* 34 NY3d 1128 [2020]; *People v Pagan*, 159 AD2d 6 [1st Dept 1990], *lv denied* 76 NY2d 895 [1990]).

Therefore, based on the totality of these circumstances, and in the interest of justice, we reduce defendant's eight-year sentence to five years (see *Brisman*, 43 NY3d at 324; *People v Rosenthal*, 305 AD2d 327, 329 [1st Dept 2003], citing *Delgado*, 80 NY2d at 783; CPL 470.15 [6] [b]). Concur—Kern, J.P., Rodriguez, Pitt-Burke, Rosado, JJ.

Friedman, J., concurs in part and dissents in part in a memorandum as follows: While I concur with the result reached by the majority insofar as it declines to vacate defendant's guilty plea, I disagree, for reasons more fully discussed below, with the majority's view that a statement made by the court itself at the sentencing hearing—upon a subject that had been thoroughly explored throughout the entire prosecution—triggered a duty on the part of the court “to inquire further to ensure that defendant's guilty plea is knowing and voluntary” (*People v Lopez*, 71 NY2d 662, 666 [1988]). I dissent from the majority's reduction of the eight-year sentence, which defendant, with the advice of counsel, had accepted as part of her plea agreement.

Defendant, who lived in an apartment building, set her mattress on fire and then left the building. The fire caused extensive direct damage to defendant's apartment and the one directly above it, caving in ceilings and walls. In addition, the building as a whole sustained heavy damage from water and smoke, and windows were broken throughout the building. The fire necessitated the evacuation of the entire building for several hours, on a day when there was snow on the ground. For this act, defendant was charged by a grand jury with second-degree arson (Penal Law § 150.15).

The record is replete with evidence of defendant's mental illness, which involved schizophrenia that caused her to hallucinate by hearing voices. Defendant was initially found unfit to stand trial but, about a year after her crime, she was found fit to stand trial after medication brought her symptoms under control. A psychiatric report in the record specifically notes that defendant had told her examiners that, on the day of the fire, "the voices" were "getting the best of [her]."

In plea negotiations, the People offered to accept a plea of not guilty by reason of insanity. Defense counsel discussed this option with defendant, but she declined to pursue it. Since defendant refused to plead not guilty by reason of insanity, the People offered a 10-year prison sentence. At the plea hearing, defense counsel requested the minimum five-year sentence. The court was unwilling to impose a minimum sentence in light of defendant's criminal history and the seriousness of her offense, but offered an eight-year sentence, two years less than the People's offer. Defendant accepted the court's offer and pleaded guilty to second-degree arson, admitting that she "intentionally damaged a building by starting a fire" while "there were other individuals in the building."

Four weeks after the plea hearing, defendant appeared for sentencing. Before sentence was pronounced, the following exchange between the court and defendant took place:

"THE COURT: So with regard to the defense, I just have one question. In the [presentence report], Ms. [D], it says that you claim that, at the time of the incident, you were hearing voices. You understand that by pleading guilty, you give up the right to raise that as a defense; do you understand?"

"THE DEFENDANT: Mmm, hmm."

"THE COURT: I will take that as a yes."

In the above colloquy, the court was apparently referring to the following statement attributed to defendant in the presentence report: "I set my bed on fire. I was listening to the voices that were in my head. I admit my guilt."

On appeal, defendant argues that, when the court referred at the sentencing hearing to her statement in the presentence report about “hearing voices” at the time she set the fire, the court triggered a duty under *Lopez* for the justice “to inquire further to ensure that defendant’s guilty plea [was] knowing and voluntary” (*Lopez*, 71 NY2d at 666). Defendant contends that the one question the court asked at that juncture (“You understand that by pleading guilty, you give up the right to raise that as a defense; do you understand?”) was insufficient to discharge its duty of inquiry. The majority agrees with defendant that the court’s statement triggered a duty of inquiry under *Lopez*, but finds that, in light of the record as a whole, the inquiry the court actually made discharged that duty. In my view, no duty of inquiry arose.

The *Lopez* duty of inquiry typically arises from a statement made by the defendant at the plea or sentencing hearing that “clearly casts significant doubt upon the defendant’s guilt or otherwise calls into question the voluntariness of the plea” (*Lopez*, 71 NY2d at 666; *see id.* at 664 [“During the plea allocution, . . . defendant made statements that raised the possibility of a justification defense and the possibility that he lacked the requisite criminal intent”]; *see also People v Mox*, 20 NY3d 936, 937-938 [2012]). Last year, this Court extended the *Lopez* rule by holding that a duty of inquiry may arise from “the prosecution’s comments, made during a plea or sentencing proceeding in open court, that raise a possible defense to the charged offense” (*People v Dupree*, 235 AD3d 120, 121 [1st Dept 2025]). As the majority acknowledges, a duty to inquire never arises from a statement written in a presentence report that is not referred to in open court at the sentencing hearing (*see People v Grant*, 203 AD3d 477, 478 [1st Dept 2022], *lv denied* 38 NY3d 1033 [2022]).*

In the present case, the majority and defendant take the position that a duty of inquiry was triggered by a statement at the sentencing hearing that was not made either by *defendant*

* Contrary to the majority’s assertion, defendant’s statement in the presentence report that she was hearing voices when she set the fire (which simply restated what she had been saying since her arrest) is not a “story [that] does not square with the crime to which [s]he [was] pleading” (*People v Serrano*, 15 NY2d 304, 310 [1965]). That her crime was related to her mental illness simply raised a possible affirmative defense that a jury might or might not have accepted. The connection of her crime to her mental illness was not inconsistent with her guilt, as her initial attempt to blame the crime on a nonexistent boyfriend (as more fully described in my discussion of the sentencing issue) tends to show that she was aware of the wrongfulness of her conduct.

or by *the prosecution*. Rather, the statement in question was made by *the court*, sua sponte, based on a sentence in the presentence report that, by itself, could not have triggered any duty. No authority has been cited as support for the view that the court could impose a duty of inquiry upon itself—a duty that would not otherwise exist—simply by referring to a sentence in the presentence report. I do not see what purpose is served by holding that, by making such a statement, the court imposes upon itself a duty to make further inquiry. The disutility of such a rule is particularly evident in this case, where the substance of the statement in the presentence report—that defendant had been hearing “voices in [her] head” when she committed her crime—had been well known and thoroughly explored throughout the pendency of this matter, during which the disposition of the case was delayed for about a year until defendant’s mental condition was stabilized by medical treatment, and the possibility of a plea of not guilty by reason of insanity had been raised by the prosecution and rejected by defendant. If the court’s statement triggered a duty of inquiry, as the majority maintains, the minimal inquiry the court actually made can be regarded as sufficient only if this procedural history is borne in mind.

Turning to the issue of the sentence itself, I disagree with the majority’s view that the eight-year sentence—the penalty offered by the court that defendant, advised by counsel, agreed to accept as part of her plea agreement—was so “unduly harsh” that a reduction to five years is warranted “in the interest of justice.” There is no question that defendant suffers from mental illness, but, at the time of her plea, her medical treatment had rendered her fit to stand trial. The court’s offer of eight years extended a significant measure of leniency to defendant, since the prosecution had offered 10 years. Had she gone to trial, she faced the possibility of a sentence of up to 25 years in prison (*see* Penal Law § 70.02 [3] [a]). The People had a very strong case against her—including surveillance video of her fleeing her apartment just before black smoke started pouring from under the door—and there is little doubt that she would have been convicted after a trial.

Moreover, defendant committed a most serious crime that placed numerous other people in danger. She set fire to her apartment in a six-story residential building, placing the entire building at risk and jeopardizing the lives and well-being of all of its residents, as well as responding firefighters. The fire caused severe damage throughout the building while ruining multiple apartments. Dozens of residents of the building,

including elderly people and children, were displaced and had to wait in a bus for hours until accommodations could be found for them. Defendant realized the danger of what she did, since she fled the building immediately after starting the fire, without warning anyone else. Five minutes later, she called 911 to report the fire, claiming that it had been set by her “boyfriend.” In fact, defendant later admitted that she had no boyfriend at the time. It is no thanks to defendant that, fortunately, no one suffered serious injury or death as a result of her criminal actions.

The eight-year sentence is also warranted by defendant’s criminal history. She has two prior felony convictions, both for attempted third-degree criminal sale of a controlled substance. The mitigating factors cited by defendant—her mental illness, her traumatic life experiences, and her intellectual limitations—were known to the sentencing court, which, taking them into account, deemed eight years to be the appropriate sentence, rather than the 10 years sought by the People. Nor, considering the nature of the crime, is a reduction of the sentence consistent with a proper concern for public safety.

For all of the foregoing reasons, I would affirm the conviction in all respects, and respectfully dissent from the majority’s reduction of the sentence.

27 The People of the State of New York, Respondent, v Christopher Twilley, Appellant. [248 NYS3d 226]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Tara A. Collins, J.), rendered August 22, 2024, 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. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

28 Leon Pokoik et al., Appellants, v Michael Steinberg et al., Respondents. [253 NYS3d 41]—

Partnership—Breach of Fiduciary Duty—Business Judgment Rule—Partners Acting as Fiduciaries

Judgment, Supreme Court, New York County (Joel M. Cohen, J.) entered on or about May 14, 2025, in favor of defendants, and bringing up for review an order, same court and Justice, entered on or about February 5, 2025, which, after a nonjury trial, dismissed with prejudice plaintiffs’ causes of action for breach of fiduciary duty against defendants Michael Steinberg and Jay Lieberman, unanimously affirmed, without costs. Ap-

peal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The business judgment rule “provides that, where corporate officers or directors exercise unbiased judgment in determining that certain actions will promote the corporation’s interests, courts will defer to those determinations if they were made in good faith” (*Matter of Kenneth Cole Prods., Inc., Shareholder Litig.*, 27 NY3d 268, 274 [2016]). As relevant here, partners acting as fiduciaries are entitled to the same protections as corporate directors (*see Levine v Levine*, 184 AD2d 53, 59 [1st Dept 1992]). The deference afforded by the business judgment rule is not applicable where the challenged transaction is affected by an inherent conflict of interest (*see Wolf v Rand*, 258 AD2d 401, 404 [1st Dept 1999]), in which case the burden shifts to the defendant to prove the fairness of the challenged transaction (*see id.*).

Here, Supreme Court properly applied the business judgment rule where the shareholders, including plaintiffs, held roughly equal interests in the tripartite ownership structure made up of three entities holding their interests in the property, and no individual held a controlling position in nominal defendant Norsel Realities (*see Marx v Akers*, 88 NY2d 189, 202 [1996]; *Matter of Yin Shin Leung Charitable Found. v Seng*, 177 AD3d 463, 465 [1st Dept 2019]; *see also Lewis v S. L. & E., Inc.*, 629 F2d 764, 767 [2d Cir 1980]). Plaintiffs fail to submit credible evidence that defendants received any profit or other financial benefit that was not received by other shareholders in connection with their proportional ownership interest, nor that defendants were controlled or dominated by an interested party (*see Owen v Hamilton*, 44 AD3d 452, 456 [1st Dept 2007], *lv dismissed* 10 NY3d 757 [2008]).

The setting of the ground rent at issue here was properly ratified under Norsel’s articles of partnership, which provide that partnership decisions only require a simple majority. The eighth amendment to the ground lease specifically contained the option for three lease extensions, including the first renewal embodied in the ninth amendment. It is undisputed that plaintiff Leon Pokoik was involved in the management of the three entities when the eighth amendment was executed in 1995, without any objection from him. Further, he financially benefitted from his interest in the three entities before and after the contemplated April 30, 2016 expiration date of the partnership. Thus, Norsel is not precluded from abiding by the terms of the ninth amendment and continuing the business of the partnership, at least through the expiration of the ninth

amendment. Based on the foregoing, plaintiffs' reliance on *Northmon Inv. Co. v Milford Plaza Assoc.* (284 AD2d 250 [1st Dept 2001], *lv dismissed* 97 NY2d 677 [2001], *lv denied* 97 NY2d 743 [2002]) for the proposition that unanimous consent was required to extend the Norsel partnership past April 30, 2016, before executing the ninth amendment, is misplaced.

Because the business judgment rule applies here, it is unnecessary to reach the parties' arguments as to entire fairness review.

We have considered plaintiffs' remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

29 Antonio Rosario Roque, Respondent, v 240 Lincoln Place LLC, Appellant. [248 NYS3d 551]—

Labor—Safe Place to Work—Elevation-Related Hazard—Fall from Slipping A-frame Ladder

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered January 23, 2025, which granted plaintiff's motion for summary judgment on liability on his Labor Law § 240 (1) claim, unanimously affirmed, without costs.

Plaintiff established prima facie entitlement to partial summary judgment on his Labor Law § 240 (1) claim through his submission of undisputed evidence that the 12-foot A-frame ladder he was working on slipped out from under him while he was standing on it, causing him to fall and land on top of the ladder (*see Morales v 2400 Ryer Ave. Realty, LLC*, 190 AD3d 647, 647 [1st Dept 2021]).

In opposition, defendant failed to raise an issue of fact. Contrary to defendant's argument, the record evidence fails to establish that plaintiff was a recalcitrant worker or was the sole proximate cause of the accident (*see id.*). Plaintiff's decision to use an A-frame ladder in the closed position is not, in itself, a reason to declare him the sole proximate cause of the accident, as he provided a specific reason for using the ladder while it was still closed: he was unable to open it because of its size and weight (*see id.*).

In addition, although an eight-foot ladder was available at the site, defendant failed to show that plaintiff knew he was expected to use the eight-foot ladder or that he chose, for no good reason, to forgo using it (*see id.*; *Garces v Windsor Plaza, LLC*, 189 AD3d 539, 539 [1st Dept 2020]). On the contrary, plaintiff's supervisor testified that he never told plaintiff what equipment to bring to the site and that it was up to plaintiff what equipment to use. In any event, plaintiff testified that he

had found the eight-foot ladder to be unstable when he had used it on a previous day; therefore, he had a good reason not to try and use it again (*see Garces*, 189 AD3d at 539; *see also Morales*, 190 AD3d at 647-648). Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

30 Jose Orlando Estela Santacruz, Respondent, v 58 Gerry St LLC et al., Appellants. (And Third-Party Actions.) [253 NYS3d 36]—

Pleading—Sufficiency of Pleading—Fraud—Claim Based on Unrelated Racketeer Influenced and Corrupt Organizations Act Complaint
Trial—Note of Issue and Statement of Readiness—Vacatur—Post-Note of Issue Discovery

Order, Supreme Court, Bronx County (Myrna Socorro, J.), entered January 7, 2025, which denied defendants’ motion for leave to amend their answer, to vacate the note of issue, and to compel additional discovery, unanimously modified, on the law, the facts, and in the exercise of discretion, to grant the motion for additional discovery to the extent of ordering plaintiff to appear for further deposition, within 60 days of the date of this order, consistent herewith, and otherwise affirmed, without costs.

Supreme Court providently exercised its discretion in denying defendants leave to amend their answer to assert an affirmative defense and counterclaim for fraud based on an unrelated Racketeer Influenced and Corrupt Organizations Act (RICO) complaint filed in federal court on September 6, 2024, alleging, *inter alia*, that some of the attorneys who previously represented plaintiff in this action, and some of his medical providers, conspired to defraud insurers in workers’ compensation and third-party personal injury actions. “The unproven allegations of fraud against plaintiff’s [former] attorney[s] and medical providers in the RICO complaint do not, without more, warrant [an affirmative defense or] counterclaim for fraud against plaintiff himself” (*Linares v City of New York*, 233 AD3d 479, 480 [1st Dept 2024]; *see Anguisaca-Morales v St. Paul & St. Andrew United Methodist Church*, 238 AD3d 439, 440 [1st Dept 2025]). Even if, as defendants urge, plaintiff is the “Claimant A” referenced in that RICO complaint, these unproven allegations of fraud are insufficient to support a claim for fraud against plaintiff (*see Anguisaca-Morales*, 238 AD3d at 440). The separate fact identified by defendants that plaintiff shares and has shared an address with many other workers’ compensation claimants and personal injury plaintiffs does not in and of itself establish that plaintiff’s specific claims in this case are fraudulent (*cf. Dragons 516 Ltd. v GDC 138 E 50 LLC*,

201 AD3d 463, 464 [1st Dept 2022]). Moreover, defendants did not plead justifiable reliance or resulting damages (*see Anguisaca-Morales*, 238 AD3d at 440) beyond “having incurred litigation costs as a result of plaintiff’s pursuing a fraudulent or frivolous claim” (*Breton v Dish*, 234 AD3d 432, 433 [1st Dept 2025]). To the extent plaintiff’s claims are, in fact, frivolous, defendants’ may seek sanctions under CPLR 8303-a or Uniform Rules for Trial Courts (22 NYCRR) § 130-1.1 (*see id.*). Thus, it will remain for the trial court to determine to what extent defendants can explore these allegations at trial (*see Linares*, 233 AD3d at 480).

Supreme Court also providently exercised its discretion in declining to vacate the note of issue (*see generally* 22 NYCRR 202.21 [d]-[e]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 138-140 [2d Dept 2000]). The information on which defendants relied in support of their request to vacate the note of issue was information that already existed which could have been discovered with reasonable diligence, and thus was not an unusual or unanticipated circumstance that developed post-note of issue to justify the note’s vacatur (*see Taylor v Enterprise FM Trust*, 214 AD3d 493 [1st Dept 2023]). However, defendants are entitled to further depose plaintiff as to the RICO action (*see Lituma v Liberty Coca-Cola Beverages LLC*, 243 AD3d 504, 504-505 [1st Dept 2025]; *Franco v 800 E 173 LLC*, 240 AD3d 446 [1st Dept 2025]). While the remedy in *Lituma* was to vacate the note of issue, “courts are authorized to permit post-note of issue discovery without vacating the note of issue, so long as the parties will not suffer prejudice as a result” (*Valencia v City of New York*, 188 AD3d 549, 550 [1st Dept 2020]; *see Cabrera v Abaev*, 150 AD3d 588, 588 [1st Dept 2017]). Accordingly, we elect to exercise our discretion to authorize defendants to further depose plaintiff on the RICO action (*see Franco*, 240 AD3d at 447), and to serve appropriate post-deposition discovery demands on the limited topics raised in that further deposition, without vacating the note of issue. This case has been on the trial calendar for more than two and a half years, and there is no need to remove it therefrom for defendants to conduct further discovery proceedings. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

31 Geoffrey Sinckler, Appellant, v Ibrahim Mohammed, Respondent, et al., Defendant. Geoffrey Sinckler, Appellant, v Ibrahim Mohammed, Respondent, et al., Defendant. [251 NYS3d 96]—

Interests of Former Client—Substantially Related Matters

Order, Supreme Court, Bronx County (Erik L. Gray, J.), entered July 1, 2025, which, to the extent appealed from as limited by the briefs, granted defendant Ibrahim Mohammed's motion to disqualify Steve C. Okenwa, Esq. and the Okenwa Law Firm as counsel, unanimously affirmed, with costs. Order, Supreme Court, Bronx County (Marissa Soto, J.), entered July 9, 2025, which granted defendant Ibrahim Mohammed's motion to disqualify Steve C. Okenwa, Esq. and the Okenwa Law Firm as counsel, unanimously affirmed, with costs.

Geoffrey Sinckler brought two actions against Ibrahim Mohammed alleging that Mohammed abused the parties' business relationship to steal Sinckler's properties. We find that the court providently exercised its discretion in disqualifying Sinckler's attorney, Steve Okenwa, Esq., and his law firm, Okenwa Law Firm, in both actions. Defendant established that (1) he had a previous attorney-client relationship with Okenwa in connection with a property on 239th Street in the Bronx (the 239 property), (2) the matters involved in both representations were substantially related, and (3) that his interests and plaintiff's are materially adverse (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]).

In the first action, which concerns the 239 property, the record demonstrates that Okenwa previously represented both plaintiff's and defendant's interests in a prior action regarding ownership of the exact same property at issue in this lawsuit. The parties do not dispute that plaintiff's interests in this action are adverse to those of defendant.

In the second action, which concerns the transfer, allegedly induced by fraud, of a property on Fenton Avenue in the Bronx, defendant established that he and Okenwa had a prior attorney-client relationship, and plaintiff and defendant's interests are materially adverse. The Fenton Avenue action is substantially related to Okenwa's representation of defendant concerning the 239 property so as to warrant Okenwa's disqualification. Both actions involve defendant's alleged scheme to use his business relationship with plaintiff to defraud plaintiff into transferring his properties to defendant's corporate entities. Accordingly, there is a substantial risk that Okenwa may have obtained information about the nature of the parties' business relationship when he represented defendant in connection with the 239 property which could be used against Mohammed in the Fenton Avenue action.

We have considered the parties' remaining arguments and find them unavailing. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

32 In the Matter of Stuyvesant Town-Peter Cooper Village Tenants Association et al., Appellants, v New York State Division of Housing and Community Renewal et al., Respondents. [251 NYS3d 623]—

Landlord and Tenant—Rent Regulation—Major Capital Improvement Rent Increase—Useful Life Schedule

Order and judgment (one paper), Supreme Court, New York County (Alexander Tisch, J.), entered on or about December 5, 2023, which denied the petition to vacate or annul the February 26, 2021 order of respondent New York State Division of Housing and Community Renewal (DHCR) denying the petitions for administrative review of DHCR's orders granting the applications filed by respondents property owners/landlord for rent increases based on major capital improvements (MCI), and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's interpretation of former Rent Stabilization Code (9 NYCRR) § 2522.4 as permitting an MCI rent increase within the useful life of an improvement if the owner did not previously obtain an MCI rent increase for such improvement is not irrational or unreasonable, and thus is entitled to deference (see *Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; see also *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). Under former Rent Stabilization Code § 2522.4 (a) (2) (i) (d) one of the criteria for an MCI rent increase was that the item being replaced be beyond its "useful life," or, if not, that DHCR obtain a waiver of this requirement. The useful life for an intercom system, the major capital improvement at issue here, was 15 years (see former Rent Stabilization Code [9 NYCRR] § 2522.4 [a] [2] [i] [d] [6]). It is undisputed that the prior intercom system, installed in 2001 or 2002, was within its useful life when respondents owners/landlord installed the new system at issue in 2014, that owners/landlord did not apply for a waiver prior to the 2001 or 2002 installation, and that the owners/landlord did not take an MCI rent increase for that installation. However, former Rent Stabilization Code § 2522.4 (a) (8), which explains that no MCI increase will be granted within the useful life of an improvement "for which an increase was previously granted except with prior DHCR approval" has been interpreted by DHCR to mean that the useful life schedule applies specifically to cases where DHCR "previously granted" an increase, and does not apply where an MCI rent increase has not been previously granted, an interpretation that has been long-standing and is consistent with both DHCR's prior

determinations and case law (see e.g. *Matter of 250 Riverside Dr. Tenants' Assn. v New York State Div. of Hous. & Community Renewal*, 41 Misc 3d 1209[A], 2013 NY Slip Op 51629[U] [Sup Ct, NY County 2013]; see generally *Matter of Leggio v Devine*, 34 NY3d 448, 462 [2020]).

DHCR's determinations denying the petitions for administrative review were not arbitrary and capricious. Nor did DHCR commit an error of law in following its own long-standing precedent and determining that the useful life requirement, including the waiver requirement, was not applicable where it is undisputed that the owner had not received an MCI rent increase when the prior intercom systems were installed.

We have considered petitioners' remaining arguments and find them unavailing. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

33 In the Matter of R.M.C.T., Appellant, v A.E. et al., Respondents. [248 NYS3d 552]—

Parent, Child and Family—Custody—Grandparents—Extraordinary Circumstances

Parent, Child and Family—Custody—Grandparents—Best Interests of Child

Order, Family Court, Bronx County (Robert T. Johnson, J.), entered on or about April 17, 2024, which, to the extent appealed from as limited by the briefs, after a hearing, granted the petition of the subject child's maternal grandmother and step-grandfather (the grandparents) for sole legal and physical custody of the child and denied the father's petition for custody, unanimously affirmed, without costs.

Family Court properly found that the child's maternal grandparents demonstrated that extraordinary circumstances existed that established their standing to seek custody of the child from the child's surviving parent (see *Matter of Suarez v Williams*, 26 NY3d 440, 448 [2015]; *Matter of Sharon B. v Tiffany P.*, 143 AD3d 573, 573 [1st Dept 2016]; Domestic Relations Law § 72 [2] [a]). Since the mother's death, the grandparents have been the child's consistent, primary caregivers and means of financial support (see *Roberta P. v Vanessa J.P.*, 140 AD3d 457, 457 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]). The father, on the other hand, testified that he visited the child sporadically before the mother's death and had no contact with the child since then (see *id.* at 458).

The totality of the circumstances demonstrated that the award of custody to the grandparents was in the best interests of the child (see *Matter of Tawanna W. v Kamella T.*, 233 AD3d 638, 638 [1st Dept 2024]). The grandparents provided the child

with a stable and nurturing home following the child's mother's death (*Matter of Ruth L. v Clemese Theresa J.*, 104 AD3d 554, 555 [1st Dept 2013], *lv denied* 21 NY3d 860 [2013]). The grandmother credibly testified to providing the child with emotional support and guidance following this traumatic and devastating loss, including enrolling in grief therapy. The grandparents also enrolled the child in school, attended to the child's educational and medical needs, and facilitated contact with the child's stepsiblings. Having had the ability to view the witnesses and hear the testimony, the court's findings on this issue should be accorded great deference (*see Matter of Tawanna W.*, 233 AD3d at 639). Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

34 Wilson Minaya Torres, Appellant, v 40 East End Ave. Associates LLC et al., Respondents. [251 NYS3d 615]—

Labor—Safe Place to Work—Elevation-Related Hazard—Safety Device—Pallet Jack

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about December 19, 2024, which denied plaintiff's motion for summary judgment on liability pursuant to Labor Law § 240 (1) and granted defendants' motion for summary judgment dismissing plaintiff's complaint, unanimously modified, on the law, defendants' motion for summary judgment denied to the extent it seeks to dismiss plaintiff's Labor Law §§ 240 (1) and 241 (6) claims, and otherwise affirmed, without costs.

Plaintiff alleges that he was injured as he was guiding a pallet of construction material being delivered to a work site. According to plaintiff, his coworker was moving the load using a pallet jack, which used a hydraulic machine to raise the pallet up so that it could be moved. As the coworker who was operating the jack began to move the pallet, the wooden part of the pallet broke, and the hydraulic machine got stuck on the edge of the truck that had delivered the material. Although the coworker managed to free the hydraulic machine, he lost control of the machine's lever, and the full load of the pallet fell on plaintiff's foot.

There is no basis to disturb Supreme Court's decision to consider defendants' untimely submissions in support of their summary judgment motion, although defendants' motion was filed one day late. Defendants provided good cause for the late submission, and the record makes clear that the late filing was an inadvertent mistake and not a tactical decision. In addition, plaintiff did not assert that he suffered any prejudice from the

late filing (see *Brill v City of New York*, 2 NY3d 648, 652-653 [2004]; *Lewis v Rutkovsky*, 153 AD3d 450, 453 [1st Dept 2017]).

Turning to the merits, Supreme Court should have denied defendants' motion for summary judgment to the extent it sought dismissal of plaintiff's Labor Law § 240 (1) claim. Defendants failed to eliminate issues of fact as to the sufficiency of the pallet jack as a safety device for moving the load of construction material. The record does not establish why plaintiff's coworker could not control the pallet jack or why he was unable to hold onto it properly. The record therefore presents factual issues as to whether the jack itself was defective and failed to provide adequate protection against a risk arising from application of the force of gravity to a heavy load during a hoisting operation (see *Schoendorf v 589 Fifth TIC I LLC*, 206 AD3d 416, 417 [1st Dept 2022]; *Ali v Sloan-Kettering Inst. for Cancer Research*, 176 AD3d 561, 561 [1st Dept 2019]).

We reject defendants' assertion that their submission of the incident report eliminates all issues of fact as to their liability. Although the report states that the load fell because the coworker released the lever on the hydraulic machine, the report does not state why the coworker did so and thus does not foreclose the possibility that the coworker lost control of the lever because the jack was defective or inadequate for the job being performed. Furthermore, the record is not clear as to whether the author of the report actually witnessed plaintiff's accident. Accordingly, at most, the incident report raises an issue of fact as to whether the accident was caused by human error. For the same reason, Supreme Court properly denied plaintiff's motion for summary judgment on liability on his section 240 (1) claim.

Triable issues also exist as to plaintiff's Labor Law § 241 (6) claim. That claim is predicated on a violation of Industrial Code (12 NYCRR) § 23-9.8 (h), which requires that loaded pallets be kept level at all times (see *Kuligowski v One Niagara, LLC*, 177 AD3d 1266, 1268 [4th Dept 2019]). According to plaintiff's un rebutted testimony, his coworker lost control of the lever on the hydraulic machine when he tried to free the machine from the edge of the truck after the pallet broke. Thus, the record presents issues of fact as to whether the broken pallet may have contributed to the accident by rendering the construction materials unlevel. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

35 In the Matter of Shelby C.V., Appellant, v Joshua W.K., Respondent. [248 NYS3d 543]—

and Enforcement Act—Proceeding Pending in Another State—Communication with Out-of-State Court
Parent, Child and Family—Custody—Uniform Child Custody Jurisdiction and Enforcement Act—Temporary Emergency Jurisdiction

Order, Family Court, New York County (Jacob K. Maeroff, Ref.), entered on or about December 4, 2024, which, to the extent appealed from as limited by the briefs, dismissed with prejudice the mother's petition for custody on the ground that New York lacked jurisdiction, unanimously reversed, on the law, without costs, the motion to dismiss denied, and the matter remanded for further proceedings.

Family Court failed to satisfy the procedural mechanism required by the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law art 5-A) when a custody-related proceeding is pending in another state. Specifically, after the court became aware of the Ohio proceeding, the record does not reflect that the court attempted to communicate with the Ohio court, which is a reversible error (*see* Domestic Relations Law §§ 76-c [4]; 76-e [1]; 75-i; *Vanneck v Vanneck*, 49 NY2d 602, 610-611 [1980]; *see also Matter of Vashon H. v Bret I.*, 191 AD3d 1120 [3d Dept 2021]).

The father's assertion that the communication might have taken place, even if the court did not mention it on the record, is unavailing because the court must make a record of the communication between the courts and inform the parties, none of which transpired in this case (*see* Domestic Relations Law § 75-i [4]). Moreover, there is no statutory or case law authority to substantiate the father's argument that the court's failure to communicate with the Ohio court and put the proceedings on the record is a harmless error.

Moreover, Family Court failed to comply with the statutory requirement to consider, under the circumstances presented and in light of the serious allegations of domestic violence in the mother's petition, whether it was necessary to exercise temporary emergency jurisdiction to protect the mother and the child (*see* Domestic Relations Law § 76-c [1]; *Matter of Alger v Jacobs*, 169 AD3d 1415, 1416-1417 [4th Dept 2019]; *Matter of Santiago v Riley*, 79 AD3d 1045, 1046 [2d Dept 2010]). Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

36 Wah Win Group Corporation, Appellant, v 979 Second Avenue LLC et al., Respondents. [248 NYS3d 553]—

Appearances—Appearance by Corporation—Motion for Extension of Time to Retain Counsel

Dismissal and Nonsuit—Want of Prosecution—Failure to Comply with 90-Day

Notice

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered on or about June 14, 2024, which denied plaintiff Wah Win Group Corporation's motion for an extension of time to obtain replacement counsel and to file a note of issue, and granted defendant 979 Second Avenue LLC's cross-motion to dismiss the complaint pursuant to CPLR 3216 (a) for failure to prosecute, unanimously affirmed, without costs.

Plaintiff's motion for an extension of time to retain counsel was properly denied. Plaintiff is a corporation and may not proceed pro se (CPLR 321 [a]; *see Matter of Nieblas-Love v New York City Hous. Auth.*, 212 AD3d 509, 510 [1st Dept 2023], *lv dismissed* 40 NY3d 973 [2023]). There is no evidence that it assigned its claims to its non-attorney manager, who accordingly did not have authority or standing to represent the corporation in court (*see id.*; *Kinlay v Henley*, 57 AD3d 219, 220 [1st Dept 2008]). To the extent that plaintiff claims not to have been served with papers by its prior counsel withdrawing from representation, its arguments are conclusory and fail to rebut the presumption of proper service based on the affidavits of service (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]). Plaintiff's motion is otherwise supported by conclusory, unsupported statements as to why it was unable to retain counsel within statutory and court-imposed deadlines.

In addition, Supreme Court providently granted defendant's cross-motion to dismiss the action (*see* CPLR 3216; *see Baczkowski v Collins Constr. Co.*, 89 NY2d 499, 503 [1997]). Defendant satisfied the prerequisite for a motion pursuant to CPLR 3216 by issuing a 90-day notice, with which plaintiff did not comply (*see* CPLR 3216 [b] [3]; *Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]). Again, to the extent plaintiff claims it was not served with the notice, it fails to rebut the affidavit of service creating a presumption of proper service. Dismissal was a proper remedy because, in opposition to the motion, plaintiff did not demonstrate a lack of intention to abandon prosecution of the action, having failed to sufficiently show that its extensive delay was justified or excused, or that it had a meritorious claim (*see Espinoza v 373-381 Park Ave. S., LLC*, 68 AD3d 532, 533 [1st Dept 2009]).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Scarpulla, Friedman, Chan, Hagler, JJ.

37 The People of the State of New York, Respondent, v Joseph Garrett, Appellant. [248 NYS3d 226]—Judgment, Supreme

Court, New York County (Gregory Carro, J.), rendered October 19, 2022, 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. Concur—Webber, J.P., Kapnick, Gesmer, Shulman, Michael, JJ.

(February 24, 2026)

1 In the Matter of Aryeh Realty Corp., Appellant, v 18 E. 69th St Tenant, LLC, Also Known as 18 East 69th Street Tenant, LLC, et al., Respondents, et al., Respondent. [253 NYS3d 99]—

Landlord and Tenant—Lease—Oral Agreement to Modify Rent—Performance Confirming Modification

Landlord and Tenant—Lease—Attorneys' Fees—Prevailing Party

Order of the Appellate Term, Supreme Court, First Department, entered on or about October 25, 2024, which affirmed a judgment of the Civil Court, New York County (Aija Tingling, J.), entered November 13, 2023, unanimously affirmed, without costs.

The Appellate Term correctly found that Civil Court's finding that the parties orally agreed to a modification of the monthly rent was supported by the record. That finding "rest[ed] in large measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992] [internal quotation marks omitted]). We agree with the Appellate Term that Civil Court properly found that the parties orally agreed that petitioner landlord would reduce the rent by \$15,000 per month, and that, although such a reduction was not compatible with the lease as written, there was

performance confirming the modification that was unequivocally referable to the oral modification (*see Paramount Leasehold, L.P. v 43rd St. Deli, Inc.*, 136 AD3d 563, 568 [1st Dept 2016], *lv denied and dismissed* 28 NY3d 1024 [2016]). We decline to consider landlord’s argument related to consideration for the rent reduction, since it was not presented to Civil Court (*see National Interstate Ins. Co. v Interstate Indem. Co.*, 215 AD3d 593, 595 [1st Dept 2023]; *Twitchell Tech. Prods., LLC v Mechoshade Sys., LLC*, 227 AD3d 45, 55-56 [2d Dept 2024]). For similar reasons, we decline to consider landlord’s argument that tenant did not detrimentally rely on the oral modification.

Determining whether a party has “prevailed” for purposes of recovering its attorneys’ fees “requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope” (*Excelsior 57th Corp. v Winters*, 227 AD2d 146, 147 [1st Dept 1996]). The Appellate Term properly found that Civil Court correctly concluded that the central issue in this proceeding, was whether the lease was orally modified to afford tenant a rent reduction. Petitioner did not prevail and is therefore not entitled to recover attorneys’ fees (*see Matter of Wiederhorn v Merkin*, 98 AD3d 859, 863 [1st Dept 2012], *lv denied* 20 NY3d 855 [2012]).

Landlord failed to allege a violation of Article 45 of the lease in its petition, the May 2021 notice to cure or the November 2021 rent demand. Landlord first mentioned that it was seeking recoupment of the rent concession during its closing argument following trial.

We have considered petitioner’s remaining arguments and find them to be unavailing. Concur—Webber, J.P., Kennedy, González, Higgitt, Michael, JJ.

The Decision and Order of this Court entered herein on December 4, 2025 (244 AD3d 448 [1st Dept 2025]) is hereby recalled and vacated (*see* 2026 NY Slip Op 62953[U] [1st Dept 2026] [decided simultaneously herewith]). **[Prior Case History: 85 Misc 3d 1.]**

2 Larone Butler, Respondent, v Marco Realty Associates, L.P., et al., Appellants, and All-Rite Construction Co., Inc., et al., Respondents. (And a Third-Party Action.) [253 NYS3d 44]—

Labor—Safe Place to Work—Demolition Laborer—Elevation-Related Haz-

ard—Pipe Falling from Ceiling

**Labor—Safe Place to Work—Statutory and Common Law Negligence—Means and Methods of Work—Supervisory Authority over Injury-Producing Work
Indemnity—Contractual Indemnification—Negligence in Coordinating Injury-Producing Work**

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about April 10, 2025, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on liability on his Labor Law § 240 (1) claim as against defendants Marco Realty Associates, L.P., Old Navy, LLC, The Gap, Inc., and James Hunt Construction Co., Inc. (collectively, the building defendants); granted defendant/third-party defendant Always First, Inc.'s motion for summary judgment dismissing the building defendants' claim for common-law indemnification and contribution; and denied the building defendants' motion for summary judgment dismissing plaintiff's Labor Law §§ 200 and 240 (1) and common-law negligence claims as against them and for judgment in their favor on their contractual indemnification claims as against Always First, Inc. and third-party defendant QCC Maintenance, Inc., unanimously modified, on the law, to dismiss the Labor Law § 200 and common-law negligence claims as against Marco Realty, Old Navy, and The Gap, and otherwise affirmed, without costs.

Supreme Court properly concluded that plaintiff, who worked as a demolition laborer for Always First, established prima facie entitlement to partial summary judgment under Labor Law § 240 (1) based on his testimony that a pipe measuring around 8 inches wide and 10 feet long fell from the ceiling while he was working underneath it. The pipe, which had been partially cut by another trade worker a few hours before the accident, was an object that required securing, and "plaintiff's injury was the foreseeable consequence of the risk of performing the task without any safety device of the kind enumerated in the statute" (*Diaz v Raveh Realty, LLC*, 182 AD3d 515, 516 [1st Dept 2020]). In opposition, defendants failed to raise a material issue of fact (*id.*).

The motion court should have dismissed the section 200 and common-law negligence claims as against Marco Realty, Old Navy, and The Gap. Because the accident arose from the means and methods of the work, as opposed to any defect on the premises, the relevant inquiry is whether defendants had supervisory authority over the injury-producing work (*see Humphrey v Park View Fifth Ave. Assoc. LLC*, 113 AD3d 558, 559 [1st Dept 2014]; *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 265-266, 269 [2001]). Plaintiff does not dispute that

Marco Realty, Old Navy, and The Gap, the owner and tenants of the premises, did not control the injury-producing work. The record, however, presents an issue of fact as to whether James Hunt, the general contractor at the work site, controlled the schedule of trades that were working at the subcellar floor and ceiling, placing it in a position to avoid the unsafe condition of plaintiff's work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 353 [1998]; *Garcia v 100 Church Fee Owner, LLC*, 244 AD3d 480, 482 [1st Dept 2025]).

Because issues of fact remain as to James Hunt's negligence in coordinating the injury-producing work, Supreme Court properly denied the building defendants' motion for summary judgment on the contractual indemnification claims as against Always First and QCC. James Hunt is the sole indemnitee under the indemnification provisions in Always First's and QCC's subcontracts. While the indemnity agreements are unenforceable with respect to James Hunt's own act of alleged negligence (*see General Obligations Law* § 5-322.1; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]), they will be enforceable should a jury determine that James Hunt is free of negligence.

With regard to QCC, summary judgment on the contractual indemnification claim as against it was properly denied for the additional reason that factual issues remain as to whether plaintiff's claim arose out of QCC's work given the unresolved circumstances surrounding the identity of the worker who cut the pipe and whether the pipe was QCC's responsibility to remove.

Finally, Supreme Court properly granted Always First's motion dismissing the common-law indemnification and contribution claims as plaintiff's shoulder and spine injuries are not among the "grave injuries" enumerated in Workers' Compensation Law § 11.

We have considered defendants' remaining arguments and find them unavailing. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

3 In the Matter of Benjamin Cui, Petitioner, v City of New York et al., Respondents. [252 NYS3d 55]—

Civil Service—Police—Discipline of Police—Disparaging Remarks About Female Officers

Determination of respondents, dated March 24, 2023, which demoted petitioner from probationary captain to lieutenant effective March 17, 2023, and determination of respondents, dated December 12, 2023, which, after a hearing, approved the

finding of the Assistant Deputy Commissioner of Trials that petitioner was guilty of employment discrimination and imposed a penalty of 30 vacation days, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, New York County [Lyle E. Frank, J.], entered on or about Oct. 3, 2024), dismissed, without costs.

Substantial evidence supports respondents' determination that petitioner violated a New York City Police Department policy prohibiting discourteous, disparaging, or disrespectful remarks based on membership in a protected class (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Petitioner admitted that he stated to a group of subordinates that he "prefer[s] two female officers not riding in the same car" and that "a female officer might not be able to handle some situation[s] . . . because most of the female officers don't have upper body strength" and "need a male officer to help in a fight." Furthermore, two other officers who were present testified that petitioner also suggested that two women officers, if partnered together, will "gossip." Based on the testimony of petitioner's two subordinates who witnessed the comments, the NYPD had a rational basis to conclude that he made "disparaging remarks" about women in violation of NYPD procedure (*see Matter of Sexton v Kelly*, 95 AD3d 544, 544 [1st Dept 2012]). Even assuming petitioner's preference for mixed-gender patrol assignments was grounded in genuine concerns for officer safety and community engagement, the Hearing Officer reasonably concluded that the message petitioner communicated was that women officers cannot handle themselves in the field.

Contrary to petitioner's contention, the NYPD need not prove that petitioner's conduct would be actionable under the New York City Human Rights Law in order to discipline him for making "disparaging" remarks. On the contrary, the Police Commissioner is authorized to discipline officers for violations of NYPD rules and codes of conduct (*see Administrative Code of City of NY* § 14-115 [a]).

Petitioner's challenge to his prehearing demotion from probationary captain to lieutenant is time-barred because he commenced this proceeding more than four months after that decision became final on March 17, 2023. Contrary to petitioner's contention otherwise, the NYPD did not create ambiguity about the finality of the decision or suggest that it was contingent on the hearing outcome, and the letter notifying petitioner of his demotion clearly communicated its effective date (*see CPLR* 217 [1]; *Matter of Rocco v Kelly*, 20 AD3d 364,

366 [1st Dept 2005]). Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

4 Linda Day, Respondent, v The Plumber's Shop & Associates LLC, Appellant, et al., Defendant. [249 NYS3d 56]—

Release—Scope of Release—Ambiguous Language—Failure to Define Property Damage Claim

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 25, 2025, which, to the extent appealed from, denied defendant's motion to dismiss the complaint based on the terms of a release signed by plaintiff, unanimously affirmed, with costs.

A release, which plaintiff signed after receiving an insurance settlement for substantial water damage to her property, contained language stating that it applied to “any and all property damage claims which [plaintiff] now [has] or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen property damage.” Plaintiff seeks to recover alternative living expenses and loss of use (ALE) after receiving the settlement and signing the release.

Supreme Court correctly denied defendant's motion to dismiss, as the language of the release is susceptible to more than one interpretation. Contrary to defendant's contention otherwise, the release did not plainly define a “property damage claim,” nor does it otherwise make clear that a claim to recover the ALE damages that flowed from or grew out of the property damage must itself necessarily constitute a “property damage claim” that is subject to the terms of the release. The release is therefore ambiguous with respect to whether the ALE claim constitutes a property damage claim that falls within the terms of the release (*see Stolper v Burbaki*, 200 AD3d 480, 481 [1st Dept 2021]; *Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381, 382 [1st Dept 2007]).

We have considered defendant's remaining contentions and find them unavailing. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

5 Juan Fernandez, Respondent, v Sub 412 Associates, LLC, et al., Appellants-Respondents, and Nucor Construction Corp., Respondent-Appellant/Third-Party Plaintiff-Respondent-Appellant, et al., Defendant. Anfield Interiors, Inc., Third-Party Defendant-Appellant-Respondent/Second Third-Party Defendant-Appellant-Respondent/Third Third-Party Defendant-Appellant-Respondent, et al., Third-Party Defendant. Aramis,

Inc., Second Third-Party Plaintiff-Appellant-Respondent. The Estee Lauder Companies Inc., Third Third-Party Plaintiff-Appellant-Respondent. [252 NYS3d 59]—

Labor—Safe Place to Work—Construction Project—Elevation-Related Hazard—Collapse of Floating Ceiling

Labor—Safe Place to Work—Statutory and Common Law Negligence—Inherent Defect

Order, Supreme Court, New York County (Nicholas W. Moyne, J.), entered on or about April 25, 2024, which granted plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim, unanimously affirmed, without costs.

Order, same court and Justice, entered August 20, 2024, which, to the extent appealed from, denied the motion of defendants-appellants-respondents Sub 412 Associates, LLC (Sub 412), 2398 Realty Associates, LLC (Realty) (collectively, Sub 412/Realty) for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against them, unanimously affirmed, without costs.

Order, same court and Justice, entered on or about March 24, 2025, insofar as it granted defendant-third-party plaintiff-respondent-appellant Nucor Construction Corp. (Nucor) conditional contractual indemnification against third-party defendant-second third-party defendant-third third-party defendant-appellant respondent Anfield Interiors, Inc. (Anfield) and defendant-second third-party plaintiff-appellant-respondent Aramis, Inc. (Aramis), denied the branch of Nucor's motion as sought summary judgment on its third-party claim against Anfield for common law indemnification, denied Nucor summary judgment dismissing all cross claims and counterclaims against it for common-law indemnity and contribution, and denied Nucor summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it, unanimously modified, on the law, to grant Nucor summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it, to grant Nucor full contractual indemnification against Anfield and to strike Aramis' name from the order, and otherwise affirmed, without costs.

Plaintiff was working as a laborer on a construction project, cleaning debris from the floor, when a floating ceiling that was installed as part of the project collapsed onto him, causing injuries. The floating ceiling was constructed by Anfield's carpenters, who were supposed to follow the plans and specifications prepared by defendant architectural firm. Post-accident inspection of the collapsed drop ceiling revealed that some of the steel rods supporting the drop ceiling were not embedded

into the ceiling's concrete slab as required by the architectural plans, but rather, were affixed to non-structural sheetrock soffits. Anfield acknowledged its defective work and reconstructed the drop ceiling at its own expense. An expert engineer retained by Nucor, the general contractor, opined that the accident was caused by Anfield's failure to properly affix all the steel rod supports of the drop ceiling to the overhead concrete slab.

Defendants Sub 412/Realty owned the property. Defendant-third-party plaintiff-appellant-respondent The Estee Lauder Companies Inc. (Estee) and its subsidiary, Aramis, leased the sixth floor of the building and hired Nucor to renovate the space. Plaintiff was employed by third-party defendant Manhattan Fine Cleaners Inc., which Nucor hired to clean the worksite. The evidence established that Anfield directed and controlled the means and methods of the work involved in constructing the faulty drop ceiling at issue.

The court properly granted plaintiff's motion for partial summary judgment on the Labor Law § 240 (1) claim. Plaintiff established that his claim "involved a falling object as well as a fall from an elevation caused by inadequate safety devices" (*Molina v 114 Fifth Ave. Assoc., LLC*, 231 AD3d 543, 543 [1st Dept 2024]). Defendants' argument that the floating ceiling was a permanent structure, and that plaintiff was required to show that the collapse of the structure was foreseeable for the protections of Labor Law § 240 (1) to apply is not persuasive. No evidence was offered as to a final inspection of the structure that would precede a "sign off" as to the drop ceiling's completion (see *Rivera v 454 W. 57th St. Holding LLC*, 236 AD3d 477, 477 [1st Dept 2025]; *Delcid v Park Ave. Christian Church [Disciples of Christ]*, 231 AD3d 666, 666 [1st Dept 2024]).

Defendant Nucor should have been granted summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence against it. The evidence established that Anfield workers created the dangerous condition by the means and methods of their work when they failed to properly anchor all the pencil rods of the suspended ceiling into the ceiling's overhead concrete slab. Such defect was not inherent in the premises.

Also, because there was no evidence offered to raise a triable issue that Nucor negligently performed its general supervision and inspection responsibilities over Anfield's work, Nucor has demonstrated its entitlement to full contractual indemnification from Anfield based on the broad, "arising out of" Anfield's work language contained in the contract (see *Pimentel v DE Frgt. LLC*, 205 AD3d 591, 594 [1st Dept 2022]), and inasmuch

as Nucor's liability, if any, is purely vicarious (*see Quiroz v Wells Reit-222 E. 41st St., LLC*, 128 AD3d 442, 443 [1st Dept 2015]). Nucor is also entitled to common-law indemnification from Anfield, since it has demonstrated its liability is vicarious, without any proof of any negligence or actual supervision on its own part (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]). For similar reasons, Nucor is entitled to summary judgment dismissing all other cross claims and counterclaims against it for common-law indemnification and contribution.

To the extent Nucor did not move for contractual indemnification from Aramis, and Aramis did not have a contractual relationship with Nucor, Nucor is not entitled to such relief from Aramis. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

6 In the Matter of Sr K' M.W., a Child Alleged to be Neglected. K.W., Appellant; New York City Administration for Children's Services, Respondent. [249 NYS3d 57]—

Parent, Child and Family—Abused or Neglected Child—Imminent Risk of Harm—Untreated Mental Illness

Order of disposition, Family Court, New York County (Valerie A. Pels, J.), entered on or about December 17, 2024, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about November 7, 2024, which, after a hearing, found that respondent K.W. neglected the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of respondent's longstanding history of mental illness and psychiatric hospitalizations, resistance to treatment, refusal to take prescribed medication, and recent episodes of bizarre and erratic behavior (*see* Family Ct Act §§ 1046 [b] [i]; 1012 [f] [i] [B]; *Matter of Derick L. [Catherine W.]*, 135 AD3d 499 [1st Dept 2016], *lv denied* 27 NY3d 903 [2016]; *Matter of Caress S.*, 250 AD2d 490 [1st Dept 1998]).

Evidence of actual injury was not required to enter a finding of neglect, as there is sufficient evidence that the child is at imminent risk of harm due to respondent's untreated mental illness (*see Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]; *Matter of Shanai W. [Sherry P.]*, 212 AD3d 447, 448 [1st Dept 2023]).

There are no grounds for disturbing Family Court's evaluation of the evidence, including the court's credibility determina-

tions, as the findings were clearly supported by the record (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]; *Matter of Sade B. [Scott M.]*, 103 AD3d 519, 520 [1st Dept 2013]). Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

7 Lava Media Pte Ltd., Appellant, v John Hart, Respondent. [249 NYS3d 60]—

Actions—Stay—Risk of Inconsistent Adjudications

Order, Supreme Court, New York County (Suzanne J. Adams, J.), entered January 13, 2025, which, insofar appealed from, granted defendant's motion for a stay pending the resolution of another action, unanimously affirmed, with costs.

In January 2021, defendant John Hart and another individual filed an action in a court in India against, among others, plaintiff Lava Media Pte Ltd., alleging that Lava Media and the other defendants interfered with his rights to a novel. Although the India court denied an application for a preliminary injunction, the India action remains ongoing. Lava Media then commenced this New York action against Hart in February 2023, alleging, among other things, that in commencing the India action, Hart breached a release and agreement not to sue that he signed in August 2013.

Supreme Court providently exercised its discretion in staying this action pending resolution of the India action. To determine whether the defendants in the India action infringed Hart's copyright, the India court will have to determine whether the August 2013 assignment of rights to Particle Media Private Limited, Lava Media's assignor and predecessor in interest, was valid. If, as Hart contends in the India action, the 2013 assignment is invalid, Hart's covenant not to sue, which is part and parcel of the assignment, will likely also be invalid. In that event, most of the claims in this New York action would be subject to dismissal. As a result, allowing this action to proceed would risk inconsistent adjudications and constitute a waste of judicial resources (CPLR 2201; *215 W. 84th St Owner LLC v Ozsu*, 209 AD3d 401, 401 [1st Dept 2022]).

Despite Lava Media's contention otherwise, a stay under CPLR 2201 is not limited to situations in which the action stayed is between the same parties and for the same cause and relief as the other action (*see PK Rest., LLC v Lifshutz*, 138 AD3d 434, 436 [1st Dept 2016]; *Asher v Abbott Labs.*, 307 AD2d 211, 211-212 [1st Dept 2003]; *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93-94 [1st Dept 1997]).

We have considered defendant's remaining contentions and

find them unavailing. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

8 In the Matter of N.N. and Another, Children Alleged to be Permanently Neglected. Delroy N., Appellant; Children's Aid Society, Respondent. [252 NYS3d 57]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Adoption by Foster Parents

Parent, Child and Family—Termination of Parental Rights—Desire to Keep Children Together

Order of disposition, Family Court, Bronx County (Karen M. C. Cortes, J.), entered on or about November 20, 2023, which, after a fact-finding determination that respondent father permanently neglected the subject children, terminated his parental rights to the children and committed their guardianship and custody to petitioner agency and the Commissioner of Social Services for the purposes of adoption, unanimously affirmed, without costs. Appeal from fact-finding order, same court and judge, entered on or about March 1, 2023, unanimously dismissed, without costs, as no appeal lies from an order entered on default.

As to the dispositional order, the record supports the determination that termination of the father's parental rights is in the children's best interests (*see Matter of Shilloh M.J. [Jamesina M.J.]*, 183 AD3d 540, 541 [1st Dept 2020]). The evidence presented at the dispositional hearing established that the children were doing well living with their respective foster parents, with whom they have resided for almost the entirety of their lives, approximately 12 years, and that both children wanted to be adopted by their foster parents, did not feel safe in the father's care, and did not want to see him (*see Matter of CaAliyah W-N. A. [Carl A.]*, 236 AD3d 401, 402 [1st Dept 2025]; *Matter of "No Given Name" O. [Adele O.]*, 209 AD3d 443, 443-444 [1st Dept 2022]; *Matter of Anthony R.L.O. [Anthony L.O.]*, 143 AD3d 475, 476 [1st Dept 2016]). The father also displayed limited knowledge of the subject child's diagnosed medical condition and was unaware of that child's medical providers (*see Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*, 112 AD3d 535, 537 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]).

To the extent the father claims that the court should have issued a suspended judgment, there is no basis for such relief, where the father's situation is unlikely to change with a short reprieve, and the children are entitled to permanency in their pre-adoptive foster homes (*see Matter of Nautica Skyy W. [Amber NY-Cole W.]*, 198 AD3d 589, 590 [1st Dept 2021]).

Finally, the father's desire to keep the children together is not a sufficient basis to reverse the disposition under the circumstances. While generally it may be preferable for siblings to reside together, the rule is not absolute, especially where, as here, the children have lived in separate foster homes for many years (*see Matter of Ender M. Z.-P. [Olga Z.]*, 109 AD3d 834, 836 [2d Dept 2013], *lv denied* 72 NY3d 863 [2014]), and the foster parents are committed to arranging sibling visits for the children to maintain their relationship (*see Matter of Joseph P. [Edwin P.]*, 143 AD3d 529, 530 [1st Dept 2016], *lv denied* 28 NY3d 1110 [2016]).

No appeal lies from the fact-finding order, since the father defaulted at the fact-finding hearing (*see Matter of Roberto O. [Lakeysha H.]*, 151 AD3d 525, 525 [1st Dept 2017]; *Matter of Jaquan Tieran B. [Latoya B.]*, 105 AD3d 498, 499 [1st Dept 2013]).

We have considered the father's remaining arguments and find them unavailing. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

9 NYCTL 2019-A Trust et al., Plaintiffs, v 196 East 7th Street LLC et al., Defendants. 196 East 7 Venture LLC, Nonparty Appellant, v 198 East Tenants Corp., Nonparty Respondent. [249 NYS3d 58]—

Mortgages—Foreclosure—Writ of Assistance—Dispossession of Nonparty

Order, Supreme Court, New York County (Francis A. Kahn III, J.), entered on or about September 17, 2025, which denied nonparty-appellant 196 East 7 Venture LLC's motion for a writ of assistance pursuant to Real Property Actions and Proceedings Law § 221, unanimously affirmed, with costs.

RPAPL 221 was not the appropriate vehicle to seek dispossession of nonparty-respondent. By its terms, the statute authorizes a writ of assistance “[i]f a party . . . withholds possession.” Further, issuance of a writ of assistance “against one who was not joined as a party to the proceeding would violate due process” (*Goshen Mtge., LLC v Cumberbatch*, 219 AD3d 806, 807 [2d Dept 2023] [internal quotation marks omitted]; *see Gibbs v Kinsey*, 170 AD2d 1049, 1049 [4th Dept 1991]). Appellant's reliance on CPLR 6501 (a) is misplaced because that section does not account for how RPAPL 221 could be used against a nonparty despite the latter section's requirement that the target of the writ be a party.

We have considered the remaining arguments and find them unavailing. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

10 The People of the State of New York, Respondent, v Clinton Benjamin, Appellant. [248 NYS3d 556]—

Crimes—Sentence—Surcharge and Fees

Judgment, Supreme Court, New York County (Steven M. Statsinger, J.), rendered April 17, 2019, convicting defendant, upon his plea of guilty, of attempted murder in the second degree under indictment No. 2561/17, and bail jumping in the second degree under indictment No. 2350/17, and sentencing him to an aggregate term of five years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed at sentencing with respect to indictment No. 2561/17 only, and otherwise affirmed.

Based on our own interest of justice powers, we vacate the surcharge and fees imposed on defendant at sentencing with respect to indictment No. 2561/17 (*see People v Chirinos*, 190 AD3d 434, 435 [1st Dept 2021]). We note that the People consent to this relief. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

11 The People of the State of New York, Respondent, v Gregory Darby, Appellant. [248 NYS3d 557]—Judgment, Supreme Court, New York County (Neil Ross, J., at suppression hearing; James Burke, J., at plea and sentencing), rendered November 16, 2021, convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree and attempted criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of five and a half years followed by five years of postrelease supervision, unanimously affirmed.

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 567-569 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his challenge to the court's denial of his motion to suppress physical evidence (*see People v Araujo*, 10 AD3d 535, 535 [1st Dept 2004], *lv denied* 4 NY3d 760 [2005]). Defendant's valid waiver of appeal also forecloses review of his excessive sentence claim (*see People v Nunez*, 220 AD3d 597, 597 [1st Dept 2023], *lv denied* 41 NY3d 1004 [2024]). In any event, we perceive no basis for reducing defendant's sentence. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

12 The People of the State of New York, Respondent, v Leonard Lewis, Appellant. [253 NYS3d 47]—

Crimes—Promoting Sexual Performance by Child—Morphed Image of Identifiable Minor

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about January 9, 2025, which adjudicated defendant a level one sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), reversed, on the law, without costs, and the sex offender adjudication vacated.

This case centers on three images of a depraved and disgusting kind created by the 58-year-old defendant over several months of his communications with his 16-year-old cousin. The particulars of the images are not relevant to the question before the court, except in one respect. Defendant sent his cousin images of adult bodies engaged in sexual conduct, with the 16-year-old victim's face superimposed on one of the figures in each image. Defendant was convicted under 18 USC § 1466A (a) (1) (A) which proscribes images created, adapted or modified to appear as though an identifiable minor is engaging in sexual conduct, otherwise known as “morphed” child pornography. We agree with our dissenting colleague that defendant's actions were deplorable. Nevertheless, we are constrained to find that this conduct does not give rise to criminal liability under the analogous New York State statute, Penal Law § 263.15, as it existed at the time of Mr. Lewis' conviction. Therefore, the court erred in adjudicating defendant a sex offender.

The conduct prohibited by Penal Law § 263.15 at the time of defendant's conviction was the production, direction, or promotion of “any performance which includes sexual conduct by a child less than seventeen years of age.” Thus, this statute criminalizes pornography that results from a performance by a child.¹ This type of pornography corresponds to one of the three varieties of child pornography recognized under federal law, which is established when “the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct” (18 USC § 2256 [8] [A]). However, the conduct underlying defendant's federal conviction fell within 18 USC § 2256 (8) (C), which is violated when “such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.” At that time, New York's statute did not proscribe such conduct. Since then, Penal Law § 263.15 has been amended to include “a performance cre-

1. Contrary to the dissent's claim, our decision gives meaning to the plain language of the applicable statute, which covers “conduct by a child.” Nor do we discount the harm suffered by the victim in this case, as the dissent implies. Nevertheless, and despite our shared abhorrence of defendant's behavior, we disagree with the dissent that the pre-amendment statute criminalized his acts.

ated or altered by digitization.” However, this amendment did not go into effect until July 8, 2025, more than six years after Mr. Lewis’ conviction.

While this issue has not been addressed by our courts previously, we find persuasive the reasoning in decisions of two appellate courts of other states which held that proscriptions in their state statutes materially the same as the pre-2025 amendment version of Penal Law § 263.15 did not cover the sort of “morphed” image involved here (*see Parker v State*, 81 So3d 451, 453 [Fla Dist Ct App 2011]; *State v Zidel*, 156 NH 684, 695-696, 940 A2d 255, 265 [2008]). Following these decisions, the state legislatures in Florida and New Hampshire amended their child pornography laws to cover “morphed” images. As stated above, our legislature has already done so.

The People and the dissent argue that the statutory definition of “sexual conduct” includes “simulated” sex acts (*see* Penal Law § 263.00 [3]) and that the statutory definition of “simulated” includes “the explicit depiction of [sex acts]” (*see* Penal Law § 263.00 [6]). From these two definitions, they derive an expansive definition of “depicts” that would include within the scope of the pre-2025 amendment version of Penal Law § 263.15 virtually any visual representation of sexual conduct involving a minor, whether or not it includes a photographic image of the minor’s face. Under the People’s definition, even a drawing of stick figures purportedly engaged in sexual conduct, with some indication that one of the figures is a particular minor, would “depict” sexual conduct. This analysis ignores that the pre-2025 version of Penal Law § 263.15 was clearly intended only to criminalize pornography created by means of a performance by a child.

In addition, the dissent focuses on the language in Penal Law § 263.00 (6) that defines “simulated” to mean a depiction that “creates the appearance” of sexual conduct. However, if the legislature had understood that language to include morphed images, there would have been no need for it to amend Penal Law § 263.15 to cover images of sexual conduct “created or altered by digitization” (L 2025, ch 55, § 1, part L, § 3). Indeed, the Court of Appeals and the United States Supreme Court both determined that the pre-amendment statute was aimed, as suggested by its plain language, at preventing the “exploitation of children as subjects in sexual performances” by criminalizing the possession of material in which actual children perform real or simulated sexual acts (*People v Ferber*, 52 NY2d 674, 682 n 3 [1981, Jasen, J., dissenting], *revd* 458 US 747 [1982]; *see also New York v Ferber*, 458 US 747, 759, 764

[1982] [noting the harm to children in the “permanent record of the children’s participation” and the statute’s focus on a definable class of material and “the welfare of children engaged in its production”]; *Ashcroft v Free Speech Coalition*, 535 US 234, 241, 249 [2002] [noting that New York’s pre-amendment statute addressed in *New York v Ferber* addressed “images made using actual minors” and that New York’s pre-amendment statute prohibited images that “are themselves the product of child sexual abuse”)].²

In *Ferber*, the US Supreme Court addressed a criminal defendant’s First Amendment challenge to the pre-amendment Penal Law § 263.15. The Court noted that Penal Law § 263.00 (3) includes “simulated” sexual intercourse (*Ferber*, 458 US at 751). However, based on the New York motion court’s opinion, which was affirmed by this Court without decision (*People v Ferber*, 74 AD2d 558 [1st Dept 1980]), the Court clearly interpreted that language to refer to the simulation of a sexual act by an actual child. In determining whether the pre-amendment Penal Law § 263.15 violated the First Amendment to the extent that it prohibited material that might have artistic or scientific value, the Court balanced First Amendment interests against the state’s interest in protecting children. In doing so, the Court noted that, “if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. *Simulation outside of the prohibition of the statute could provide another alternative.* Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more ‘realistic’ by utilizing or photographing children” (*Ferber*, 458 US at 763 [emphasis added]).

The dissent argues that Penal Law § 263.15 implicates First Amendment issues. In *Ferber*, the Supreme Court noted that, for First Amendment purposes, “the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed” (*Ferber*, 458 US at 764). The Court found that because the pre-amendment Penal Law § 263.15 was limited to works depicting “sexual conduct by children below a specified age,” the conduct met that requirement (*id.*). Since it is clear and confirmed by the courts of this State and the United States Supreme Court that the pre-

2. Thus, the dissent is incorrect in stating that we adopt the position that the pre-amendment Penal Law § 263.15 is violated only if there is “actual sexual conduct by a child.” Rather, our position is that it is violated only if a child performs an actual or simulated sexual act.

amendment statute was aimed at preventing the creation and dissemination of material in which actual children performed actual or simulated sexual acts, applying the interpretation urged by our dissenting colleague would implicate the very First Amendment concerns she raises.³

The dissent also argues that our decision requires courts to consider the “parts or percentages” of a child’s body depicted in the material at issue in order to determine whether it is covered by the prior version of Penal Law § 263.15. That is inaccurate. Rather, our decision finds that the pre-amendment statute does not cover morphed images at all, regardless of the body parts or percentages depicted.

Under *Matter of North v Board of Examiners of Sex Offenders of State of N.Y.* (8 NY3d 745, 753 [2007]), where there is overlap between the elements of the foreign offense and the New York statute but the foreign offense also criminalizes conduct not covered under the New York offense, a court must examine the conduct underlying the foreign conviction to determine whether that conduct would have constituted a crime in New York. If so, then the foreign conviction is a registrable offense. Here, the foreign offense criminalizes conduct not covered under the New York statute because the creation of “morphed” images of a minor engaged in sexual conduct did not violate Penal Law § 263.15 prior to July 8, 2025, the effective date of the amendment. Accordingly, defendant’s adjudication as a sex offender must be vacated. Concur—Kern, J.P., Friedman, Gesmer, O’Neill Levy, JJ.

Pitt-Burke, J., dissents in a memorandum as follows: Article 263 of New York’s Penal Law was enacted to protect children, the most vulnerable and defenseless New Yorkers. As evident throughout its legislative history, its purpose was to “make material containing children in sexual performances, no matter what the purpose, against the public policy of this State” (Assembly Mem in Support at 2, Bill Jacket, L 1977, ch 910). By its terms, Penal Law § 263.15 states that “[a] person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, such person produces, directs or promotes any performance which includes sexual

3. The dissent mischaracterizes our discussion of these First Amendment cases as “holding . . . that the production and distribution of morphed images has absolute First Amendment protection under the pre-amendment statute.” We do not so hold. Rather, our discussion of these cases merely highlights that these courts interpreted the pre-amendment Penal Law § 263.15 as criminalizing the production, direction or promotion of any obscene performance involving sexual conduct, whether real or simulated, by an actual child.

conduct by a child less than seventeen years of age.”¹ “The crime is the offense against the child—the harm ‘to the physiological, emotional, and mental health’ of the child; the ‘psychological harm’; the invasion of the child’s ‘vulnerability.’ These harms collectively are the consequential damages that flow from the trespass against the dignity of the child” (*United States v Wiegand*, 812 F2d 1239, 1245 [9th Cir 1987] [citations omitted], *cert denied* 484 US 856 [1987], citing *New York v Ferber*, 458 US 747, 758, 775-776 [1982]).

Defendant concedes that he committed a sexual offense. However, he asserts that he is not subject to registration because Penal Law § 263.15 does not criminalize the production and distribution of the “morphed images”² he created. This argument highlights a pivotal concern before this Court. As technology has advanced, the obscene and predatory ways in which children have been preyed upon has progressed in tandem. I believe this Court’s interpretation of the conduct prohibited by Penal Law § 263.15 must progress in lockstep, a determination to the contrary undermines the legislative intent behind its existence.

While I agree with the majority regarding the deplorable nature of defendant’s conduct, its holding, provides that the production and distribution of morphed images has absolute First Amendment protection under the pre-amendment statute, thereby undermining, “New York’s asserted interest in protecting children from psychological, emotional, and mental harm” (*New York v Ferber*, 458 US 747, 775 [1982, O’Connor, J., concurring]). As aptly stated by the Sixth Circuit, “[m]orphed images . . . offer[] a difference in degree of injury but not in kind . . . [M]orphed images may create many of the same reputational, emotional and privacy injuries as actual pornography” (*Doe v Boland*, 698 F3d 877, 880-881 [6th Cir 2012], *cert denied* 570 US 904 [2013]). Here, the 16-year-old child

1. In July 2025, this statute was modified to address the use of artificial intelligence in creating child pornography and now reads as: “A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, such person produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age, including a performance created or altered by digitization” (L 2025, ch 55, § 1, part L, § 3 [eff July 8, 2025]).

2. According to *Ashcroft v Free Speech Coalition*, morphed images refer to “means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children” (535 US 234, 242 [2002]).

victim, the defendant's cousin, undoubtedly suffered harm when his face was adapted into these images engaged in sexually explicit activity and those images subsequently distributed. The harm to the child was the legislature's chief concern in enacting article 263 of New York's Penal Code (News Release of James W. McCabe, Sr., Assembly Vice-Chairman of Mental Health at 3, Bill Jacket, L 1977, ch 910). I dissent.

Background

Defendant, who was 58 years old at the time of his offense, was convicted in federal district court in Pennsylvania, of production and distribution of obscene visual representations of the sexual abuse of children (18 USC § 1466A [a] [1] [A], [B]). Defendant's federal conviction stemmed from his sex-related communications with his 16-year-old cousin. During these communications, defendant expressed that he has wanted to have a sexual relationship with the victim since the victim was 12 years old; sent his victim sexually graphic text messages, some of which included photographs and videos; requested sexually graphic images of the victim; expressed desires to engage in sex acts with the victim; included photos and videos containing child pornography;³ and sent three "morphed" images which were the grounds for his federal conviction.

Defendant was subsequently released in 2022 and began living in a reentry facility in the Bronx. The Board of Sex Offenders prepared a Risk Assessment Instrument (RAI) in which it determined that defendant was required to register as a sex offender because his federal conviction "included all of the essential elements" of the registrable New York offense of promoting a sexual performance by a child (Penal Law § 263.15).

While defendant does not dispute that the federal statute and state statute have the same essential elements, he contends that his conduct is not criminalized under Penal Law § 263.15 because "morphed" images do not constitute child pornography within the meaning of the statute. Specifically, defendant contends that Penal Law § 263.15 requires that there be "actual sexual conduct by a child" and because the morphed images he created portray a child's face on an adult's body, his conduct does not fall within the statute. An argument the majority seemingly adopts.

Discussion

In 1995, New York enacted the Sex Offender Registration Act

3. While defendant communications included child pornography, his federal conviction stemmed from the production and distribution of morphed images and not the other pornographic images.

(SORA) requiring individuals convicted of certain sex offenses to register. SORA was enacted as a civil statute meant to protect members of the community, particularly children, by notifying them of individuals who may present a danger (*Doe v Pataki*, 120 F3d 1263, 1276-1278 [2d Cir 1997], *cert denied* 522 US 1122 [1998]).

When an individual is convicted of a sex offense in a foreign jurisdiction, a SORA court must conduct an analysis to determine whether the out-of-state offense is a registrable offense in New York (*Matter of North v Board of Examiners of Sex Offenders of State of N.Y.*, 8 NY3d 745, 753 [2007]). In doing so, the court must first compare the statutes to determine whether they have the same essential elements and if so, determine whether defendants conduct would have been criminalized under the New York Statute (*id.*).

Here, defendant concedes that the statute has all the same essential elements as the federal statute. Therefore, we are left to determine only whether defendant's conduct is criminalized under Penal Law § 263.15, and if he is, in turn, subject to registration pursuant to SORA (*id.*).

In *Ferber*, the United States Supreme Court held that state legislatures are entitled to "greater leeway in the regulation of pornographic depictions of children" (458 US at 756). Thus, when interpreting article 263, "our goal is to give force to the intent of the legislature and we therefore begin with the plain text—the clearest indicator of legislative intent. In a manner consistent with the text, we may look to the purpose of the enactment and the objectives of the legislature. We must also interpret a statute so as to avoid an unreasonable or absurd application of the law" (*Bank of Am., N.A. v Kessler*, 39 NY3d 317, 324 [2023] [citation omitted]).

Article 263 was introduced to prevent, "pernicious peddlers of child pornography . . . from preying on unsuspecting children" (News Release of James W. McCabe, Sr., Assembly Vice-Chairman of Mental Health at 3, Bill Jacket, L 1977, ch 910). From its inception, the statute sought to make material containing "children in sexual performances, no matter what the purpose, against the public policy of this State" (Assembly Mem in Support at 2, Bill Jacket, L 1977, ch 910). To achieve this goal, the legislature intended that article 263 be applied broadly to act as a shield to prevent the exploitation of innocent children by predatory adults, both known and strangers alike (*People v Keyes*, 75 NY2d 343, 348 [1990]). The statute must also be interpreted "as a whole, and all parts of an act are to be read and construed together to determine the legisla-

tive intent” (McKinney’s Cons Laws of NY, Statutes § 97; *Bank of Am., N.A.*, 39 NY3d at 324).

In determining what constitutes sexual performance under article 263, we must turn to the statutorily defined terms and apply those definitions uniformly within the statutory text (McKinney’s Cons Laws of NY, Statutes § 97; *Bank of Am., N.A.*, 39 NY3d at 324). Article 263 defines sexual performance as, “any performance or part thereof which . . . includes sexual conduct by a child less than seventeen years of age” (Penal Law § 263.00 [1]). Sexual conduct, as defined at the time of defendant’s offense, was “actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals” (Penal Law § 263.00 [3]).⁴ Finally, simulated is defined as, an “explicit depiction^[5] . . . which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks” (Penal Law § 263.00 [6]).

When considering the above definitions as applied in the statutory text, defendant’s conduct is clearly a violation of Penal Law § 263.15. To understand the severity of defendant’s conduct, it is important to set forth the details of his actions. At issue, are three “morphed” images defendant created by adapting the underaged victim’s face into extremely explicit sexually graphic images which are described in his federal presentence investigation report as follows:

Image No. 1: “[A] cartoon rendering of a naked mature adult male with his legs spread. The male had a white liquid leaking from his exposed rectum. An image of [the 16-year-old victim’s] face was placed onto the male’s body.”

Image No. 2: “Appears to be naked male on his hands and knees. This male has an image of [the 16-year-old victim’s] face placed onto the body. Another naked male is behind the first male with his hands on his shoulders. This individual has what appears to be an image of the defendant’s face placed onto the body.”

4. The definition of sexual conduct has since been revised and now reads as: “actual or simulated vaginal sexual contact, oral sexual contact, anal sexual contact, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.” (Penal Law § 263.00 [3]; L 2023, ch 777, § 56 [eff Sept. 1, 2024]).

5. According to Merriam-Webster’s dictionary, a depiction is “a representation in words or images of someone or something.” (Merriam-Webster.com Dictionary, depiction [<https://www.merriam-webster.com/dictionary/depiction>]).

Image No. 3: “Appears to be a naked adult male on his back. He is exposing an erection, and it appears there is ejaculate on his stomach. This individual has an image of [the 16-year-old victim’s] face placed onto it. It appears another naked individual is up against him.”

Defendant contends, and the majority credits, that these three images do not fall within the meaning of simulated sexual conduct under Penal Law § 263.15 because the images do not show sexual conduct by an actual minor. Stated plainly, defendant contends that superimposing the 16-year-old child victim’s face on a morphed image engaged in sexually explicit conduct is not criminalized in New York.

To accept defendant’s argument, we must not only ignore that the description of image No. 2 does not indicate that an adult’s body was used, but also the statutory definition of simulated, an “explicit depiction . . . *which creates the appearance of such conduct*” (Penal Law § 263.00 [6] [emphasis added]), and sexual performance, “any performance or part thereof which . . . includes sexual conduct by a child less than seventeen years of age” (Penal Law § 263.00 [1]). Defendant’s argument also forces this Court to draw an arbitrary distinction as to the percentage of a child’s body that must be incorporated into a morphed image to constitute sexual performance by a child. Are we to say that a child is not as much of a child from the neck up as they are from the neck down, whereas here, the distributed images create the appearance of the 16-year-old victim engaging in sexual conduct, by adapting his face into the underlying image?

When the statute is read as a whole, rather than piecemeal, an image that involves a minor and creates the appearance that they are engaged in sexual conduct is clearly penalized (McKinney’s Cons Laws of NY, Statutes § 97; Penal Law § 263.15; *Bank of Am., N.A.*, 39 NY3d at 324). The statute does not contemplate which portion of a child is used in the image, how much of the child’s body is used or how realistic the image is (*see* Penal Law § 263.15). It simply requires an actual child victim, as is clear by the age requirement in the definition of sexual performance (Penal Law § 263.00 [1]). These considerations are expressly relevant here, where the face used in the images was defendant’s readily identifiable underage family member.

While we are constrained to the descriptions contained in defendant’s federal presentence investigation report to make a determination, the majority’s finding, is an unnecessary narrowing of the statute (*People v Fraser*, 96 NY2d 318, 327 [2001]

[“By enacting article 263, the New York Legislature intended to ‘employ broad measures to eradicate child pornography in all its forms’ ” (citation omitted)], *cert denied* 533 US 951 [2001]). Specifically, the majority finds that Penal Law § 263.15 does not criminalize morphed images “regardless of the body parts [of a child] or percentages depicted.” Said differently, the majority contends that as long as an image can be considered morphed, it does not fall within the purview of the pre-amendment statute even if it would otherwise constitute the promotion of a sexual performance by a child. This in turn means that a morphed image that utilizes the body and face of a child with the arms of an adult is not criminalized under New York law, thus highlighting the shortcomings of the majority’s position and its failure to adhere to the broad application of Penal Law § 263.15 the legislature intended (Assembly Mem in Support at 2, Bill Jacket, L 1977, ch 910).

Further, the majority’s contention that the legislature has since amended Penal Law § 263.15 to criminalize morphed images misses the mark. As clearly highlighted in the session notes and bill jacket directly corresponding to the amendment, the language “created or altered by digitization” was introduced to address the rampant use of artificial intelligence (AI) in the creation of child pornography (NY Assembly Debate on 2025 NY Assembly Bill A3005-C at 137 [“I introduced . . . the New York State AI Child Safety Act to finally bring justice into the 21st Century to close a dangerous loophole in our State’s Penal Law that allow predators to exploit innocent victims through deep fake pornography and walk away with a slap on the wrist”]).

While morphed images can be created using artificial intelligence, this is not the sole method in which these images are created. Morphed images, as defined by the United States Supreme Court in *Ashcroft v Free Speech Coalition*, involve the creation of “virtual images . . . [to] alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children” (535 US 234, 242 [2002]).

It is also clear that the amended statute’s inclusion of the language “created or altered by digitization” does not negate or replace the statutory definition of simulated (L 2025, ch 55, § 1, part L, § 3 [eff July 8, 2025; Penal Law § 263.00 [6]). As a result, contrary to the majority’s contention, the legislature’s 2025 amendment more readily indicates that it believed the conduct at issue here was already criminalized under the stat-

ute, rather than the amendment being implemented for its inclusion.

The majority's interpretation also serves as a complete disregard of the plain language of the statute and the legislature's intent to protect minors from predatory adults, essentially creating a carve out in the New York penal law for the predation of minors. However, as explained in further detail below, I believe defendant's conduct falls within the simulated sexual conduct prohibited under Penal Law § 263.15—specifically, it constitutes simulated lewd exhibition of genitals (Penal Law § 263.00 [3], [6]).

As noted by the majority, Penal Law § 263.15 was aimed at protecting actual children from falling victim to the dissemination of material which depicts them engaged in actual or simulated sexual conduct. The statute's requirement that the conduct include an actual child simply means that the victim must be under the age of 17 (Penal Law § 263.15), presumably to ensure the statute would not criminalize conduct involving youthful-looking adults (*Ferber*, 458 US at 776 [Brennan, J., concurring] ["the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material"]). Here, defendant created and distributed morphed images that included the actual face of a child victim and simulated the victim engaged in sexually explicit acts (*see* Penal Law §§ 263.15; 263.00 [3], [6]). The actual child victim that the statute requires, and who suffered harm the majority seemingly deems inadequate to trigger the application of Penal Law § 263.15, is defendant's 16-year-old cousin.

At the time of the offense, article 263 defined sexual conduct as "actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or *lewd exhibition of the genitals*" (Penal Law § 263.00 [3] [emphasis added]), and simulated as, "the explicit depiction . . . *which creates the appearance of such conduct* and which exhibits any uncovered portion of the breasts, genitals or buttocks" (Penal Law § 263.00 [6] [emphasis added]).

While the statute did not separately define "lewd exhibition of the genitals" when it provided that such conduct would constitute "sexual conduct," courts have repeatedly utilized the six-factor test in *United States v Dost* (636 F Supp 828, 832 [SD Cal 1986], *affd* 813 F2d 1231 [9th Cir 1987], *cert denied*

484 US 856 [1987]) to determine whether images constitute “lewd exhibitions of genitals” (see *Doe v Wilhelmina Models, Inc.*, 229 AD3d 128, 133 [1st Dept 2024]; *People v Wheeler*, 99 AD3d 1168, 1172 [4th Dept 2012], *lv denied* 20 NY3d 989 [2012]; *People v Horner*, 300 AD2d 841, 842-845 [3d Dept 2002]). Similarly, here, the legislature did not expressly define “simulated lewd exhibition of genitals.” Therefore, I believe the *Dost* test, modified to incorporate the statutory definition of simulated, should be applied to determine whether the morphed images constitute “simulated lewd exhibition of genitals” (*Dost*, 636 F Supp at 832; Penal Law § 263.00 [3], [6]).

In applying this modified *Dost* test, we should consider whether the image creates the appearance that “the focal point of the visual depiction is on the child’s genitalia or pubic area”; “whether the setting of the visual depiction is sexually suggestive”; whether the image creates the appearance of “the child . . . depicted in an unnatural pose, or in inappropriate attire, considering the age of the child”; whether the image creates the appearance of “the child . . . fully or partially clothed, or nude”; “whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity”; and “whether the visual depiction is intended or designed to elicit a sexual response in the viewer” (*id.*). Regarding the last factor, we should consider “whether it is designed to elicit a sexual response in the viewer, albeit perhaps not the average viewer, but perhaps in the pedophile viewer” (*Horner*, 300 AD2d at 843 [internal quotation marks and citation omitted]).

As in *Horner*, this factor test would represent a nonexhaustive list that is to be applied in a manner which allows courts to make a fact intensive determination whether the conduct fits within the framework of Penal Law § 263.15 (*Horner*, 300 AD2d at 843). The application of this modified standard would ensure that the legislature’s intent in enacting article 263 is met, while also guaranteeing that the statute is being applied in a manner that does not infringe on an individual’s constitutional rights (see *Ferber*, 458 US at 773-774; *Dost*, 636 F Supp at 832).

In applying the modified *Dost* test to the facts of this case, defendant’s conduct is prohibited under Penal Law § 263.15 (Penal Law § 263.00 [3], [6]; *Dost*, 636 F Supp at 832; *Horner*, 300 AD2d at 843). Here, defendant created three “morphed” images by superimposing the underaged victim’s face onto the body of an adult male engaged in sexually explicit activities.

The first factor, whether the image creates the appearance that “the focal point of the visual depiction is on the child’s

genitalia or pubic area,” weighs in favor of the images produced constituting simulated lewd exhibition of genitals (*Dost*, 636 F Supp at 832). Image No. 1, creates the appearance that the victim’s genitals are the focal point of the visual depiction by superimposing the victims face onto the adult body. Specifically, image No. 1 creates the appearance that the 16-year-old victim has his legs spread while white liquid leaked from his exposed rectum.

The second factor, “whether the setting of the visual depiction is sexually suggestive,” also weighs in favor of the images qualifying as simulated lewd exhibition of genitals (*id.*). Images Nos. 1, 2, and 3 are sexually suggestive in depicting various sexually explicit actions; image No. 1 depicts a body with the legs spread and an exposed rectum; image No. 2 depicts a naked male on his hands and knees while another male is behind him with his hands on his shoulders; and image No. 3 depicts a naked male on his back exposing an erection.

The third factor, whether the image creates the appearance of “the child . . . depicted in an unnatural pose, or in inappropriate attire, considering the age of the child” weighs in favor of the images produced constituting simulated lewd exhibition of genitals (*id.*). Images Nos. 1 and 2 create the appearance of the child in an unnatural pose (*id.*); image No. 1 creates the appearance of the 16-year-old victim with his legs spread and rectum exposed; and image No. 2 creates the appearance of the 16-year-old victim laid on his back with apparent white liquid on his stomach.

The fourth factor, whether the image creates the appearance of “the child . . . fully or partially clothed, or nude” weighs in favor of the images constituting simulated lewd exhibition of genitals (*id.*). All three images superimpose the victims face onto a nude body, creating the appearance that the 16-year-old victim is nude.

The fifth factor, “whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity” also weighs in favor of the images constituting simulated lewd exhibition of genitals (*id.*). All three images suggest a willingness to engage in sexual activity based on the positions in which the body that the victim was superimposed onto are positioned (*id.*).

Finally, the sixth factor “whether the visual depiction is intended or designed to elicit a sexual response in the viewer” is to be analyzed not by the average viewer, but rather the pedophilic viewer (*Dost*, 636 F Supp at 832; *Horner*, 300 AD2d at 843). All three morphed images were created in a manner to

elicit a reaction in the viewer as the bodies were posed in sexually suggestive positions (*Dost*, 636 F Supp at 832), and weigh in favor of defendant's conduct constituting simulated lewd exhibition of genitals. While an average viewer would likely be alarmed and repulsed by the "morphed" images at issue, the pedophile viewer would not be (*id.*; *Horner*, 300 AD2d at 843). Therefore, considering this modified *Dost* test, defendants conduct in creating and distributing the three morphed images of the victim qualifies as simulated sexual conduct and is criminalized under Penal Law § 263.15 (*id.*).

Critically, the United States Supreme Court found that Penal Law § 263.15 required a case-by-case analysis to ensure its application would not run afoul with a defendant's First Amendment rights (*Ferber*, 458 US at 773-774). Contrary the majority's contention, the application of the modified *Dost* test ensures that defendant's First Amendment rights are not infringed upon while also ensuring the legislature's intent in enacting article 263 are met (*Dost*, 636 F Supp at 832; Penal Law § 263.00 [3], [6]; News Release of James W. McCabe, Sr., Assembly Vice-Chairman of Mental Health at 3, Bill Jacket, L 1977, ch 910).

Unlike the majority's holding, this finding does not rely on the case law of foreign jurisdictions to determine whether defendant's conduct is prohibited under the law of *this* state. Nevertheless, the cases relied on by the majority, *State v Zidel* (156 NH 684, 940 A2d 255 [2008]) and *Parker v State* (81 So3d 451 [Fla Dist Ct App 2011]), are distinguishable from this case, both by their facts and by their First Amendment implications.

Zidel and *Parker* did not involve the distribution of morphed images. Rather, these cases implicated the First Amendment because they involved the "mere" possession of morphed images which included a child from the neck up placed on the body of an adult involved in a sexually explicit activity (*Zidel*, 156 NH at 685, 940 A2d at 256-257; *Parker*, 81 So3d at 452). In *Zidel*, the court found that since the defendant only possessed the image and there was no harm suffered by the child whose face was used, his possession of the image was protected under the First Amendment (*Zidel*, 156 NH at 696, 940 A2d at 265). In *Parker*, the court also credited the fact that the defendant was only charged with possession as the reason the "morphed" image was not prohibited by the statute (*Parker*, 81 So3d at 455). While I appreciate the *Parker* and *Zidel* courts' analyses, it is not the practice of this Court to blindly follow foreign courts' nonbinding interpretation of foreign statutes when interpreting our penal law.

The possession of child pornography has First Amendment implications, which is why statutes like Penal Law § 263.15 require a fact intensive application to ensure that it does not interfere with a defendant's constitutional rights (*see Ashcroft*, 535 US at 257-258; *Ferber*, 458 US at 773-774). In *Zidel*, the court found that defendant's possession was protected under the First Amendment because there was "no demonstrable harm . . . to the child whose face is depicted in the image" (*Zidel*, 156 NH at 693, 940 A2d at 263). The same cannot be said here, the harm to the victim was felt immediately as the images were distributed.

Although *Parker* and *Zidel* similarly involve morphed images, they are readily distinguishable as the defendant here was convicted of both the production and distribution of the images (*see Zidel*, 156 NH at 685, 940 A2d at 256-257; *Parker*, 81 So3d at 452). Therefore, defendant's conduct fits squarely within the purview of article 263.

Article 263 and SORA's purpose are two sides of the same coin,⁶ the protection of the community, particularly minors, from the predatory individuals who commit sex offenses (News Release of James W. McCabe, Sr., Assembly Vice-Chairman of Mental Health at 3, Bill Jacket, L 1977, ch 910; L 1995, ch 192, § 1). Article 263 was meant to be broadly applied to eradicate child pornography from within our border (*Keyes*, 75 NY2d at 348). As stated in its legislative history, "[w]hat deep scars will etch themselves into the psyches of these children? What chance for normal social adjustment will exist for them. These youngsters have no adequate means to protect themselves. We must supply this protection." (Letter from City of New York, Office of the Mayor at 2, Bill Jacket, L 1977, ch 910). As arbiters of the law, we should apply law in the manner intended by the legislature rather than a manner that circumvents legislative intent. It is as true today as it was when article 263 was enacted, children are the most vulnerable New Yorkers, and we must protect them as they are ill-equipped to protect themselves. As a result, I would affirm the SORA court's determination to adjudicate defendant as a level one offender.

13 The People of the State of New York, Respondent, v Lonzell Green, Appellant. [253 NYS3d 59]—

Crimes—Assault—Serious Physical Injury—Protracted Impairment of Health Element

Crimes—Sentence—Youthful Offender—Violent Gang-Related Offenses

6. While Penal Law § 263.15 exists to punish the sexual conduct, SORA exists to protect the community from those who commit such conduct.

Judgment, Supreme Court, New York County (Cori H. Weston, J.), rendered July 13, 2022, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 13 years, unanimously affirmed.

Judgment of resentencing, same court (Kate Paek, J.), rendered July 8, 2024, resentencing defendant to an aggregate term of 3½ years, upon his conviction, same court (Edward J. McLaughlin, J.), rendered October 27, 2015, upon his pleas of guilty, of gang assault in the second degree and conspiracy in the fourth degree, unanimously affirmed.

The court properly declined to instruct the jury on the lesser included offense of assault in the second degree because there was no reasonable view of the evidence, viewed most favorably to defendant, that the victim did not sustain a “protracted impairment of health” sufficient to constitute serious physical injury (*see* Penal Law §§ 10.00 [10]; 120.10 [1]; 120.05 [2]). The victim testified about the pain and physical limitations she suffered for months after the shooting, and her testimony was amply corroborated by the medical records (*see People v Marquez*, 49 AD3d 451, 451 [1st Dept 2008], *lv denied* 10 NY3d 936 [2008]; *People v McDuffie*, 293 AD2d 287 [1st Dept 2002], *lv denied* 98 NY2d 699 [2002]). “[N]othing in the statute limits ‘protracted’ impairments to those that are permanent or measured in years” (*People v Herrera*, 202 AD3d 517, 519 [1st Dept 2022] [internal quotation marks omitted], *lv denied* 38 NY3d 1134 [2022]). Moreover, the record reflects that the victim continued to suffer weakness and a limited range of motion at the time of trial, about two years later (*see People v Graham*, 297 AD2d 579, 580 [1st Dept 2002], *lv denied* 99 NY2d 535 [2002]).

Defendant’s ineffective assistance of counsel claim is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*People v Mora*, 290 AD2d 373, 373-374 [1st Dept 2002], *lv denied* 98 NY2d 639 [2002]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel took a position adverse to defendant (*see People v Fredericks*, 43 NY3d 551, 560 [2025]), or that any potential conflict of inter-

est operated on the defense (*see People v Ortiz*, 76 NY2d 652, 655-656 [1990]; *People v Silva*, 15 AD3d 263, 263 [1st Dept 2005], *lv denied* 4 NY3d 857 [2005]).

We perceive no basis for reducing the sentence.

With respect to the judgment of resentencing, the court providently exercised its discretion in denying youthful offender treatment (*see generally People v Anthony C.*, 25 NY3d 937, 938 [2015]). The underlying crimes were serious, involving multiple instances of violent gang-related activity (*see People v Johnson*, 226 AD3d 597 [1st Dept 2024], *lv denied* 42 NY3d 928 [2024]), and in the years before his resentencing, defendant committed an additional violent felony offense, causing the victim to sustain serious physical injury (*see People v Ortiz*, 168 AD3d 463 [1st Dept 2019], *lv denied* 33 NY3d 952 [2019]). We perceive no basis to substitute a youthful offender adjudication in the interest of justice. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

14 The People of the State of New York, Respondent, v René Rodriguez, Appellant. [249 NYS3d 59]—

Crimes—Plea Bargaining—Enforcement of Agreement—Surcharge and Fees

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered April 27, 2017, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of four years, unanimously affirmed.

Defendant claims that the court's imposition of the mandatory surcharge and fees constituted a breach of his plea agreement because he was not informed that he would be assessed these fees prior to the entry of his plea. Regardless of the validity the appeal waiver (*see People v Lemos*, 34 AD3d 343, 343 [1st Dept 2006], *lv denied* 8 NY3d 924 [2007]), this claim is unpreserved, and we decline to review it in the interest of justice (*see People v Prihett*, 279 AD2d 335 [1st Dept 2001]). In any event, defendant's claim is unavailing. "The mandatory surcharge, crime victim assistance fee and DNA databank fee are not components of a defendant's sentence" and a failure to pronounce the surcharge and fees prior to a defendant's entry of a plea does not "deprive the defendant of the opportunity to knowingly, voluntarily and intelligently choose among alternative courses of action" (*People v Hoti*, 12 NY3d 742, 743 [2009], citing *People v Guerrero*, 12 NY3d 45 [2009]; *People v Henderson*, 67 AD3d 426 [1st Dept 2009], *lv denied* 14 NY3d 841 [2010]; *cf. People v Catu*, 4 NY3d 242, 245 [2005]). Nothing in the record suggests that defendant was induced to accept a

plea by the promise of a waiver of any surcharge or fees (*Prihett*, 279 AD2d at 335). Further, the imposition of the surcharge and fees is mandatory (Penal Law § 60.35; CPL 420.35 [2]). Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O’Neill Levy, JJ.

15 The People of the State of New York, Respondent, v William Bunce, Appellant. [248 NYS3d 557]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered November 2, 2022, and 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. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O’Neill Levy, JJ.

16 The People of the State of New York, Respondent, v Marlon Cruz, Appellant. [249 NYS3d 59]—

Crimes—Appeal—Invalid Waiver—Suggestion That Right to Appeal Conditioned upon Going to Trial

Judgment, Supreme Court, New York County (Anne Swern, J.), rendered September 28, 2023, convicting defendant, upon his plea of guilty, of robbery in the third degree and grand larceny in the fourth degree (two counts) and sentencing him respectively to concurrent indeterminate prison terms of 3½ to 7 years, 2 to 4 years, and 2 to 4 years, unanimously affirmed.

Defendant’s waiver of his right to appeal was not made knowingly, intelligently, and voluntarily (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]; *People v Johnson*, 14 NY3d 483, 486-487 [2010]). Although there is no mandatory litany that must be used to obtain a valid waiver of the right to appeal (*Johnson*, 14 NY3d at 486), when using the trial context to illustrate the waiver the court improperly suggested that the right to appeal was conditioned upon going to trial (*see People v Colon*, 219 AD3d 1256, 1256 [1st Dept 2023] [court’s explanation improperly suggested that the right to appeal was “limited to review of trial errors”]; *cf. People v Lopez*, 6 NY3d 248, 257 [2006] [finding the waiver invalid where the court made the “misleading” statement that “when you plead guilty you waive your right of appeal”]). The detailed written waiver that defendant executed with counsel cannot save the confusing nature of the court’s oral colloquy, “as a written waiver is not a complete substitute for an on-the-record explanation” (*People v Bonilla*, 211 AD3d 614, 615 [1st Dept 2022] [internal quotation marks omitted]).

However, we perceive no basis for reducing the sentence. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O’Neill Levy, JJ.

17 Hal Rubin, Appellant-Respondent, v Harleen Kahlon, Respondent-Appellant. [253 NYS3d 62]—

Libel and Slander—Actionable Words—“Of and Concerning” Requirement—Social Media Post

Civil Rights—Strategic Lawsuits against Public Participation—Issue of Public Interest

Order, Supreme Court, New York County (Richard G. Latin, J.), entered on or about July 25, 2025, which, to the extent appealed from as limited by the briefs, granted defendant’s motion to dismiss the amended complaint for failure to state a claim and denied defendant an award of attorneys’ fees pursuant to Civil Rights Law § 70-a, unanimously modified, on the law, to the extent of granting attorneys’ fees and costs to defendant, and the matter remanded for further proceedings consistent with this decision, and otherwise affirmed, without costs.

The motion court properly granted defendant’s motion to dismiss plaintiff’s complaint because, on its face, the allegedly defamatory Facebook post was not “of and concerning” plaintiff (*see Matter of Soames v 2LS Consulting Eng’g, D.P.C.*, 187 AD3d 490, 492 [1st Dept 2020]). Contrary to plaintiff’s argument, this was a question of law for the court (*see Three Amigos SJJ Rest., Inc. v CBS News Inc.*, 28 NY3d 82, 87 [2016]). The post was made anonymously in a private Facebook group known as “Moms of the UES.” It described an incident involving an unnamed doorman and an unnamed child in a building identified only as being located at the corner of 68th Street and Second Avenue, a location that plaintiff does not dispute contains three large buildings collectively employing numerous doormen. A member of the “Moms of the UES” without special knowledge would have no way of knowing, whether by innuendo or otherwise, that the anonymous post specifically referred to plaintiff.

We are not persuaded by plaintiff’s contention that his employer and colleagues understood the post to be about him. He offers no information or evidence identifying individuals who recognized him as the subject of the post, and the amended complaint makes clear that his employer suspended him even before defendant made the Facebook post. Moreover, the termination notice given to plaintiff by his employer makes no reference to the post and instead cites only plaintiff’s own conduct.

The instant action falls within the scope of the anti-SLAPP statute (CPLR 3211 [g]; Civil Rights Law §§ 70-a, 76-a). The Facebook post concerned an issue of public interest (*see Carey v Carey*, 74 Misc 3d 1214[A], 2022 NY Slip Op 50124[U], *5 [Sup Ct, NY County 2022], *affd* 220 AD3d 477 [1st Dept 2023]). Furthermore, the adjudication under CPLR 3211 (a) (7) in defendant's favor was sufficient to support her entitlement to a mandatory award of counsel fees pursuant to Civil Rights Law § 70-a (1) (a) (*see Reeves v Associated Newspapers, Ltd.*, 232 AD3d 10, 12 [1st Dept 2024], *lv dismissed* 44 NY3d 990 [2025]). Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O'Neill Levy, JJ.

18 Thor 138 N. 6th St. LLC, Appellant, v Goldberg Weprin Finkel Goldstein LLP, Respondent. [252 NYS3d 52]—

Escrows—Breach of Agreement—Refusal to Release Escrow—Liability of Escrow Agent

Contracts—Contractual Limitation of Liability—Willful Default—Refusal to Release Deposit under Assignment Agreement

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 10, 2021, which denied plaintiff's motion under CPLR 3212 for summary judgment and dismissed the action, unanimously affirmed, with costs.

Plaintiff failed to establish that defendant-escrow agent violated the escrow provisions of the assignment agreement so as to warrant an award of summary judgment in plaintiff's favor or to entitle plaintiff to prejudgment interest under CPLR 5001. Defendant was the escrow agent for the deposit under an assignment agreement between plaintiff and nonparty Tisoped Corp., which was the subject of the underlying dispute previously resolved by this Court (*see Tisoped Corp. v Thor 138 N 6th St LLC*, 180 AD3d 587 [1st Dept 2020], *lv denied* 37 NY3d 914 [2021]). On appeal of the March 14, 2018 order, this Court affirmed summary judgment in plaintiff's favor (*see id.*). Defendant was entitled to await the resolution of the appeal in the underlying action before releasing the balance of the escrow funds to plaintiff.

Under section 14 (c) of the assignment agreement, when presented with a demand for the release of the escrow balance by either side, defendant was required to notify the other side and give it the opportunity to object to the release of the deposit within 10 days. Under section 14 (d) (ii), upon the entry of "a final order or judgment," defendant "may" release the deposit, but that section also expressly provides, "the Escrow Agent shall not be or become liable in any way or to any person for his refusal to comply with any such claims or demands" for the

release of the deposit to either party, absent gross negligence or willful default. The permissive “may” in section 14 (d) (ii) renders meritless plaintiff’s assertion that defendant lacked discretion to refuse to release the balance of the escrow funds (see e.g. *Western & S. Life Ins. Co. v U.S. Bank N.A.*, 209 AD3d 6, 13 [1st Dept 2022]).

Plaintiff did not establish any gross negligence or willful default on the part of defendant to overcome section 14’s limitations on the liability of defendant as escrow agent. Gross negligence in the context of a limitation on liability requires a showing of “a reckless indifference to the rights of others” (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). A “willful default” requires a showing that the party intended to commit a breach of a legal obligation (see e.g. *Pearce, Urstadt, Mayer & Greer Realty Corp. v Atrium Dev. Assoc.*, 77 NY2d 490, 495 [1991]). Since defendant’s conduct in refusing to release the deposit over Tisoped’s objection did not violate sections 14 (c) and (d) of the agreement, plaintiff cannot establish the degree of culpable conduct on defendant’s part that would render it liable for its refusal to release the deposit while Tisoped’s appeal was pending.

It is undisputed that after this Court’s February 25, 2020 affirmation of summary judgment in plaintiff’s favor in the underlying action (*Tisoped Corp.*, 180 AD3d at 587), defendant promptly released the escrow balance to plaintiff on March 25, 2020, following plaintiff’s March 6, 2020 demand. The record shows that defendant’s conduct did not contravene section 14 of the assignment agreement and that defendant was not in breach of any provision in the assignment agreement which pertained to the escrow agent. Prejudgment interest under CPLR 5001 did not accrue and Supreme Court properly denied plaintiff’s motion and dismissed the action.

We have considered plaintiff’s remaining contentions and find them unavailing. Concur—Renwick, P.J., Kennedy, Rodriguez, Pitt-Burke, O’Neill Levy, JJ.

19 In the Matter of West Side Marquis LLC, Respondent, v Carlos Maldonado, Appellant, et al., Respondents. [253 NYS3d 101]—

Landlord and Tenant—Lease—Failure to Offer Renewal Lease—Continuation of Rights under Expiring Lease

Landlord and Tenant—Lease—Applicability of Housing Stability and Tenant Protection Act

Landlord and Tenant—Rent Regulation—Return to Actual Collectible Rent Sent Forth in Agreement—Increases Authorized by Law

Order, Appellate Term of the Supreme Court, First Depart-

ment, entered on or about February 23, 2024, which reversed the order of the Civil Court, New York County (Daniele Chinaea, J.), entered on or about August 5, 2022, granting respondent tenant's cross-motion for summary judgment dismissing petitioner landlord's holdover petition, reinstated the petition and remanded to the Civil Court for further proceedings, unanimously reversed, on the law, without costs, and respondent tenant's cross-motion for summary judgment dismissing the petition granted. The Clerk is directed to enter judgment accordingly.

In April 2005, the apartment building at issue exited the Mitchell-Lama program and became subject to rent stabilization laws. To facilitate the building's transition out of the Mitchell-Lama program, the nonparty predecessor landlord filed an application with the New York State Division of Housing and Community Renewal (DHCR) under Rent Stabilization Law of 1969 (RSL) (Administrative Code of City of NY) § 26-513 (a) "for adjustment of the initial legal regulated rent" for apartments in the building. By rent-stabilized lease dated July 15, 2005, the predecessor landlord leased an apartment to respondent tenant's grandmother for a two-year term. The tenant, who had lived in the apartment with his grandmother since 1988, was listed as a co-occupant.

By agreement dated December 1, 2006, the predecessor landlord entered into a settlement agreement with certain tenants, including the tenant's grandmother, to rent their apartments at a legal regulated rent of \$500 per room per month (the WSM Agreement). The terms of the WSM were ratified by DHCR order dated December 29, 2006 (the DHCR Order). Under paragraph 2 (B) of the DHCR Order, the parties agreed that the signatories would pay a preferential rent, denominated the actual collectible rent (ACR), applicable solely to those tenants and their qualifying successors.* It is undisputed that the tenant is not entitled to rely on the ACR as set forth in the WSM Agreement because he was not at least 28 years old on December 1, 2006, as is required under paragraph 3 (A) (iii) of the DHCR Order.

As relevant here, in the last renewal lease signed by the tenant's grandmother, dated August 17, 2015, she elected to renew for a one-year term commencing on November 1, 2015 and ending on October 31, 2016 at a legal regulated rent of

* The DHCR Order also states in relevant part, "This Order is issued pursuant to the application and stipulation and is specific to the address and docket referenced above and has no precedential effect on any other application nor establishes any policy of [DHCR]."

\$2,429.53 per month and an ACR of \$791 per month. The tenant's grandmother died in June 2016.

In 2017, the landlord commenced a holdover proceeding against the tenant. By order entered July 16, 2018, the Civil Court held that the tenant was the lawful successor to his grandmother's rights and therefore entitled to receive a renewal lease in his name. The tenant, however, was not offered a renewal lease until November 2019.

The Housing Stability and Tenant Protection Act of 2019 (HSTPA) (L 2019, ch 36) was enacted on June 14, 2019, and became effective immediately. The HSTPA restricts a landlord's right to withdraw a previously offered preferential rent, even if properly preserved in the lease. Specifically, Rent Stabilization Law § 26-511 (c) (14) provides that for "any tenant who . . . is or was entitled to receive a renewal or vacancy lease" as of the date of the HSTPA's enactment, "the amount of rent for such housing accommodation that may be charged and paid shall be no more than the rent charged to and paid by the tenant prior to that renewal, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law."

In or about September 2019, the landlord commenced another holdover proceeding against the tenant, which was voluntarily discontinued. As stated above, on or about November 7, 2019, the landlord offered the tenant a renewal lease in his name for a one-year term commencing March 1, 2020, at a legal regulated rent of \$2,481.62. The renewal did not include an ACR amount. The tenant rejected the renewal lease and, by 15-day notice of termination dated January 8, 2020, the landlord terminated the tenant's lease effective January 29, 2020.

On January 30, 2020, the landlord commenced the instant holdover proceeding seeking a judgment of possession and warrant of eviction to remove the tenant for failure to execute the renewal lease. As relevant here, the Civil Court denied the landlord's motion under CPLR 3212 for summary judgment and under CPLR 3211 (b) to dismiss the tenant's affirmative defenses. The Civil Court granted the tenant's cross-motion to the extent of dismissing the petition on the basis that the tenant was entitled to a renewal lease at the time the HSTPA was enacted, warranting its application to require the landlord to offer the renewal on the same terms and conditions as the grandmother's prior lease. The landlord appealed to the Appellate Term.

By order entered February 23, 2024, the Appellate Term re-

versed and reinstated the petition for further proceedings, finding that the HSTPA did not apply because the tenant's entitlement to a renewal lease arose prior to the HSTPA's enactment.

We disagree. Where a landlord fails to offer a renewal lease, the rights under the expiring lease continue to apply (Rent Stabilization Code [9 NYCRR] § 2523.5 [d] [(T)he failure to offer a renewal lease pursuant to this section shall not deprive the tenant of any protections or rights provided by the RSL and this Code and the tenant shall continue to have the same rights as if the expiring lease were still in effect]). Where a renewal lease is not made in a timely fashion, "courts have repeatedly upheld . . . allowing the renewal lease increase to take effect only prospectively" (*Matter of 24 Fifth Ave. Assoc. v New York State Div. of Hous. & Community Renewal*, 191 AD2d 331, 331 [1st Dept 1993], *lv denied* 82 NY2d 652 [1993]).

Accordingly, the Appellate Term should have concluded that the tenant's succession rights under the prior lease signed by the tenant's grandmother continued to apply until he was offered a renewal lease on November 7, 2019 after the passage of the HSTPA. As the HSTPA applies to tenant's succession rights, his cross-motion dismissing the petition should have been granted on the basis that he was entitled to a lease at the amount of rent paid under the prior lease signed by his grandmother (Rent Stabilization Law § 26-511 [c] [14]).

The landlord's arguments to the contrary are unavailing. Initially, application of the HSTPA to the instant action does not result in an impermissible retroactive effect because the renewal lease offer was made after the HSTPA came into effect in June 2019 (*see Matter of West Pierre Assoc. LLC v Harvey*, 241 AD3d 413, 413 [1st Dept 2025] [(T)here is no cause for us to engage in a constitutional retroactivity analysis in the application of the HSTPA in this 2022 nonpayment proceeding, as the tenant's first lease commenced December 1, 2020, after the HSTPA's enactment]).

Moreover, the return to the legal regulated rent from the ACR set forth in the WSM Agreement does not fall within the category of "any other increases authorized by law" under Rent Stabilization Law § 26-511 (c) (14). "Expressions such as . . . 'allowed by law' . . . as used in the statutes refer exclusively to the statute law of the State . . . unless, by the purposes of the statute where the words are used, a broader signification is required" (*Board of Educ. of Union Free School Dist. No. 6 v Town of Greenburgh*, 277 NY 193, 195 [1938] [citations omitted]). Here, the DHCR Order is an administrative determination, not a statutory law. Although DHCR appears to have

come to a different conclusion in at least one case involving another apartment in the building, this Court is not bound by an agency's statutory interpretation (see *Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]).

Further, the DHCR Order setting the legal regulated rents for apartments in the building and incorporating the terms of the WSM Agreement does not have preclusive effect pursuant to the doctrines of administrative finality, res judicata or collateral estoppel because it was issued in a proceeding to reset the legal regulated rent, not one determining whether the landlord can disregard the ACR notwithstanding the HSTPA (cf. *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 203 [1st Dept 2011], *appeal withdrawn* 18 NY3d 954 [2012]). In any event, the record does not reflect the tenant's involvement in the 2006 DHCR proceedings, meaning he did not have a full and fair opportunity to litigate in the prior proceeding (see *Ryan v New York Tel. Co.*, 62 NY2d 494, 501 [1984]). Concur—Kern, J.P., Friedman, Rodriguez, Pitt-Burke, Rosado, JJ.

(February 26, 2026)

1 1946Tremont1B, LLC, Appellant, v Nawal Realty, Inc., et al., Respondents. [253 NYS3d 105]—

Mortgages—Foreclosure—Reforeclosure Action

Lis Pendens—Constructive Notice—Deed Includes Language Identifying Mortgage

Order, Supreme Court, Bronx County (Kim A. Wilson, J.), entered on or about November 6, 2024, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, granted defendant Nawal Realty Inc.'s cross-motion for summary judgment on its counterclaim for a declaration that it is the record owner of the subject premises and for leave to amend its answer to assert a new counterclaim for reforeclosure of the premises, unanimously modified, on the law, to deny so much of the cross-motion as sought summary judgment on Nawal Realty's counterclaim for a declaration that it is the record owner of the premises, and otherwise affirmed, without costs.

On November 25, 2015, plaintiff purchased property in the Bronx from nonparty West Fork Capital Equities, Inc., who had acquired the property through a condominium lien foreclosure proceeding. The property was subject to a mortgage held by nonparty Ocwen Loan Servicing, LLC. This purchase oc-

curred after the lapse of a notice of pendency Ocwen had filed in a mortgage foreclosure action, but before a successive notice of pendency was filed. Neither Ocwen nor its successor-in-interest joined plaintiff as a defendant in its mortgage foreclosure action. Following a judgment of foreclosure and sale, the referee in the mortgage foreclosure action deeded the property to defendant Real Homes Management Holdings, Inc., which in turn deeded the property to defendant Nawal Realty.

Supreme Court properly denied plaintiff's motion for summary judgment, as plaintiff failed to sustain its burden of showing that it lacked knowledge of Ocwen's foreclosure action when it purchased the premises (*see Morequity, Inc. v Centennial Ins. Co.*, 201 AD3d 929, 931 [2d Dept 2022]; *Wells Fargo Bank, NA v Rodriguez*, 203 AD3d 869, 870 [2d Dept 2022]).

Supreme Court also providently exercised its discretion in granting Nawal leave to amend to include a reforeclosure cause of action. The proposed cause of action was not palpably devoid of merit, as the property was sold to Real Homes in accordance with a judgment of foreclosure and sale (*see* RPAPL 1503; *Mashinsky v Drescher*, 188 AD3d 465, 466 [1st Dept 2020]). Plaintiff argues that, because it owned the property and the foreclosure sale sold the mortgage and not the property, the property was not truly "sold" to Real Homes within the meaning of RPAPL 1503. However, the statute specifically allows a person acquiring property in a foreclosure sale to reforeclose against an "owner of the real property mortgaged," and therefore contemplates that a plaintiff in a reforeclosure action might not be the owner. Nawal Realty also alleged in the amended counterclaim that Ocwen's omission of plaintiff from the mortgage foreclosure action was not due to fraud or willful neglect, and plaintiff does not show that this allegation was palpably insufficient (*see Mashinsky*, 188 AD3d 466). Additionally, delay alone is insufficient to establish prejudice (*see Barbour v Hospital for Special Surgery*, 169 AD2d 385, 386 [1st Dept 1991]), and plaintiff did not otherwise sustain its burden of explaining how it would be prejudiced by the amendment (*see Leslie v Hymes*, 60 AD2d 564, 564 [1st Dept 1977]).

However, Supreme Court should not have granted Nawal Realty's cross motion for summary judgment seeking a declaration that Nawal was the record owner of the premises, as Nawal did not establish that plaintiff had knowledge of the pending mortgage foreclosure action when plaintiff purchased the property (*see Taveras v 1149 Webster Realty Corp.*, 134 AD3d 495, 496 [1st Dept 2015], *affd* 28 NY3d 958 [2016]; *Morequity*, 201 AD3d at 931). Although the deed to West Fork

included language identifying Ocwen's mortgage, and West Fork's deed to plaintiff was necessarily subject to that mortgage (see *Matter of International Ribbon Mills [Arjan Ribbons]*, 36 NY2d 121, 126 [1975]), this language did not necessarily give plaintiff notice of the mortgage foreclosure action. At a minimum, the deed to plaintiff, together with the mortgage, would have given plaintiff constructive notice of the mortgage, but not the foreclosure action (see e.g. *80P2L LLC v U.S. Bank Trust, N.A.*, 194 AD3d 593, 594 [1st Dept 2021], *lv denied* 38 NY3d 904 [2022]; *436 Franklin Realty, LLC v U.S. Bank N.A.*, 188 AD3d 960, 962 [2d Dept 2020]).

We have considered the remaining contentions and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

2 21st Mortgage Corporation, Respondent, v Jin Hua Lin et al., Defendants, and Renaissance Economic Development Corporation, Appellant. [253 NYS3d 110]—

Motions and Orders—Reargument or Renewal—Change in Law—Timeliness—Foreclosure Abuse Prevention Act

Order, Supreme Court, New York County (Francis A. Kahn, III, J.), entered on or about October 21, 2024, which denied defendant Renaissance Economic Development Corporation's motion to stay and vacate the judgment of foreclosure and sale and for renewal of its motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted and the matter remanded for further proceedings in accordance with this decision.

Supreme Court rendered its judgment of foreclosure and sale on July 12, 2023. The judgment sufficiently drew attention to the filing date via the computer generated stamp across the top (compare *Pac Fung Feather Co. Ltd. v Porthault NA LLC*, 140 AD3d 576, 577 [1st Dept 2016]). Therefore, plaintiff's July 27, 2023 notice of entry correctly stated that the judgment of foreclosure and sale was entered by the County Clerk on July 12, 2023 (cf. *Baranello v Westchester Sq. Med. Ctr.*, 282 AD2d 259, 259 [1st Dept 2001]).

Generally, "a motion for leave to renew based upon an alleged change in the law must be made prior to the entry of a final judgment, or before the time to appeal has fully expired" (*Matter of 160 E. 84th St. v New York State Div. of Hous. & Community Renewal*, 203 AD3d 501, 501 [1st Dept 2022]). However, in *Article 13 LLC v Ponce De Leon Fed. Bank*, the Court of Appeals clarified the application of the Foreclosure Abuse Prevention Act (FAPA), finding that it applies retroac-

tively and to all foreclosure actions in which “a final foreclosure sale had not been enforced prior to its effective date, including actions pending at the time of its effective date” (*Article 13 LLC v Ponce De Leon Fed. Bank*, — NY3d —, —, 2025 NY Slip Op 06536, *2 [2025]).

A judgment of foreclosure and sale is deemed enforced when the sale is concluded (*see Guardian Loan Co. v Early*, 47 NY2d 515, 519-520 [1979]; *Wilmington Sav. Fund Socy., FSB v Thomas*, 226 AD3d 1064, 1067 [2d Dept 2024]). Therefore, the only way to effectuate the retroactive application of FAPA after a judgment has been entered and the time to appeal has expired, is by filing a motion to renew before the sale is conducted (*Article 13 LLC*, — NY3d at —, 2025 NY Slip Op 06536, *2). Based on a change in the law with the enactment of the FAPA, Renaissance’s January 2024 motion for leave to renew pursuant to CPLR 2221 (e) (2), was timely (*id.*; *Early*, 47 NY2d at 519-520; *Thomas*, 226 AD3d at 1067).

Accordingly, we remand the motion to Supreme Court for consideration on the merits. Concur—Manzanet-Daniels, J.P., Friedman, Pitt-Burke, Rosado, Chan, JJ.

The Decision and Order of this Court entered herein on October 2, 2025 (242 AD3d 401 [1st Dept 2025]) is hereby recalled and vacated (*see* 2026 NY Slip Op 63156[U] [1st Dept 2025] [decided simultaneously herewith]).

3 237 East 20 LLC, Appellant, v SD Second Avenue Property LLC, Respondent, et al., Defendants. [249 NYS3d 71]—

Judgments—Default Judgment—Limited Liability Company—Additional Service of Summons by First-Class Mail

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered on or about October 7, 2024, which, to the extent appealed from as limited by the briefs, denied plaintiff’s motion for a default judgment against defendant Silverback Acquisitions and Development LLC doing business as Silverback Development, unanimously affirmed, without costs.

Supreme Court properly denied plaintiff’s motion for a default judgment, finding that plaintiff did not establish that it provided Silverback with an additional service of the summons by first class mail at defendant’s last known address at least 20 days before entry of judgment, as mandated by CPLR 3215 (g) (4) (*see Wonder Works Constr. Corp. v RCDolner, LLC*, 44 AD3d 526, 526 [1st Dept 2007]; *Crespo v A.D.A. Mgt.*, 292 AD2d 5, 7 [1st Dept 2002]; *but see Gershman v Ahmad*, 131 AD3d

1104, 1105 [2d Dept 2015]). Contrary to plaintiff's contention, the fact that defendant is an LLC, as opposed to a corporation, does not render CPLR 3215 (g) (4) inapplicable (*see Crespo*, 292 AD2d at 7). Public policy, and our case law dictates, that the added layer of notice provided by CPLR 3215 (g) (4) applies equally to both corporations and LLCs. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

4 3502 Partners LLC, Respondent, v Metropolitan Transportation Authority et al., Appellants. [249 NYS3d 70]—

Pleading—Amendment—Gross Negligence

Order, Supreme Court, New York County (Dakota D. Ramseur, J.), entered November 20, 2024, which granted plaintiff's motion for leave to amend its complaint, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in granting plaintiff's motion for leave to amend the complaint to include allegations of gross negligence. Plaintiff sufficiently demonstrated that the proposed amendment was not palpably insufficient or clearly devoid of merit (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [1st Dept 2010]). The new allegations, if proven, may be sufficient to establish that defendants acted with reckless disregard for plaintiff's rights, or did not even exercise slight care. Defendants failed to demonstrate either surprise or prejudice from the proposed amendment (*see* CPLR 3025 [b]; *Murray v City of New York*, 43 NY2d 400, 405 [1977]; *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]). The proposed amended complaint does not seek to add entirely new facts, and instead relies on material provided by defendants late in the discovery phase to assert that defendants' conduct, related to the same events set forth in the initial complaint, rises to a level sufficient to establish gross negligence. Supreme Court made clear that defendants will be given an opportunity to conduct discovery necessary to address the gross negligence claim and make dispositive motions if warranted. There is no indication that defendants have lost the opportunity to obtain evidence or testimony because of any delay.

Defendants failed to argue before Supreme Court that some of them may be immune from an award of punitive damages because of their alleged status as public benefit corporations. In any event, defendants have failed to make a sufficient showing that all of them would be immune from punitive damages, and there is no dispute that one of them—Tutor Perini Corporation—does not qualify as a public benefit corporation. Thus,

even assuming that some of the defendants enjoy immunity, that fact does not lead to the conclusion that plaintiff's proposed gross negligence cause of action is entirely devoid of merit.

We have considered defendants' remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

5 In the Matter of Luisanny A., Appellant, v Jonathan C., Respondent. [253 NYS3d 63]—

Parent, Child and Family—Custody—Modification

Order, Family Court, Bronx County (Teresa J. Grogan, Ref.), entered on or about June 4, 2025, which dismissed petitioner mother's petition for an order modifying a prior order of custody, dated December 9, 2015, unanimously modified, on the law, to the extent of deleting the provision that the dismissal is "with prejudice," and otherwise affirmed, without costs. Appeal from the underlying order of dismissal, same court and Referee, entered on or about May 29, 2025, unanimously dismissed, without costs, as superseded by the appeal from the June 4, 2025 order.

There is a sound and substantial basis in the record to support Family Court's dismissal of the petition, as the mother failed to show a material change in circumstances warranting modification of the prior custody order awarding residential custody to the father (*see Matter of Keidy A.R. v Timothy L.L.*, 233 AD3d 630, 631 [1st Dept 2024]). Although the mother testified that after she filed the petition she moved to a larger apartment and undertook the care of her two younger children, she did not testify regarding the nature of the child's relationship with their half siblings so as to show that the change in her living circumstances constituted a substantial change warranting a modification of the custody order (*see Matter of Yvette F. v Corey J.G.*, 177 AD3d 549, 550 [1st Dept 2019]). The mother also testified that when she filed the modification petition on January 31, 2024, she was primarily responsible for attending the child's medical and dental appointments and school meetings. However, she conceded that she had more or less the same responsibilities when the custody order was entered in 2015, because the father, who had a less flexible work schedule, needed childcare assistance to fulfill his obligations as the child's residential custodian.

We find no basis to disturb the court's credibility determinations, which are entitled to deference (*see Matter of Stepan K. v Marina M.*, 188 AD3d 600, 601 [1st Dept 2020]). Family Court

properly rejected the mother's testimony that the child spent most of their time with her, as that testimony conflicted with her allegation in the petition that the child spent most of their time with their paternal grandmother.

We note that the June 4, 2025, order dismissed the petition "with prejudice," while the May 29, 2025, order dismissed the petition "without prejudice." Child custody and parental access orders are not entitled to res judicata effect and are subject to modification based on a showing of changed circumstances (*see Matter of Huges v Gadsden*, 172 AD3d 863, 864-865 [2d Dept 2019]). Thus, the June 4, 2025 order should be modified to the extent of deleting the provision that the dismissal of the petition is "with prejudice" (*see Matter of Keidy A.R.*, 233 AD3d at 631). Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

6 Ruth Acevedo, Appellant, v City of New York et al., Respondents. [252 NYS3d 62]—

Municipal Corporations—Notice of Street Defect—Affirmative Act of Negligence

Evidence—Opinion Evidence—Condition of Site on Date of Accident—Review of Photographs

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered November 27, 2024, which, to the extent appealed from as limited by the briefs, granted the motion of defendant the City of New York for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The City established its entitlement to summary judgment as a matter of law by demonstrating that it did not receive prior written notice of the defect that allegedly caused plaintiff's injuries. The deposition testimony from an employee of the Department of Transportation's (DOT) records department, the affidavit of the Director of the Division of Bronx Roadway Repair and Maintenance, and the DOT records themselves establish that on February 26, 2019, about two months before plaintiff's accident, the DOT repaired five potholes pursuant to a defect number reporting a defect near the subject location. That defect number was then referred to the DOT's Street Maintenance Division, which dispatched a crew to the location on March 4, 2019, to repair nine potholes. Moreover, the City submitted an affidavit by the Director of the Division of Bronx Roadway Repair and Maintenance stating that all defective conditions found by the supervisor on the segment would be repaired to ensure that the specific defective condition identified in the complaint was addressed (*see Figueroa v City of New York*, 210 AD3d 584, 584-585 [1st Dept

2022]). The DOT inspection reports created in preparation for special events and pertaining to the vicinity of the accident location, which indicate that the DOT found potholes in the roadway on September 30, 2017, and September 29, 2018, about seven months before plaintiff's May 1, 2019 accident, and that those potholes were not repaired at that time, did not raise a triable issue of fact as to prior written notice in light of the evidence submitted by the City that the potholes in the vicinity of the accident were repaired in February and March of 2019.

In response to the City's prima facie showing that it had no prior written notice of a defect, plaintiff failed to present evidence showing one of the two exceptions to the prior written notice requirement—namely, that the condition of the roadway immediately resulted from an affirmative act of negligence by the City (*see Rosenblum v City of New York*, 89 AD3d 439, 439-440 [1st Dept 2011]), or that a special use resulted in a special benefit to the City (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). “Additionally, the affirmative negligence exception is limited to work by the City that immediately results in the existence of a dangerous condition” (*Yarborough*, 10 NY3d at 728 [internal quotation marks omitted], quoting *Oboler v City of New York*, 8 NY3d 888, 889 [2007]). Here, plaintiff presented no evidence showing that the City affirmatively created the crack in the roadway when it last repaired the potholes at the location of the accident or any evidence of the condition of the roadway immediately after the City repaired the accident location (*see Jones v City of New York*, 159 AD3d 571, 572 [1st Dept 2018]).

Furthermore, Supreme Court properly found that plaintiff's expert affidavit, opining that the alleged crack in the roadway was immediately apparent because the DOT used two different and incompatible materials, was not probative of the accident site's condition on the date of the accident, given that the engineer never inspected the accident location (*see Chiu Shing Tsang v Ng*, 235 AD3d 460, 461 [1st Dept 2025]). Although plaintiff's expert indicated that he reviewed photographs of the crack, and plaintiff testified that the photographs accurately represented the condition at the time of the accident, there is no evidence regarding who took the photographs or when they were taken (*see Oboler v City of New York*, 31 AD3d 308, 308-309 [1st Dept 2006], *affd* 8 NY3d 888 [2007]). Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

7 Thomas Barlotta et al., Respondents, v American Honda Motor Co., Inc. (AHM), Appellant, et al., Defendants. [249 NYS3d 62]—

Products Liability—Exposure to Toxic Substances—Asbestos-Containing Brakes

Order, Supreme Court, New York County (Adam Silvera, J.), entered November 22, 2024, which denied the motion of defendant American Honda Motor Co., Inc. (AHM) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

AHM failed to “unequivocally establish that its product could not have contributed to the causation of” decedent’s injury (*Matter of New York City Asbestos Litig.*, 122 AD3d 520, 521 [1st Dept 2014]). AHM does not dispute that its vehicles were equipped with asbestos-containing brakes during the period decedent alleged he was exposed. Moreover, and as Supreme Court correctly found, AHM cherry-picked and mischaracterized portions of plaintiff Thomas Barlotta’s testimony in support of its motion, which was insufficient to satisfy its burden.

Even if AHM established its *prima facie* case, plaintiff Barlotta’s testimony and decedent’s interrogatory responses raised a triable issue of fact as to whether decedent was exposed to asbestos through his contact with defendant’s vehicles (*see Carboni v Alfa Romeo USA*, 223 AD3d 585, 586 [1st Dept 2024]). Barlotta testified that while he primarily pumped gas, there were days in which he was in the shop and assisted decedent with “brake jobs” and witnessed decedent working on Hondas “replacing brake components.”

We have considered AHM’s remaining contentions and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

8 Eduina Batista, Appellant, v Robert Burgos et al., Respondents. [249 NYS3d 61]—

Appeal—Appealable Paper—Interlocutory Order

Appeals from order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about May 10, 2024, which, to the extent appealed from as limited by the briefs, denied plaintiff’s motion for summary judgment on the issue of liability and for sanctions based on defendants’ willful failure to disclose evidence, and denied defendants’ cross-motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as nonappealable.

“With the entry of a final judgment, an appeal from an intermediate order must fall, and the order can only be reviewed on an appeal from the final judgment if it affects the final judgment” (*Dietz Intl. Pub. Adjusters v Frankart Distribs.*, 157

AD2d 625, 625 [1st Dept 1990] [internal quotation marks and brackets omitted]; *Hill Dickinson LLP v Il Sole Ltd.*, 149 AD3d 471, 471 [1st Dept 2017]; *see also* CPLR 5501).

Here, a final judgment dismissing the complaint was entered on September 30, 2025, pursuant to an order dated August 25, 2025, which granted defendants' CPLR 3126 motion to strike plaintiff's complaint for her "willful refusal to appear for her deposition and physical examination in violation of numerous prior court orders," and which directed the Clerk to dismiss the action. Judgment was entered after the instant appeals from the interlocutory order entered on or about May 10, 2024. Thus, the right to appeal from this order terminated with entry of the final judgment. Plaintiff has not appealed from the final judgment, and that failure is jurisdictionally fatal. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

9 Board of Managers of 45 East 22nd Street Condominium, Respondent, v 45 East 22nd Street Property LLC et al., Respondents, and Ian Bruce Eichner et al., Appellants. [253 NYS3d 570]—

**Fraud—Fraud in Inducement—Safety and Construction Defects
Fraudulent Conveyances—Transfer in Fraud of Creditors—Mortgage**

Order, Supreme Court, New York County (James d'Auguste, J.), entered on or about February 5, 2025, which, to the extent appealed from, granted plaintiff Board of Managers of 45 East 22nd Street Condominium's motion for a preliminary injunction or order of attachment to the extent of prohibiting defendants from distributing from escrow the proceeds of the sale of unit 52AB in the building located at 45 East 22nd Street, New York, New York, pending further order of the court, and denied the motion of defendants Madison Realty Capital, L.P. and 45 East 22nd Street 1 LLC (together, the Madison Defendants) pursuant to CPLR 3211 (a) (1) and (7) to dismiss the sixth cause of action in the amended complaint as against them, sounding in fraudulent conveyance, and the motion of defendant Ian Bruce Eichner pursuant to CPLR 3211 (a) (7) to dismiss the third cause of action as against him sounding in fraudulent inducement and the sixth cause of action as against him, unanimously affirmed, with costs.

The court properly denied dismissal of the fraudulent inducement claim against Eichner, the principal of the sponsor of the subject condominium building. The amended complaint alleged that he knew of the building's need for repairs, including its purportedly systematic lack of firestopping and other safety and construction defects which sponsor was obligated to repair,

but nevertheless directed the sponsor to affirmatively certify in the offering plan that the building was free from defects and was not in need of repairs, and swore to the truth of the sponsor's representations in the sponsor's certification (*see Board of Mgrs. of the Walton Condominium v 264 H2O Borrower, LLC*, 180 AD3d 622, 622 [1st Dept 2020]). This was "sufficient to permit a reasonable inference of the alleged conduct, especially as discovery may reveal that defendants knew about the defects" (*id.* at 623 [internal quotation marks omitted]). Further, notwithstanding the requirement to plead fraud claims with particularity (CPLR 3016 [b]), the claim against Eichner was not impaired by allegations that were made on information and belief where the facts underlying the allegations were within Eichner's exclusive knowledge (*see Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). In addition, Eichner can be held liable for the alleged fraud without recourse to piercing the corporate veil, so long as plaintiff can establish that he personally participated in it (*see Board of Mgrs. of the S. Star v WSA Equities, LLC*, 140 AD3d 405, 405 [1st Dept 2016]).

The fraudulent conveyance claims were also properly sustained as against the Madison Defendants and Eichner. Contrary to those defendants' contentions, the allegations based on information and belief were alleged to be not only within their exclusive knowledge, but also reasonably inferred from the documents and the timing of the transactions (*see 477 Realty, L.L.C. v Wing Soho, LLC*, 234 AD3d 469, 471 [1st Dept 2025]). Furthermore, plaintiff alleged a violation of former Debtor and Creditor Law §§ 273 and 275, insofar as the sponsor obtained a mortgage from the Madison Defendants at a time when the sponsor and Eichner were at risk of defaulting in their obligations to their investors, to whom Eichner had given his personal guarantee (*see e.g. American Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 [1st Dept 2016]). The amended complaint further alleged that the sponsor and Eichner used the loan proceeds, secured by the units, to pay off their investors, while the Madison Defendants operated as insiders of the sponsor by standing in its shoes and controlling its actions so as to divest the sponsor of assets without reasonably equivalent consideration credited against the mortgage. These allegations sufficiently alleged that the sponsor, through its principal, incurred an obligation designed to render the sponsor insolvent and unable to pay its debts under former Debtor and Creditor Law §§ 273 and 275. The transfers of the units to the Madison Defendants, allegedly without receiving adequate consideration and leaving the spon-

sor undercapitalized, support the allegations under current Debtor and Creditor Law §§ 273 (a) and 274. The allegations also sufficiently satisfy several “badges of fraud” to warrant discovery (Debtor and Creditor Law § 273 [b] [1], [5], [9], [10], [11]).

Although the Madison Defendants contend that the mortgage was an ordinary, arm’s length transaction, the allegations, if established, may support a finding that the loan was used to perpetrate a fraud (*see* Debtor and Creditor Law § 274 [b] [“A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent”]; *see also* 245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC, 223 AD3d 604, 606 [1st Dept 2024]). The Madison Defendants further contend that the allegations against them are lacking; however, plaintiff produced some evidence that Madison employees had involved themselves in the minutiae of the sponsor’s unit sales, which could support a finding that they were acting as an affiliate and insider of the sponsor (Debtor and Creditor Law § 270 [a] [4]; [h] [4]).

Finally, the motion court properly exercised its discretion in awarding plaintiff a preliminary injunction for the purpose of precluding the distribution or transfer of sale proceeds from the final sponsor-owned unit (*see* CPLR 6212, 6301; Debtor and Creditor Law § 276 [a] [3] [i]), Although money damages generally do not constitute irreparable harm, plaintiff established its entitlement to injunctive relief by establishing a likelihood of success and an imminent risk that the sponsor would be rendered insolvent (*see* 180 Life Sciences Corp. v Tyche Capital LLC, 216 AD3d 419, 420 [1st Dept 2023]). Concur—Kennedy, J.P., Scarpulla, González, Rodriguez, JJ.

10 Deutsche Bank National Trust Company, Appellant, v Kenneth Roberts, Also Known as Kenneth J. Roberts, et al., Respondents, et al., Defendants. [252 NYS3d 64]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure

Statutes—Retroactive Application of Statute—Foreclosure Abuse Protection Act

Order, Supreme Court, New York County (Francis A. Kahn, III, J.), entered on or about February 7, 2025, which, to the extent appealed from as limited by the briefs, granted the motion of defendants John J. Reddy, Jr., as Administrator c.t.a. of the Estate of defendant Kenneth Roberts, also known as Ken-

neth J. Roberts, and 721 5455B Condo, LLC, pursuant to CPLR 3211 (a) (5) to dismiss the complaint, unanimously affirmed, without costs.

Supreme Court properly found that plaintiff's foreclosure action was time-barred. Plaintiff commenced a foreclosure action on May 20, 2009. Paragraph 9 of the complaint stated that plaintiff "elects herein to call due the entire amount secured by the mortgage(s)." This action, which seeks to foreclose on the same consolidated mortgage, was brought on July 27, 2023, well beyond the six-year limitation period (CPLR 213 [4]).

The loan was not de-accelerated by plaintiff's voluntary discontinuance in 2011 of the 2009 action. CPLR 3217 (e), enacted on December 30, 2022, as part of the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821, § 8), provides that the voluntary discontinuance of such an action "shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action."

Plaintiff's argument that FAPA should not be applied retroactively to render the 2011 voluntary discontinuance of the 2009 action ineffective to reset the statute of limitation period was conclusively rejected by the Court of Appeals in *Article 13 LLC v Ponce De Leon Fed. Bank* (— NY3d —, 2025 NY Slip Op 06536 [2025]; see *Genovese v Nationstar Mtge. LLC*, 223 AD3d 37, 45 [1st Dept 2023]).

Plaintiff's constitutional arguments are also foreclosed. The Court of Appeals has determined that retroactive application of FAPA does not violate either substantive or procedural due process (*Article 13 LLC*, — NY3d at —, 2025 NY Slip Op 06536, *4-5). Nor, as this Court has determined, does FAPA's retroactive application effect an unconstitutional taking by permanently depriving plaintiff's lien of all value (see *Bank of N.Y. Mellon v Del Rio*, 233 AD3d 529, 532 [1st Dept 2024]).

Finally, plaintiff identifies no contractual provision that entitles it either to de-accelerate the loan by discontinuing a foreclosure action or to reset the statute of limitations once it already expired (see *Article 13 LLC*, — NY3d at —, 2025 NY Slip Op 06536, *4-5; *Bank of N.Y. Mellon*, 233 AD3d at 532). Therefore, plaintiff has not established that FAPA abridges any of its contractual rights, or violates the Contracts Clause of the Federal or State Constitutions (*Bank of N.Y. Mellon*, 233 AD3d at 532).

We have considered plaintiff's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

11 Global Bank, Respondent, v 43 Mott Realty Owner, LLC, et al., Appellants, et al., Defendants. [248 NYS3d 558]—

**Judgments—Vacatur of Judgment—Foreclosure and Sale—Stipulation
Consenting to Summary Judgment
Attorney and Client—Authority of Attorney—Stipulation Consenting to Sum-
mary Judgment**

Order, Supreme Court, New York County (Francis A. Kahn, J.), entered on or about June 9, 2025, which denied the motion by defendants 43 Mott Realty Owner, LLC, Tai Cheung Realty, Inc., also known as Tai Cheung Realty Inc., Kevin Ye, Ping Cheung, and Grand Top LLC under CPLR 5015 (a) to vacate the judgment of foreclosure and sale, unanimously affirmed, and all stays lifted.

Supreme Court providently denied vacatur of the judgment of foreclosure and sale. Defendants' argument that the judgment should be vacated pursuant to CPLR 5015 (a) (1) is unavailing, as the record reflects that defendants, through their counsel, consented to the entry of summary judgment in plaintiff's favor by attorney stipulation dated December 7, 2023.

The court properly declined to set aside the stipulation. Defendants contend that their counsel lacked authority to enter into a stipulation consenting to summary judgment, but "a settlement agreement signed by an attorney may bind a client even where it exceeds the attorney's actual authority, if the attorney had apparent authority to enter into the agreement" (*Servider v City of New York*, 212 AD3d 475, 476 [1st Dept 2023]). Here, defendants failed to present any evidence that their former counsel, their attorney of record at the time of the stipulation, lacked apparent authority to sign the stipulation on their behalf. He was fully authorized to appear in the action on defendants' behalf and was in regular contact with them at all relevant times. In any event, defendants ratified the terms of the stipulation by failing to object to the stipulation for more than a year (*see Pruss v Infiniti of Manhattan, Inc.*, 180 AD3d 163, 169 [1st Dept 2020], *lv dismissed* 35 NY3d 1001 [2020]).

There is therefore no basis to vacate the judgment. Defendants alternatively argue that judgment should be vacated in the interests of justice based on the payment they made to plaintiff (*see e.g. Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]), which they believed was for the purpose of curing their default, but that issue is unrelated to whether the stipulation is binding (*see Servider*, 212 AD3d at 476).

We have considered defendants' remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

12 In the Matter of L.K., a Child Alleged to be Neglected. C.K., Appellant; Administration for Children's Services, Respondent. [252 NYS3d 66]—

Parent, Child and Family—Abused or Neglected Child—Imminent Risk of Harm—Diagnosed and Untreated Mental Illness

Parent, Child and Family—Abused or Neglected Child—Medical Records—Business Records Exception to Hearsay Rule

Order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about November 19, 2024, to the extent it brings up for review a fact-finding order, same court, Judge, and date, which found that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence, which established that the mother suffers from diagnosed and untreated mental illness, including PTSD, psychosis, and schizophrenia, that interfered with her judgment and parenting abilities, thus placing the child, who was less than one year old and totally dependent on her, at imminent risk of physical, mental, and emotional impairment (*see* Family Ct Act §§ 1046 [b] [i]; 1012 [f] [i] [B]; *Matter of N.A.S. [V.H.]*, 217 AD3d 485, 486 [1st Dept 2023]; *Matter of Ruth Joanna O.O. [Melissa O.]*, 149 AD3d 32, 39 [1st Dept 2017], *affd* 30 NY3d 985 [2017]). The record shows that the mother suffers from paranoia, delusions, and psychotic behavior, and underwent multiple psychiatric hospitalizations, yet she believed that she did not need psychiatric care and had stopped taking her prescribed medication. Evidence of actual injury to the child was not required to enter a finding of neglect because there is sufficient evidence that the child was at imminent risk of harm due to the mother's untreated mental illness (*see Matter of Ruth Joanna O.O. [Melissa O.]*, 149 AD3d 32, 41 [1st Dept 2017], *affd* 30 NY3d 985 [2017]).

To the extent Family Court relied on the mother's medical records, these records were admissible under the business records exception to the hearsay rule, as they related to the mother's treatment, diagnosis, and discharge (*see Matter of A.M. [Adgraille E.]*, 233 AD3d 481, 481 [1st Dept 2024]) and were properly relied upon by the court (*see Matter of Jayden S. [Shalea S.]*, 159 AD3d 500, 501 [1st Dept 2018], *lv denied* 31 NY3d 908 [2018]). Similarly, to the extent Family Court noted the mother's post-petition hospitalization, it was not improper insofar as it relates to her mental health history and failure to follow through with necessary treatment prior to the filing of

the petition (*see Matter of Jamoneisha M. [Ebony M.]*, 84 AD3d 650, 650 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]).

We have considered the mother's remaining arguments and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

13 *Kapitus Servicing, Inc., Appellant, v Suburban Waste Services, Inc., et al., Respondents.* [253 NYS3d 65]—

Usury—Usurious Agreement—Receivable Purchase Agreements

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered on or about October 1, 2024, which denied plaintiff's motion for summary judgment and denied defendants' motion for summary judgment, unanimously affirmed, with costs.

We affirm the denial of both motions, but on grounds different from those set forth by Supreme Court. Although Supreme Court found that the agreements were loans as a matter of law, it also found that the record presented issues of fact as to whether the loans were usurious and denied both motions for summary judgment on that basis. We disagree that the agreements are loans as a matter of law, and find instead that the record presents issues of fact as to whether the agreements are loans or a sale and purchase of receivables, thus rendering summary judgment on either motion inappropriate.

In considering whether the agreements at issue are receivable purchase agreements or usurious loans, courts look to three factors: "(1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy." (*LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 666 [2d Dept 2020]).

While certain provisions suggest that the transactions were a loan, other provisions suggest that the transactions were instead a sale and purchase of receivables. For example, defendants established that the agreements provide for recourse in the event the merchant declares bankruptcy. Specifically, plaintiff is entitled upon defendant Suburban Waste Services, Inc.'s (Suburban) bankruptcy to enter a confession of judgment against defendants and to enforce the personal guaranties signed by the individual defendants, which suggests a loan (*see Kapitus Servicing, Inc. v Point Blank Constr., Inc.*, 221 AD3d 532, 534 [1st Dept 2023]; *Kapitus Servicing, Inc. v Ragtime Gourmet Corp./Joe-Le Holding Corp.*, 242 AD3d 638, 638 [1st Dept 2025]). On the other hand, it is undisputed that the agreements do not have a definite term, suggesting that the repayment obligations were contingent insofar as they required de-

fendant Suburban to make payments to plaintiff “until such time as [plaintiff] receives payment in full” (*Ragtime Gourmet Corp./Joe-Le Holding Corp.*, 242 AD3d at 639; *Point Blank Constr.*, 221 AD3d at 534). Additionally, “although the presence in an agreement of a right to reconciliation may be an indication of whether an agreement constitutes a loan, the agreement here does not make clear on its face whether it conferred that right” (*Point Blank Constr., Inc.*, 221 AD3d at 534). It is not clear whether reconciliation is mandatory or exercisable at plaintiff’s discretion under the terms of the agreements.

As consideration of the three factors provides no definitive answer as to whether the agreements can be categorized as loans, the record presents an issue of fact as to how to characterize the agreements (*see LG Funding*, 181 AD3d at 666).

Finally, defendants fail to raise an issue of fact as to plaintiff’s performance under the agreements. Although defendants did receive less cash for the receivables than was provided for on the face of the agreements, they conceded that the funding to be received under the agreements would be reduced by fees set forth in the schedule to the agreements and by sums needed to satisfy earlier funding agreements. These documented and authorized deductions account for the entirety of the reduced cash payment for the receivables. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

14 In the Matter of Sopio Kay, Appellant, v Citibank, N.A., Respondent, and Fisher Island Holdings, LLC, Respondent. [249 NYS3d 65]—

Banks and Banking—Safe-Deposit Box—Ownership of Personal Property in Box

Order, Supreme Court, New York County (Lancelot B. Hewitt, Ref.), entered March 6, 2025, which determined that petitioner failed to demonstrate that she was the sole owner of personal property contained in the subject safe deposit box such that the personal property was beyond the scope of the restraining notice served upon respondent Citibank, N.A., by respondent Fisher Island Holdings, LLC, the judgment creditor, unanimously affirmed, without costs.

The Special Referee’s conclusions were supported by a fair interpretation of the evidence, especially as credibility was an important factor (*see Matter of State Farm Mut. Ins. Cos. v Goldberg*, 226 AD2d 115, 116 [1st Dept 1996]). The Special Referee correctly found that the signature card established that

petitioner intended to provide her husband, the judgment debtor, with unfettered access to the safe deposit box, and the bank's access record showed that he often visited the box alone and more frequently than petitioner. Given the Special Referee's finding that petitioner's testimony was not credible with respect to why her husband was granted access to the box, there was no credible direct evidence rebutting the presumption of joint tenancy under Banking Law § 675 (see *Matter of New York Community Bank v Bank of Am., N.A.*, 169 AD3d 35, 38-39 [1st Dept 2019], *lv denied* 33 NY3d 908 [2019]).

Petitioner contends that she presented direct evidence of sole ownership of some of the contents of the safe deposit box, which the Special Referee found credible. However, nothing in Banking Law § 675 suggests that an analysis of joint tenancy rights proceeds on an item-by-item basis. The statutory presumption applies to the entire contents of the box since petitioner's husband had access to everything in the box.

We have considered petitioner's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

15 Rebecca Labby et al., Respondents, v Allegra Cummings, M.D., et al., Defendants, and Mala Varma, M.D., et al., Appellants. [252 NYS3d 68]—

Physicians and Surgeons—Malpractice—Antiphospholipid Syndrome—Prescription of Blood Thinner

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about July 12, 2024, which, to the extent appealed from, denied so much of the separate motions of defendant Mala Varma, M.D. and defendants Alex Spyropoulos, M.D. and Lenox Hill Hospital (together, the LHH defendants), for summary judgment dismissing plaintiffs' medical malpractice claim as against them, unanimously affirmed, without costs. Order, same court and Justice, entered on or about January 16, 2025, which granted plaintiffs' motion for leave to reargue, and, upon reargument, denied so much of Dr. Varma's motion for summary judgment dismissing plaintiffs' loss of services claim, unanimously affirmed, without costs.

"A defendant in a medical malpractice action demonstrates prima facie entitlement to summary judgment by showing either that he or she did not depart from good and accepted medical practice or that any departure did not proximately cause plaintiff's injuries. Once a defendant has established prima facie entitlement to summary judgment, the burden shifts to plaintiff to rebut the prima facie showing via medical evidence

attesting that the defendant departed from accepted medical practice and that such departure was a proximate cause of the injuries alleged” (*Ducasse v New York City Health & Hosps. Corp.*, 148 AD3d 434, 435 [1st Dept 2017] [internal quotation marks and citations omitted]; see *Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]). In opposing a motion for summary judgment, it is incumbent on a plaintiff’s expert to specifically address defendants’ experts’ allegations and explain his or her reasoning, “relying on specifically cited evidence in the record” (*Tsitrin v New York Community Hosp.*, 154 AD3d 994, 996 [2d Dept 2017] [internal quotation marks omitted]; see also *Rong Lan Lin v Wong*, 202 AD3d 406, 408 [1st Dept 2022] [medical malpractice claim was properly dismissed where “expert set forth only general conclusions, misstatements of evidence and unsupported assertions”]).

Both Dr. Varma and the LHH defendants satisfied their prima facie burden by submitting their respective expert hematologists’ detailed explanations of what the applicable standard of care for antiphospholipid syndrome (APS), plaintiff’s condition, was, why that was the applicable standard of care, how Dr. Varma and Dr. Spyropoulos’s prescription of the blood thinner Xarelto (rivaroxaban) instead of Coumadin (warfarin) did not depart from the applicable standard of care, and why any departure by Dr. Varma or Dr. Spyropoulos was not a proximate cause of plaintiff’s claimed injuries (see e.g. *Buckner v St. Luke’s Roosevelt Hosp. Ctr.*, 103 AD3d 535, 535 [1st Dept 2013]).

However, plaintiffs raised an issue of fact as to whether Varna and the LHH defendants departed from the standard of care by submitting the opinion of their own expert hematologist, who opined that Coumadin was the “gold standard,” “front-line” medication for treating APS, especially for a patient like plaintiff, who not only had APS but also was at the highest risk for developing clots. Plaintiffs’ expert further opined that Dr. Varma and Dr. Spyropoulos were incorrect as to the state of the medical literature about the safety and efficacy of drugs like Xarelto, and that the literature was in fact far more equivocal and inconclusive than either of them suggested. Indeed, plaintiffs’ expert stated that some of the literature, which Dr. Varna and Dr. Spyropoulos admitted they were aware of, even went so far as to suggest that drugs like Xarelto were more dangerous and had a higher risk of clotting in patients like plaintiff than Coumadin. Given this uncertainty in the field, plaintiffs’ expert opined that the applicable standard of care required that physicians treating high-risk APS patients not

resort to novel drugs like Xarelto, even if not doing so would be contrary to the patient's desires.

Contrary to Dr. Varma's argument, plaintiffs and their expert do not impermissibly seek to supplant "the reasonably prudent doctor standard" in medical malpractice actions (*Nestorowich v Ricotta*, 97 NY2d 393, 398 [2002]) with a doctrine that views the relevant medical literature as defining the applicable standard of care (*cf. Halls v Kiyici*, 104 AD3d 502, 504-505 [1st Dept 2013]). Rather, plaintiffs and their expert specifically responded to defendants' experts' opinion that Dr. Varma and Dr. Spyropoulos properly relied on the available literature when determining that Xarelto was a safe course of treatment for high-risk APS patients, and argued that the applicable standard of care required a more comprehensive and critical examination of the literature than either Dr. Varma or Dr. Spyropoulos performed. Thus, the parties' "dueling expert opinions raise issues of fact and credibility that cannot be resolved on a motion for summary judgment" (*Diaz v NYU Langone Med. Ctr.*, 192 AD3d 534, 536 [1st Dept 2021]).

Since defendants were properly denied summary judgment dismissing the medical malpractice claim as against them, the motion court should not have dismissed plaintiff Scott Labby's derivative loss of services claim, and the court correctly reinstated it upon reargument (*see e.g. Elias v City of New York*, 173 AD3d 538, 539 [1st Dept 2019]; *Vaynshelbaum v City of New York*, 140 AD3d 406, 407 [1st Dept 2016]).

We have considered defendants' remaining arguments and find them unavailing. Concur—Kennedy, J.P., González, Rodríguez, Chan, JJ.

16 The People of the State of New York, Respondent, v Anthony Henry, Appellant. [249 NYS3d 63]—

Crimes—Appeal—Valid Waiver

Judgment, Supreme Court, New York County (Curtis J. Farber, J.), rendered July 10, 2023, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree and sentencing him, as a second violent felony offender, to a term of 5½ years, unanimously affirmed.

The record establishes that defendant's waiver of his right to appeal was voluntary, knowing and intelligent (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his statutory speedy trial claim (*see e.g. People v Ekukpe*, 236 AD3d 528, 528 [1st Dept 2025], *lv granted* 44 NY3d 993 [2025]; *People v Hall*, 210 AD3d 482, 482 [1st Dept 2022], *lv denied* 39 NY3d 1078 [2023]). Both

the court's colloquy and the written waiver explained that appellate rights are separate and distinct from the trial rights automatically forfeited by a guilty plea, and defendant confirmed that he understood the rights he was waiving and had read, understood, and discussed with his counsel the written waiver of appeal (*see People v Castillo*, 226 AD3d 573, 574 [1st Dept 2024], *lv denied* 41 NY3d 1017 [2024]), which explicitly stated that defendant was waiving this right. Nor did the court falsely state that defendant would waive his right to assigned counsel by waiving his right to appeal (*see People v Gonzalez*, 245 AD3d 524, 524-525, 2026 NY Slip Op 00203, *1 [1st Dept 2026]; *People v Diallo*, 242 AD3d 612, 612 [1st Dept 2025]; *cf. People v Kyra J.*, 180 AD3d 929, 929-930 [2d Dept 2020], *lv denied* 35 NY3d 971 [2020]).

As an alternative holding, we reject defendant's statutory speedy trial claim on the merits, as our independent review of the record supports Supreme Court's finding that there were exceptional circumstances that caused the People's delay, as they were awaiting DNA comparison evidence and exercised due diligence to obtain these results (*see CPL 30.30 [4] [g] [i]; People v Clarke*, 28 NY3d 48, 52 [2016]; *People v Logan*, 222 AD3d 494, 495 [1st Dept 2023], *lv denied* 41 NY3d 943 [2024]; *cf. People v Gonzalez*, 136 AD3d 581, 582 [1st Dept 2016]). Defendant's contention that this evidence was not sufficiently "material" to excuse the delay is unpreserved, and, in any event, unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

17 The People of the State of New York, Respondent, v Brian Brown, Appellant. [250 NYS3d 70]—

Crimes—Appeal—Valid Waiver

Crimes—Sentence—Probation—Conditions

Judgment, Supreme Court, New York County (Curtis J. Farber, J.), rendered June 26, 2023, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree, and sentencing him to three years of probation, unanimously modified, on the law and as a matter of discretion in the interest of justice, to the extent of striking the condition of probation prohibiting defendant "from wearing or displaying gang paraphernalia" or "having any association with a gang or members of a gang if directed by the Department of Probation," and the condition of probation requiring defendant to pay the surcharge and fees imposed at sentencing, and otherwise affirmed.

Defendant made a valid waiver of his right to appeal (*see*

People v Thomas, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]), which forecloses review of his excessive sentence claim (*see People v Berry*, 242 AD3d 644, 645 [1st Dept 2025], *lv denied* 44 NY3d 1050 [2025]; *People v Rivera*, 242 AD3d 421, 422 [1st Dept 2025]). In any event, we perceive no basis to reduce his sentence.

Defendant's appeal waiver does not foreclose his challenges to the legality of the conditions of his probation and do not require preservation (*see People v Lowndes*, 239 AD3d 574, 575 [1st Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *People v Alvarez*, 233 AD3d 619, 620 [1st Dept 2024], *lv denied* 43 NY3d 961 [2025]). As to defendant's challenge to the condition requiring him to "[a]void injurious or vicious habits; refrain from frequenting unlawful or disreputable places; and . . . not consort with disreputable people," the court providently deemed this condition reasonably related to defendant's rehabilitation because he struggled with substance abuse and had multiple drug-related felony convictions (*see Lowndes*, 239 AD3d at 575).

However, the probation condition requiring defendant to "[r]efrain from wearing or displaying gang paraphernalia and having any association with a gang or members of a gang if directed by the Department of Probation," and the probation condition requiring that he pay the mandatory surcharge and court fees, are stricken. There is no evidence that the 65-year-old defendant had any history of gang membership or that his conduct was connected to gang activity, and defendant remains indigent. Thus, those conditions are not reasonably related to defendant's rehabilitation, or necessary to ensure that he will lead a law-abiding life (*see People v Percy*, 234 AD3d 619, 620 [1st Dept 2025]; *Alvarez*, 233 AD3d at 620). We note that the People do not oppose this relief.

Defendant's constitutional as-applied challenges to his probation conditions under the First Amendment and the vagueness doctrine of due process under the Fifth and Fourteenth Amendments are foreclosed by his valid waiver of appeal (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]; *Lowndes*, 239 AD3d at 575). To the extent that his challenges to condition 7 can be deemed as facial challenges, as the People contend, they are unpreserved, and we decline to review them in the interest of justice (*see Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *2-3; *People v Cabrera*, 41 NY3d 35, 42-51 [2023]). Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

18 The People of the State of New York, Respondent, v Chad Gardner, Appellant. [250 NYS3d 73]—

Crimes—Appeal—Invalid Waiver**Crimes—Sentence—Probation—Consent to Search**

Judgment, Supreme Court, Bronx County (Guy H. Mitchell, J.), rendered February 27, 2024, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a jail term of six months and five years of probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed at sentencing, and otherwise affirmed.

The waiver of the right to appeal was invalid. The plea court “never adequately explained the nature of the waiver, the rights the defendant would be waiving or that the right to appeal was separate and distinct from the rights automatically forfeited upon a plea of guilty” (*People v Castillo*, 234 AD3d 557, 558 [1st Dept 2025], *lv denied* 43 NY3d 1006 [2025], quoting *People v Ramos*, 122 AD3d 462, 464 [1st Dept 2014]). “Instead, the court relied on defense counsel’s confirmation that he told defendant about the waiver, which was not a substitute for the court conducting its own inquiry” (*Castillo*, 234 AD3d at 558 [internal quotation marks omitted]). “The written waiver signed by defendant was no substitute for an on-the-record explanation of the nature of the right to appeal” (*Ramos*, 122 AD3d at 464). However, we perceive no basis to reduce the sentence.

The court providently imposed a condition of probation requiring defendant to “[c]onsent to a search, conducted by a Probation Officer . . . of his person, vehicle and place of abode . . . and seizure of any illegal drugs, drug paraphernalia, gun/firearm or other weapon or contraband found.” This condition was “reasonably related to [defendant’s] rehabilitation” given “the use of a firearm during the crime by an . . . accomplice” and defendant’s juvenile delinquent adjudication for possessing a firearm (*People v L.P.*, 238 AD3d 570, 571 [1st Dept 2025], *lv denied* 43 NY3d 1057 [2025]).

Based on our own interest of justice powers, we vacate the surcharge and fees imposed on defendant at sentencing (*see People v Chirinos*, 190 AD3d 434, 435 [1st Dept 2021]). Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodriguez, JJ.

19 The People of the State of New York, Respondent, v Jason Peguero, Appellant. [249 NYS3d 64]—

Crimes—Possession of Weapon—Constitutional Challenge to Gun Licensing Scheme

Judgment, Supreme Court, Bronx County (Guy Mitchell, J.,

at motion to dismiss; Albert Lorenzo, J., at plea and sentencing), rendered May 10, 2023, convicting defendant of criminal possession of a weapon in the fourth degree, and sentencing him to a conditional discharge, unanimously affirmed.

Defendant argues that his weapon possession conviction must be vacated as violative of his Second Amendment rights because he was convicted under a facially unconstitutional gun licensing scheme and because the seven months between his submission of an application for a gun license and his arrest constituted an unconstitutionally long delay. Pursuant to *People v Johnson* (— NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]), defendant's facial challenge survives his voluntary waiver of the right to appeal, and he had standing to assert it on appeal regardless of whether he sought to obtain a gun license. However, the facial constitutional challenge fails on the merits because *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) did not strike down New York's gun-licensing regime in its entirety but rather invalidated the statute's proper cause requirement and left the balance of the statute undisturbed (*see Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *3).

Defendant validly waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019], *cert denied* 589 US 1302 [2020]). Accordingly, his as-applied challenge to the licensing statute, premised on the claim that the purported delay in processing his gun license application was unconstitutional based on the particular circumstances of defendant's application, does not survive his valid appeal waiver (*see Johnson*, — NY3d at —, 2025 NY Slip Op 06528, *2). In any event, on the merits his argument fails because there is nothing in the record specifying the cause of the delay and because defendant failed to demonstrate that the delay was unconstitutionally long under the relevant circumstances. Finally, defendant's argument that the New York regulations cited in the ultimate denial of his gun license application were the equivalent of the proper cause requirement that the *Bruen* court struck down rests on an inadequately developed record. The argument fails in any event because the gun possession offense for which defendant was prosecuted was complete before the ruling on his license application. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

20 The People of the State of New York, Respondent, v Johnny Marin, Appellant. [249 NYS3d 63]—

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J., at plea; Judith Lieb, J., at sentencing), rendered February 15, 2023, convicting defendant of attempted burglary in the second degree, and sentencing him to a term of three years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed at sentencing, and otherwise affirmed.

Under the totality of the circumstances, defendant's waiver of the right to appeal was invalid (*see People v Thomas*, 34 NY3d 545, 559 [2019], *cert denied* 589 US 1302 [2020]). The court's colloquy failed to advise defendant of the claims which would survive the waiver, and incorrectly informed him that if it found that he violated the terms of the plea, such finding could not be appealed (*see People v Cruz*, 221 AD3d 465, 465 [1st Dept 2023]; *see also People v Patterson*, 106 AD3d 757, 757 [2d Dept 2013], *lv denied* 21 NY3d 1018 [2013]). Nevertheless, we find that the court providently exercised its discretion in denying defendant youthful offender status, and defendant has set forth no basis for this Court to substitute a youthful offender adjudication in the interest of justice (*see People v Roberts*, 228 AD3d 488, 489 [1st Dept 2024], *lv denied* 42 NY3d 1054 [2024]).

Based on our own interest of justice powers, we vacate the surcharge and fees imposed on defendant at sentencing (*see People v Martinez*, 231 AD3d 556, 557 [1st Dept 2024]). We note that the People do not oppose this relief. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodriguez, JJ.

21 The People of the State of New York, Respondent, v Malachi Williams, Appellant. [250 NYS3d 74]—Judgment, Supreme Court, New York County (April A. Newbauer, J.), rendered April 18, 2024, convicting defendant, upon his plea of guilty, of robbery in the third degree and attempted identity theft in the first degree under indictment No. 76084/23, and sentencing him to concurrent jail terms of 364 days, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the surcharge and fees imposed at sentencing, and otherwise affirmed. Judgment, Supreme Court, Bronx County (Steven J. Hornstein, J.), rendered March 28, 2024, convicting defendant of attempted criminal possession of a weapon in the second degree under indictment No. 71530/23, and sentencing him to a jail term of one year, to run concurrently with the above judgment, unanimously affirmed.

Defendant has standing to raise his challenge to the constitutionality of New York's prohibition on those under 21

years old from obtaining a firearm license, notwithstanding that he never applied to obtain a firearm license (*see People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *3 [2025]). On the merits, defendant has failed to establish that the instant indictment is unconstitutional under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]).

Defendant's challenges to the "good moral character" provision in Penal Law § 400.00 (1) (b) and New York's ban on large-capacity magazines (Penal Law § 265.02 [8]) are unpreserved because he failed to raise them in his motion to dismiss the indictment (*see People v Cabrera*, 41 NY3d 35, 42-51 [2023]), and we decline to review them in the interest of justice. In any event, the latter challenge is moot because defendant was not convicted of that count (*see People v Watts*, 234 AD3d 620, 621 [1st Dept 2025], *lv denied* 43 NY3d 1059 [2025]; *People v Ruiz*, 146 AD3d 417, 417 [1st Dept 2017], *lv denied* 28 NY3d 1188 [2017]).

Based on our own interest of justice powers, we vacate the surcharge and fees imposed at sentencing under indictment No. 76084/23 (*see People v Chirinos*, 190 AD3d 434, 435 [1st Dept 2021]). We note that the People do not oppose this relief. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

22 The People of the State of New York, Respondent, v Akeem Sharp, Appellant. [248 NYS3d 560]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Brendan T. Lantry, J.), rendered May 24, 2023, 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. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodriguez, JJ.

23 The People of the State of New York, Respondent, v Ayana Clinton, Appellant. [248 NYS3d 561]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ellen N. Biben, J.), rendered July 02, 2024, 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. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

24 The People of the State of New York, Respondent, v Bryan Thompson, Appellant. [248 NYS3d 559]—Judgment,

Supreme Court, New York County (April A. Newbauer, J.), rendered May 12, 2022, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of nine years of imprisonment, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence of imprisonment to a term of eight years, and otherwise affirmed.

We find the sentence excessive to the extent indicated. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

25 The People of the State of New York, Respondent, v Daryl Dean, Appellant. [248 NYS3d 559]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marisol Martinez Alonso, J.), rendered June 18, 2024, 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. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

26 The People of the State of New York, Respondent, v Jovanny Vasquez, Appellant. [249 NYS3d 66]—Judgment, Supreme Court, New York County (Abraham L. Clott, J.), rendered April 25, 2019, 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. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodriguez, JJ.

27 The People of the State of New York, Respondent, v Rafael Silva, Appellant. [250 NYS3d 76]—

Crimes—Assault—Sufficiency and Weight of Evidence—Intent

Judgment, Supreme Court, New York County (Althea E.M. Drysdale, J.), rendered August 30, 2022, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts) and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 7½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Lamont*, 25 NY3d 315, 318-319 [2015]; *People v Danielson*, 9 NY3d 342, 348-349 [2007]; *see also People v Baque*, 43 NY3d 26 [2024]). There is no basis for disturbing the jury's credibility determinations. The totality of the evidence regarding events before, during, and after the crime (*see Matter of Tatiana N.*, 73 AD3d 186, 190-191 [1st Dept 2010]), including witness testimony and surveillance video footage, supports the jury's conclusion that when defendant commanded the shooter to "pop" the victim during an argument, he was aware that the shooter possessed a loaded firearm, and he intended for the shooter to fire his weapon at the victim and cause him to sustain physical injury (*see People v Grasso*, 189 AD3d 486, 487 [1st Dept 2020], *lv denied* 36 NY3d 1097 [2021]; *People v Torres*, 108 AD3d 474, 475 [1st Dept 2013], *lv denied* 22 NY3d 998 [2013]; *People v Christie*, 55 AD3d 341, 342 [1st Dept 2008], *lv denied* 12 NY3d 757 [2009]).

Several of defendant's present challenges to the prosecutor's summation are unpreserved, and we decline to consider them in the interest of justice (*see People v Romero*, 7 NY3d 911, 912 [2006]). As an alternative holding, we find that the prosecutor's summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133, 136 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). In response to defense counsel's arguments challenging the credibility of the witnesses and the evidence of accomplice liability, the prosecutor permissibly offered common sense and evidence-based arguments that the witnesses were credible, contended that the witnesses had no reason to lie, and marshaled the evidence (*see People v Gonzalez*, 298 AD2d 133, 133-134 [1st Dept 2002], *lv denied* 99 NY2d 614 [2003]; *People v Bryant*, 294 AD2d 221 [1st Dept 2002], *lv denied* 99 NY2d 534 [2002]). The prosecutor's challenged remarks "constituted fair comment on the evidence and reasonable inferences to be drawn therefrom" (*People v Harkless*, 238 AD3d 646, 647 [1st Dept 2025], *lv denied* 44 NY3d 1028 [2025]).

We perceive no basis for reducing the sentence. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodriguez, JJ.

28 Rego Park Lender LLC, Respondent, v Pranses Golyan et al., Appellants. [253 NYS3d 108]—

Judgments—Summary Judgment—Motion for Summary Judgment in Lieu of Complaint—Existence of Guaranty, Underlying Debt, and Guarantor’s Failure to Perform

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered January 13, 2025, in plaintiff’s favor in the total amount of \$6,617,633.69, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about October 22, 2024, which granted plaintiff’s motion for summary judgment in lieu of complaint, denied defendants’ cross-motions to dismiss the action pursuant to CPLR 3211 (a) (7) and RPAPL 1371 (3), and awarded plaintiff judgment against defendants, jointly and severally, in the amount of \$6,516,365.22, plus interest and attorneys’ fees, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff satisfied its prima facie burden on its CPLR 3213 motion for summary judgment in lieu of complaint by demonstrating the existence of the guaranty and underlying debt, which arose from the default under a commercial mortgage by nonparty Golyan Enterprises LLC (the Borrower), as well as defendant guarantors’ failure to perform under the guaranty (see *BBM3, LLC v Vosotas*, 216 AD3d 403, 403 [1st Dept 2023]). The guaranty included a waiver by defendants of any defenses to the performance of their obligations under the guaranty, including defenses based on “any manner of application of any funds received by” plaintiff. This insulated plaintiff from any objection to its election to apply \$4,119,671.36 of its credit bid from the sale of the mortgaged premises to the outstanding principal balance due under the underlying note (see *DB 232 Seigel Mezz LLC v Moskovits*, 223 AD3d 610, 611 [1st Dept 2024]). Nor do the note and mortgage provide any instructions as to the order in which plaintiff was to apply the credit with respect to unpaid principal and interest. The language in those documents that defendants rely on is largely quoted out of context, instead of read “in a manner that accords the words their fair and reasonable meaning, and achieves a practical interpretation of the expressions of the parties” (*Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010] [internal quotation marks omitted]).

We reject defendants’ argument that plaintiff was required to move for a deficiency judgment against the borrower in the underlying foreclosure action under RPAPL 1371 before it could proceed under the guaranty. A judgment of foreclosure and sale

was never granted in the underlying foreclosure action because the borrower commenced a bankruptcy proceeding in which the mortgaged property was sold, rendering the foreclosure action moot and causing plaintiff to voluntarily withdraw it. Accordingly, a motion for a deficiency judgment was not possible and the statute was inapplicable (*see B & H Florida Notes LLC v Ashkenazi*, 149 AD3d 401, 402 [1st Dept 2017]).

We have considered defendants' remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

29 Wilky Rigaud et al., Respondents, v 509 W 34, L.L.C., et al., Appellants. [248 NYS3d 560]—An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Leslie A. Stroth, J.), entered on or about January 31, 2025, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated February 4, 2026, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Moulton, J.P., Friedman, Higgitt, Rosado, O'Neill Levy, JJ.

30 Kenny L. Rodriguez, Respondent, v RXR Glen Isle Partners LLC et al., Respondents. Hunter Roberts Construction Group, LLC, Third-Party Plaintiff-Respondent, v Custom Services Contracting of NY Inc., Third-Party Defendant-Appellant/Second Third-Party Defendant-Appellant. RXR Glen Isle Partners LLC et al., Second Third-Party Plaintiffs-Respondents. [249 NYS3d 68]—

Indemnity—Contractual Indemnification—Conditional Summary Judgment

Order, Supreme Court, New York County (Richard G. Latin, J.), entered August 19, 2024, which, to the extent appealed from, granted the motion of defendants RXR Glen Isle Partners LLC, RXR Garvies P1 Building H Owner LLC, RXR Garvies P1 Building I Owner LLC, RXR Garvies P1 Building B Owner LLC, and Hunter Roberts Construction Group, LLC (collectively RXR-Hunter) to the extent of granting conditional summary judgment to RXR-Hunter on its claims for contractual indemnity against third-party defendant Custom Services Contracting of NY, Inc. (CSC), unanimously affirmed, without costs.

RXR-Hunter established its prima facie entitlement to conditional summary judgment on its claims for contractual

indemnity against CSC. The record establishes that plaintiff's injury occurred while he was performing work for his employer, CSC. The accident therefore arose out of CSC's work, triggering its contractual obligation to indemnify RXR-Hunter pursuant to the broad performance-of-the-work clause (see *Travalja v 135 W. 52nd St. Owner LLC*, 232 AD3d 503, 505 [1st Dept 2024]; *McKinney v Empire State Dev. Corp.*, 217 AD3d 574, 575 [1st Dept 2023]; *Alvarado v SC 142 W. 24 LLC*, 209 AD3d 422, 423 [1st Dept 2022]). In opposition to RXR-Hunter's motion, CSC failed to raise a material issue of fact. A finding of conditional indemnity was appropriate as issues of fact remain as to possible negligence on the part of RXR-Hunter and the extent to which such negligence may have contributed to the accident (see *Travalja*, 232 AD3d at 505; *Hernandez v Argo Corp.*, 95 AD3d 782 [1st Dept 2012]). Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodríguez, JJ.

31 Alessandro Sebastiano, Respondent, v Bamundo, Zwal & Schermerhorn LLP, Appellant, et al., Defendant. [249 NYS3d 67]—

Attorney and Client—Malpractice—Slip and Fall—Determination of Applicable Building Code

Order, Supreme Court, Bronx County (Elizabeth A. Taylor, J.), entered on or about January 23, 2025, which, to the extent appealed from, denied defendant law firm's motion for summary judgment dismissing the legal malpractice action as against it, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

The law firm established its prima facie entitlement to summary judgment because its expert opined that the 1914 Building Code applied, since the plans for the construction of the staircase were approved in 1915, and the approval date was the operative date for the purposes of applying a code provision to any portion of a structure. The 1914 Code, as opposed to the 1916 Code, did not require that interior stairs have non-slip treads.

Plaintiff failed to raise a triable issue of fact as to which code applied, and so we are able to decide as a matter of law that the 1914 code applied (see *DeRosa v City of New York*, 30 AD3d 323, 326 [1st Dept 2006]). Accordingly, since plaintiff, as required by General Municipal Law § 205-e, is unable to cite to a predicate code and/or ordinance, which did require that the stairs that plaintiff's decedent fell on have a non-slip tread, he cannot establish any causal connection between the law firm's

failure to determine the station's "built" date and applicable building code, and the dismissal of the complaint in the underlying action (*see Gallet, Dreyer & Berkey, LLP v Basile*, 141 AD3d 405, 405 [1st Dept 2016]).

We have considered plaintiff's remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

32 In the Matter of Sheltering Arms Children's Services, Respondent, v Yiwei Z., et al., Respondents, and Maricely T., Appellant. [249 NYS3d 69]—

Witnesses—Cross-Examination—Client—Leading Questions

Order, Family Court, New York County (Stephanie Schwartz, J.), entered on or about May 6, 2025, which determined that respondent mother's counsel was precluded from asking leading questions in his cross-examination of the mother, whom the petitioner agency called as a witness on its direct case against the mother, unanimously affirmed, without costs.

While the subject order is not appealable as of right (Family Ct Act § 1112 [a]) because this case is based on permanent neglect, and a potential finding of permanent neglect would constitute a permanent and significant stigma that may impact the mother's status in future proceedings, we deem the notice of appeal to be a request for leave to appeal, and grant the request (*see Matter of Nekia C. [Kevin E.C.—Laurel S.McC.]*, 155 AD3d 431, 432 [1st Dept 2017]).

Family Court providently exercised its discretion in precluding the mother's counsel from cross-examining her after petitioner agency called her as a witness on its case-in-chief. Trial courts have well-established and broad authority to control courtroom proceedings (*see Jackson v Montefiore Med. Ctr.*, 109 AD3d 762, 763 [1st Dept 2013], *lv denied* 22 NY3d 858 [2013]), including witness examination (*see People v Weaver*, 302 AD2d 872, 873 [4th Dept 2003], *lv denied* 99 NY3d 633 [2003]). When an adverse party is called as a witness on the other party's case in chief, the court may permit the use of leading questions against that witness upon a showing of hostility, adversity, evasiveness or uncooperativeness (*see Matter of Maria A.M. v Dextor N.*, 95 AD3d 578, 579 [1st Dept 2012]; *Matter of Giaquinto*, 164 AD3d 1527, 1530-1531 [3d Dept 2018], *affd* 32 NY3d 1180 [2019]).

Here, although the agency called the mother as an adverse witness and was permitted to ask leading questions, the mother's counsel made no showing that the mother would be hostile, evasive, or biased against her own counsel. Accord-

ingly, the rationale underlying the use of leading questions—the need to control a reluctant or adverse witness—was entirely absent during counsel’s examination of his own client.

Further, counsel was free to call the mother on her direct case. We have reviewed the mother’s remaining contentions and find them unavailing. Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodriguez, JJ.

33 Cristian Valarezo et al., Appellants, v HP Jamsta Housing Development Fund Company Inc. et al., Respondents. [252 NYS3d 71]—

Labor—Safe Place to Work—Elevation-Related Hazard—Injury from Falling, Unsecured Metal Bar

Order, Supreme Court, New York County (Lyle E. Frank, J.), entered on or about May 1, 2023, which, to the extent appealed from as limited by the briefs, denied plaintiffs’ motion for summary judgment on liability on their Labor Law § 240 (1) claim and granted defendants’ motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, unanimously modified, on the law, to grant plaintiffs’ motion for summary judgment on liability on their Labor Law § 240 (1) claim, and otherwise affirmed, without costs.

Plaintiff was injured as he and his coworkers were making bases for cement columns by using a drilling/excavation machine to remove steel bars that had been drilled into the ground. Plaintiff testified that when removing the bars, a fabric sling was tied to the top of the bar, a hook was placed into the sling, and the drilling/excavation machine lifted the bar away. As the last bar was being removed, it fell and hit plaintiff. According to plaintiff’s testimony, the bar was standing vertically on the drilling machine and was not secured before the machine moved it.

Supreme Court should have granted plaintiffs’ motion for summary judgment on liability on their Labor Law § 240 (1) claim. Plaintiffs demonstrated prima facie entitlement to summary judgment on this claim by submitting evidence establishing that the steel bar was not secured while the excavation/drilling machine was hoisting it out of the ground (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 5 [2011]; *MacGregor v MRMD NY Corp.*, 194 AD3d 550, 551 [1st Dept 2021]). Even though plaintiff testified that he did not see the precise moment that the bar began to fall and was unsure whether a sling was attached to the bar at the time of the accident, he was not obliged to show the exact circumstances under which the object fell (*see Harsanyi v Extell 4110 LLC*,

220 AD3d 528, 529 [1st Dept 2023]). Furthermore, because the equipment used to hoist the steel bar failed to prevent it from falling, plaintiffs were also not obliged to specify the type of safety device that defendants should have provided (*see Rubio v New York Proton Mgt., LLC*, 192 AD3d 438, 439 [1st Dept 2021]).

In opposition, defendants failed to raise a triable issue of fact. Plaintiff's un rebutted testimony was sufficient to establish plaintiffs' prima facie case without the necessity of considering various documents that were submitted on plaintiffs' motion (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

Because we are granting plaintiffs' motion for summary judgment on liability under Labor Law § 240 (1), the arguments related to the Labor Law § 200 and common-law negligence claims are academic (*see Fanning v Rockefeller Univ.*, 106 AD3d 484, 485 [1st Dept 2013]). Concur—Kennedy, J.P., Scarpulla, Kapnick, González, Rodriguez, JJ.

34 Louis Vola, Also Known as Luigi Vola, Appellant, v Tully Construction Co., Inc., et al., Respondents. [252 NYS3d 72]—

Labor—Termination from Employment—Retaliation
Libel and Slander—Slander Per Se—Defamatory Meaning
Libel and Slander—Slander Per Se—Harming of Business

Order, Supreme Court, Bronx County (Fidel E. Gomez, J.), entered August 8, 2024, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was employed by defendant construction company (Tully) as a site safety manager. Supreme Court properly granted summary judgment dismissing plaintiff's first claim of retaliatory termination of employment, as the record shows that plaintiff did not make "a complaint to his . . . employer" about Labor Law safety violations (Labor Law § 215 [1] [a] [i]). Instead, plaintiff performed his job duties of ensuring site safety by coordination with supervisors on site and defendant vice president of risk management (Ryan) at Tully. As to the incident precipitating plaintiff's termination, there is no evidence that plaintiff reported any Labor Law violation to Tully supervisors, as he testified only that he stopped a laborer from improperly conducting asbestos abatement where the laborer could not properly wear a respirator mask (*compare Neu v Amelia US LLC*, 226 AD3d 515, 516 [1st Dept 2024]). In any event, defendants proffered legitimate reasons for terminating

plaintiff's employment, and plaintiff failed to raise triable issues of fact as to pretext (see e.g. *Stephens v Isabella Geriatric Ctr., Inc.*, 178 AD3d 478, 478 [1st Dept 2019], *lv denied* 35 NY3d 914 [2020]; *Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 202-203 [1st Dept 2015]).

Supreme Court also properly granted summary judgment dismissing plaintiff's second retaliation claim, purportedly arising from plaintiff bringing this action (Labor Law § 215 [1] [a] [iii]). The Labor Law § 215 retaliation claim cannot be maintained here because "the purported retaliatory act occurred when plaintiff was no longer an employee" of Tully (*Vergara v Mission Capital Advisors, LLC*, 200 AD3d 484, 485 [1st Dept 2021]; accord *Cornell Univ. v Patsalides*, 234 AD3d 434, 435 [1st Dept 2025]). Furthermore, the record demonstrates that defendants did nothing more than object to plaintiff exercising safety supervisory authority over Tully's workers at a site where Tully had been the prime contractor for over a year, citing a conflict of interest given this ongoing litigation. Indeed, the record shows that plaintiff's new employer and its client were not made aware of the instant action against defendants prior to offering plaintiff the job.

The defamation claim against Ryan was also properly dismissed. The allegedly defamatory words are "not reasonably susceptible of a defamatory meaning" and do not constitute defamation per se (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]; see *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). The transcript of the audio recording in the record shows that Ryan did not connote that plaintiff was promiscuous or adulterous, as the statements concerning plaintiff saying he was getting divorced or he had three girlfriends were not made to assert these as true facts, but only to question reasons plaintiff gave for not accepting offers to work overtime shifts (compare *Ava v NYP Holdings, Inc.*, 64 AD3d 407, 413 [1st Dept 2009], *lv denied* 14 NY3d 702 [2010]). Plaintiff testified that he did, in fact, tell Ryan that he would not work one night shift because he and his wife were going to visit his mother-in-law in the hospital (see *Dillon*, 261 AD2d at 39 ["Truth provides a complete defense"]).

Finally, Ryan's statements cannot "be readily interpreted as imparting to plaintiff 'fraud, dishonesty, misconduct or unfitness in [his] business'" (*Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 261 [1st Dept 1995]). The allegedly defamatory statements did not reflect upon plaintiff's performance as a safety manager (see *Aronson v Wiersma*, 65 NY2d 592, 594 [1985]). Instead, the statements were a "general reflection upon

. . . plaintiff's character or qualities" and were not made for the "purpose of harming . . . plaintiff in his business" (*Whelan v Cuomo*, 220 AD3d 979, 982 [2d Dept 2023] [internal quotation marks omitted], *appeal dismissed and lv denied* 41 NY3d 975 [2024]).

We have considered plaintiff's remaining contentions and find them unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

35 In the Matter of Rodney W., Appellant, v Uchechi C., Respondent. [253 NYS3d 67]—

Parent, Child and Family—Custody—Joint Custody

Parent, Child and Family—Custody—Sole Physical and Legal Custody—Best Interests of Child

Order, Supreme Court, Bronx County (Beth Beller, J.), entered on or about March 18, 2025, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing denied petitioner father's petition for sole physical and legal custody of the subject child and granted sole physical and legal custody of the subject child to respondent mother, unanimously affirmed, without costs.

Family Court properly determined that joint custody was not appropriate due to the parties' lack of trust and demonstrated difficulties with communicating effectively (*see Lubit v Lubit*, 65 AD3d 954, 955 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* 560 US 940 [2010]). Both parties unequivocally testified that they did not trust each other, and the record reflects repeated failures of communication and ongoing conflicts (*see Matter of Paul D. v Margarita O.*, 227 AD3d 439, 440 [1st Dept 2024]).

Family Court's determination that the child's best interests would be served by awarding sole physical and legal custody to the mother with parenting time to the father was based on a thorough assessment of the witnesses' demeanor and credibility and is supported by a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of Judith L.C. v Lawrence Y.*, 179 AD3d 616, 616 [1st Dept 2020], *lv denied* 35 NY3d 911 [2020]; *Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 641 [1st Dept 2012]). The court's decision to credit the mother's testimony and not to fully credit the father's testimony is entitled to great deference (*see Matter of Judith L.C.*, 179 AD3d at 616). As the court observed, the father's testimony was inconsistent and contradictory in that he claimed to be the sole breadwinner during a period when he was unemployed, he claimed not to know where the child at-

tended school yet later testified that he spoke to school staff and obtained the child's records, and he provided conflicting testimony regarding the child's need for assistance and services. Thus, the court properly discredited aspects of the father's testimony and reasonably resolved any conflicting testimony in favor of the mother (see *Matter of Alexei S. v Michael M.*, 132 AD3d 466, 467 [1st Dept 2015]).

Moreover, the mother has been the child's primary caretaker since birth and provided her with a safe and stable home life (see *Matter of Darryl M. v Shaniqua D.*, 242 AD3d 512, 513 [1st Dept 2025]). The father has lacked stable housing and employment, while the mother has maintained the same apartment and flexible job for years. The mother has always been the primary parent involved with the child's education and health (see *Matter of Stephanie C. v Ricardo E.*, 231 AD3d 663, 664 [1st Dept 2024]). The mother arranged for the child to be evaluated and receive early intervention services, enrolled the child in school, ensured the child completed her homework, and worked with the school on the child's Individualized Education Plan and services (see *Matter of Jamel W. v Stacey J.*, 136 AD3d 552, 553 [1st Dept 2016]). The mother scheduled all the child's medical appointments, handled her health insurance, and brought her to a specialized dentist (see *Matter of Daniel B. v Deshauna S.*, 226 AD3d 552, 553 [1st Dept 2024]).

The record also supports the court's determination that the mother is more likely to place the child's needs first and to foster the relationship between the father and the child, "even though both parents at times withheld information from each other" (*Matter of Shainiska D. v Gage D.*, 242 AD3d 411, 412 [1st Dept 2025], *lv denied* 44 NY3d 909 [2026]). In contrast, the father put himself first and failed to consider the child's feelings when he refused to cooperate with supervised visitation and had no contact with her for over a year, and he completely disregarded her best interests when he made false reports about the mother to law enforcement, causing the child to be subjected to interviews and bodily examinations (see *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). Although the mother was reluctant to communicate with the father due to his history of retaliatory behavior, she nevertheless expressed a willingness to cooperate and a desire for the child to have a positive relationship with the father, and she never disparaged the father to the child (see *Matter of Scott W. v Krizzia G.*, 194 AD3d 406, 407 [1st Dept 2021]). Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Mendez, Michael, JJ.

36 Yemeni-American Association, Corp., Respondent, v Ali Alsaede, Appellant, et al., Defendant. Yemeni-American Association Corp., Nonparty Appellant. [251 NYS3d 100]—

Consumer Protection—Deceptive Acts and Practices—Improper Representation

Order, Supreme Court, Bronx County (Veronica G. Hummel, J.), entered on or about January 25, 2024, which granted plaintiff's motion for a preliminary injunction to the extent of preliminarily enjoining defendants from representing themselves to be plaintiff by use of its name, service mark, or logo and from transacting any business in plaintiff's name, and denied defendant's motion for a preliminary injunction against plaintiff's member Fateh Saleh and all prior members of plaintiff's board of directors enjoining them from holding themselves out as board members of plaintiff, staying plaintiff from holding elections for the board and for "President," and declaring defendant "President," unanimously affirmed, with costs.

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). To prevail on its claim under General Business Law § 349, plaintiff is required to establish that: (1) defendant engaged in "consumer-oriented" conduct; (2) the conduct was materially misleading; and (3) plaintiff suffered an injury as a result of the conduct (*see Plavin v Group Health Inc.*, 35 NY3d 1, 10 [2020]). Since plaintiff is engaged in services to a subclass of consumers, the Yemeni-American community in New York City, its conduct falls within the statute's ambit (*see* General Business Law § 349 [a] [consumer oriented conduct applies to "the furnishing of any service in this state"]; *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 176-178 [2021] ["Section 349, on its face, applies to virtually all economic activity"] [internal quotation marks and brackets omitted]). The record also indicates that defendant misled the Yemeni-American community into believing that he represented plaintiff, despite his failure to establish that he is a member of plaintiff eligible to call an election or run for office. Even if defendant was a member who could call an election, he engaged in an election campaign that was improper, and, by doing so, apparently convinced more than 1,400 Yemeni-Americans to vote in an unauthorized election, causing injury to plaintiff.

Plaintiff demonstrated that failing to immediately enjoin de-

defendant from holding himself out as plaintiff's representative would cause irreparable injury by harming plaintiff's reputation and creating confusion and division within the community. As to the balance of equities, regardless of whether, as defendant contends, the current board is invalid, defendant has failed to establish that he has any authority to represent himself as acting on plaintiff's behalf. While plaintiff seeks to maintain the status quo with a preliminary injunction pending resolution of the matter, without which it would otherwise suffer harm, defendant has not demonstrated that he would be similarly harmed were the status quo maintained (*see Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 616 [1st Dept 2018]).

Based on the foregoing, the motion court also providently exercised its discretion in denying defendant's motion for preliminary injunctive relief.

We have considered defendant's remaining arguments and find them unavailing. Concur—Manzanet-Daniels, J.P., Moulton, Gesmer, Michael, JJ. **[Prior Case History: 81 Misc 3d 1235(A), 2024 NY Slip Op 50078(U).]**

SECOND DEPARTMENT, FEBRUARY, 2026

(February 2, 2026)

1 The People of the State of New York ex rel. Anna Boksenbaum, on Behalf of Robert Reid, Petitioner, v Lynelle Maginley-Liddie, Respondent. [251 NYS3d 224]—

Habeas Corpus—When Remedy Available—Offenses Not Bail Qualifying

Writ of habeas corpus in the nature of an application to release Robert Reid upon his own recognizance or, in the alternative, to place him in the supervised release program with electronic monitoring upon Queens County indictment No. 73565/25.

Adjudged that the writ is sustained, without costs or disbursements, to the extent that the matter is remitted to the Supreme Court, Queens County, for further proceedings consistent herewith, and the writ is otherwise dismissed.

In September 2025, the principal, Robert Reid, was arraigned in the Criminal Court on a felony complaint charging him with criminal possession of a controlled substance in the third degree (Penal Law § 220.16), a class B felony, and related charges. At the time of arraignment, the principal was on pa-

role for a conviction in a separate criminal matter. The arraignment court set bail for the principal in the amount of \$30,000 posted in cash, \$90,000 posted in the form of a partially secured bond, with the requirement of 10% down, or \$90,000 posted in the form of an insurance company bond.

On December 1, 2025, the principal applied to the Supreme Court for release on his own recognizance or, in the alternative, to be placed in the supervised release program. He argued that the charged offenses were not bail-qualifying offenses under to CPL 510.10 (4) (s) and that his parole status did not make the charged offenses bail qualifying under CPL 510.10 (4) (r). The court denied the application, concluding that the principal was charged with a bail-qualifying offense pursuant to CPL 510.10 (4) (r). The petitioner then commenced this proceeding for a writ of habeas corpus in the nature of an application to release the principal upon his own recognizance or, in the alternative, to place the principal in the supervised release program with electronic monitoring.

“Where the principal stands charged with a qualifying offense, the court, unless otherwise prohibited by law, may in its discretion release the principal pending trial on the principal’s own recognizance or under non-monetary conditions, fix bail, or order non-monetary conditions in conjunction with fixing bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff” (*id.* § 510.10 [4]). Under CPL 510.10 (4) (r), a principal stands charged with a bail-qualifying offense when he or she stands charged with “any felony offense . . . while serving a sentence of probation or while released to post release supervision.”

“[I]t is a bedrock principle of statutory interpretation that ‘the Court’s primary consideration is to ascertain and give effect to the intention of the Legislature’” (*Matter of Town of Southampton v New York State Dept. of Envtl. Conservation*, 39 NY3d 201, 209 [2023], quoting *Matter of Mestecky v City of New York*, 30 NY3d 239, 243 [2017]). “Since the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof” (*People ex rel. Larson v Spano*, 244 AD3d 910, 911 [2025] [internal quotation marks omitted]; see *People ex rel. Ellis v Imperati*, 45 NY3d 67, 73 [2025]). Here, contrary to the People’s contention, the plain language of CPL 510.10 (4) (r) refers only to probation and postrelease supervision; it does not refer to parole, which is an entirely separate category of release (see Executive Law § 259;

Penal Law § 70.45). Had the Legislature intended to incorporate parole into CPL 510.10 (4) (r), it could have done so (*see People v Finnegan*, 85 NY2d 53, 58 [1995]). Thus, since the principal was on parole rather than serving a sentence of probation or released to postrelease supervision, the Supreme Court erred in concluding that he was charged with a bail-qualifying offense within the meaning of CPL 510.10 (4) (r).

Moreover, the principal's charged drug-related offenses are not bail qualifying pursuant to CPL 510.10 (4) (s) (*see People v Boykins*, 161 AD3d 183, 187 [2018]).

Accordingly, we sustain the writ to the extent of remitting the matter to the Supreme Court, Queens County, for further proceedings consistent herewith.

In light of our determination, we do not reach the petitioner's remaining contention. Brathwaite Nelson, J.P., Wan, Love and Goldberg Velazquez, JJ., concur.

2 The People of the State of New York ex rel. Jonathan Manley, on Behalf of Jean J. Evans, Petitioner, v Errol D. Toulon, Respondent. [250 NYS3d 171]—

Habeas Corpus—When Remedy Appropriate—Terms of Release

Writ of habeas corpus in the nature of an application to release Jean J. Evans upon his own recognizance or, in the alternative, to set reasonable bail upon Suffolk County indictment No. 71565/2025.

Adjudged that the writ is sustained, without costs or disbursements, to the extent that bail upon Suffolk County indictment No. 71565/2025 is set in the sum of \$1,000,000 posted in the form of an insurance company bail bond, the sum of \$2,000,000 posted in the form of a partially secured bond, with the requirement of 10% down, or the sum of \$250,000 deposited as a cash bail alternative, on condition that, in addition to posting a bond or depositing the cash alternative set forth above, Jean J. Evans shall (1) wear an electronic monitoring bracelet, with monitoring services to be provided by a qualified entity pursuant to CPL 510.40 (4) (c), and any violations of the conditions set forth herein relating to the electronic monitoring shall be reported by the electronic monitoring service provider to the Office of the District Attorney of Suffolk County, and further proceedings pursuant to CPL 510.40 (4) (d), if any, shall be conducted in the criminal court in Suffolk County; (2) remain confined to his residence, except for visits to his attorney, his doctors, or court, and must travel directly from his residence to his attorney, his doctors, or court, and

directly back to his residence, when conducting those visits; (3) surrender all passports, if any, he may have to the Office of the District Attorney of Suffolk County, or, if he does not possess a passport, he shall provide to the Office of the District Attorney of Suffolk County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Suffolk County, in which he attests that he does not possess a passport, and shall not apply for any new or replacement passports; and (4) provide to the Office of the District Attorney of Suffolk County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Suffolk County, in which he attests that if he leaves the jurisdiction he agrees to waive the right to oppose extradition from any foreign jurisdiction; and it is further,

Ordered that upon receipt of a copy of this decision, order and judgment together with proof that Jean J. Evans (1) has given an insurance company bail bond in the sum of \$1,000,000, has given a partially secured bond in the sum of \$2,000,000 with the requirement of 10% down, or has deposited the sum of \$250,000 as a cash bail alternative; (2) has arranged for electronic monitoring with a qualified entity pursuant to CPL 510.40 (4) (c); (3) has surrendered all passports, if any, he may have to the Office of the District Attorney of Suffolk County, or, if he does not possess a passport, has provided to the Office of the District Attorney of Suffolk County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Suffolk County, in which he attests that he does not possess a passport, and shall not apply for any new or replacement passports; and (4) has provided to the Office of the District Attorney of Suffolk County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Suffolk County, in which he attests that if he leaves the jurisdiction he agrees to waive the right to oppose extradition from any foreign jurisdiction, the Warden of the facility at which Jean J. Evans is incarcerated, or his or her agent, is directed to immediately release Jean J. Evans from incarceration. Brathwaite Nelson, J.P., Wan, Love and Goldberg Velazquez, JJ., concur.

(February 3, 2026)

1 The People of the State of New York ex rel. David A. Arpino, on Behalf of Conrod Getten, Petitioner, v Michael J. Franchi et al., Respondents. [250 NYS3d 172]—

Habeas Corpus—When Remedy Appropriate—Terms for Immediate Release

from Incarceration

Writ of habeas corpus in the nature of an application to release Conrod Getten upon his own recognizance or, in the alternative, to set reasonable bail upon Suffolk County indictment No. 70062/2026.

Adjudged that the writ is sustained without costs or disbursements, to the extent that bail upon Suffolk County indictment No. 70062/2026 is set, upon the consent of the respondents, in the sum of \$150,000 posted in the form of an insurance company bail bond, the sum of \$750,000 posted in the form of a partially secured bond, with the requirement of 10% down, or the sum of \$75,000 deposited as a cash bail alternative, on condition that, in addition to posting a bond or depositing the cash alternative set forth above, Conrod Getten shall (1) wear an electronic monitoring bracelet, with monitoring services to be provided by a qualified entity pursuant to CPL 510.40 (4) (c), and any violations of the conditions set forth herein relating to the electronic monitoring shall be reported by the electronic monitoring service provider to the Office of the District Attorney of Suffolk County, and further proceedings pursuant to CPL 510.40 (4) (d), if any, shall be conducted by the County Court, Suffolk County; (2) surrender all passports, if any, he may have to the Office of the District Attorney of Suffolk County, or, if he does not possess a passport, he shall provide to the Office of the District Attorney of Suffolk County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Suffolk County, in which he attests that he does not possess a passport, and shall not apply for any new or replacement passports; and (3) provide to the Office of the District Attorney of Suffolk County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Suffolk County, in which he attests that if he leaves the jurisdiction he agrees to waive the right to oppose extradition from any foreign jurisdiction; and it is further,

Ordered that upon receipt of a copy of this decision, order and judgment together with proof that Conrod Getten (1) has given an insurance company bail bond in the sum of \$150,000, has given a partially secured bond in the sum of \$750,000 with the requirement of 10% down, or has deposited the sum of \$75,000 as a cash bail alternative; (2) has arranged for electronic monitoring with a qualified entity pursuant to CPL 510.40 (4) (c); (3) has surrendered all passports, if any, he may have to the Office of the District Attorney of Suffolk County, or, if he does not possess a passport, has provided to the Office of the District Attorney of Suffolk County an affidavit or affirma-

tion, in a form approved by the Office of the District Attorney of Suffolk County, in which he attests that he does not possess a passport, and shall not apply for any new or replacement passports; and (4) has provided to the Office of the District Attorney of Suffolk County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Suffolk County, in which he attests that if he leaves the jurisdiction he agrees to waive the right to oppose extradition from any foreign jurisdiction, the Warden of the facility at which Conrod Getten is incarcerated, or his or her agent, is directed to immediately release Conrod Getten from incarceration. Connolly, J.P., Christopher, Ventura and Golia, JJ., concur.

(February 4, 2026)

1 Doreen M. Abruzzese, Individually and as Executrix of the Estate of Michael A. Broph, Deceased, Appellant, v Ethel Pisacano, Respondent. [251 NYS3d 250]—

Quieting Title—Determination of Claim to Real Property—Triable Issues—Ambiguous Deed

Quieting Title—Determination of Claim to Real Property—Triable Issues—Delivery and Acceptance of Correction Deed

In an action pursuant to RPAPL article 15 to quiet title to certain real property and for related declaratory relief, the plaintiff appeals from an order of the Supreme Court, Suffolk County (C. Stephen Hackeling, J.), dated March 22, 2024. The order denied the plaintiff's motion for summary judgment on the complaint, searched the record, and awarded summary judgment to the defendant, in effect, declaring that title to the subject real property was conveyed pursuant to a correction deed and not a prior deed.

Ordered that the order is modified, on the law, by deleting the provision thereof searching the record and awarding summary judgment to the defendant, in effect, declaring that title to certain real property was conveyed pursuant to a correction deed and not a prior deed; as so modified, the order is affirmed, without costs or disbursements.

The plaintiff commenced this action pursuant to RPAPL article 15 to quiet title to certain real property located in East Marion (hereinafter the East Marion property) and for related declaratory relief. The defendant answered and asserted affirmative defenses and counterclaims, including a counterclaim pursuant to RPAPL article 15 to quiet title to the East Marion property. The plaintiff moved for summary judgment on the

complaint. The defendant opposed the motion. In an order dated March 22, 2024, the Supreme Court denied the plaintiff's motion, searched the record, and awarded summary judgment to the defendant, in effect, declaring that title to the East Marion property was conveyed pursuant to a correction deed and not a prior deed. The plaintiff appeals.

To obtain summary judgment in an action to quiet title pursuant to RPAPL article 15, the moving party must establish, prima facie, that it holds title or that the title claim of the nonmoving party lacks merit (*see 150A 30 St. Trust, Israel Grossman Trustee v Barca Dev., LLC*, 225 AD3d 646, 646 [2024]).

The construction of deeds is a matter of law (*see Garson v Tarmy*, 187 AD3d 1149, 1151 [2020]). "Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law" (Real Property Law § 240 [3]). "The intent of the parties is manifested by the language of the deed, and unless the deed is ambiguous, evidence of unexpressed, subjective intentions of the parties is irrelevant" (*D'Andrea v 3 Unqua Place, LLC*, 222 AD3d 830, 830 [2023] [internal quotation marks omitted]). "Where the language used in a deed is ambiguous such that it is susceptible of more than one interpretation, the courts will look beyond the written instrument to the surrounding circumstances" (*Al's Atl., Inc. v Shatma, LLC*, 109 AD3d 491, 492 [2013]).

Here, the plaintiff failed to demonstrate her prima facie entitlement to judgment as a matter of law since her submissions did not eliminate triable issues of fact. The deed through which the plaintiff claims title to the East Marion property is ambiguous on its face (*see id.*), and the plaintiff's submissions in support of her motion failed to eliminate triable issues of fact regarding this ambiguity (*see D'Andrea v 3 Unqua Place, LLC*, 222 AD3d at 831). Further, the plaintiff's submissions raised triable issues of fact as to delivery and acceptance of a subsequent correction deed (*see Dingle v Glass*, 247 AD2d 507, 507-508 [1998]; *Diamond v Wasserman*, 8 AD2d 623 [1959]). Since the plaintiff failed to establish her prima facie entitlement to judgment as a matter of law, the Supreme Court properly denied her motion for summary judgment on the complaint, regardless of the sufficiency of the defendant's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The Supreme Court, however, should not have searched the

record and awarded summary judgment to the defendant. The record does not establish that the defendant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Triable issues of fact exist, precluding judgment as a matter of law in the defendant's favor, regarding, inter alia, delivery and acceptance of the correction deed through which the defendant claims title to the East Marion property.

We modify the order accordingly. Dillon, J.P., Connolly, Landicino and McCormack, JJ., concur.

2 John Aretakis, Appellant, v CPEX Real Estate, LLC, et al., Respondents, et al., Defendant. [251 NYS3d 695]—

Pleading—Sufficiency of Pleading—Libel and Slander—Documents Filed against Property

Limitation of Actions—Contractual Limitations Period—Acts during Period of Brokerage Commission Agreement

Attorney and Client—Frivolous Conduct—Sanctions for Frivolous Amended Complaint

In an action, inter alia, to recover damages for breach of contract and slander of title, the plaintiff appeals from an order of the Supreme Court, Kings County (Carolyn E. Wade, J.), dated January 31, 2024. The order granted the motion of the defendants CPEX Real Estate, LLC, SVN CPEX Real Estate, Ryan Condren, and Timothy King for summary judgment dismissing the amended complaint insofar as asserted against them and pursuant to 22 NYCRR 130-1.1 to impose sanctions upon the plaintiff, and granted the separate motion of the defendant Michael King for summary judgment dismissing the amended complaint insofar as asserted against him.

Ordered that the order is affirmed, with costs to the defendants CPEX Real Estate, LLC, SVN CPEX Real Estate, Ryan Condren, and Timothy King.

In 2016, CPEX Real Estate, LLC (hereinafter CPEX), commenced an action (hereinafter the 2016 action) against Tomtro Realty Corp. (hereinafter Tomtro), alleging that Tomtro owed CPEX a commission under a brokerage commission agreement (*see Cpex Real Estate, LLC v Tomtro Realty Corp.*, 202 AD3d 905, 905 [2022]). After a nonjury trial, the Supreme Court entered a judgment in favor of CPEX (*see id.*). On appeal, this Court reversed the judgment and dismissed the complaint (*see id.*).

The plaintiff, as an assignee of Tomtro, subsequently commenced this action against, among others, the defendants CPEX, SVN CPEX Real Estate, Ryan Condren, and Timothy King (hereinafter collectively the CPEX defendants), and the defendant Michael King (hereinafter Michael), who was CPEX's

attorney in the 2016 action. The amended complaint asserted causes of action alleging, inter alia, breach of contract and slander of title, primarily based on the commencement and prosecution of the 2016 action. The CPEX defendants moved for summary judgment dismissing the amended complaint insofar as asserted against them and pursuant to 22 NYCRR 130-1.1 to impose sanctions upon the plaintiff, and Michael moved for summary judgment dismissing the amended complaint insofar as asserted against him. In an order dated January 31, 2024, the Supreme Court granted the motions. The plaintiff appeals.

The Supreme Court properly directed dismissal of the cause of action alleging slander of title insofar as asserted against the CPEX defendants and Michael. The elements of a cause of action to recover damages for slander of title are “(1) a communication falsely casting doubt on the validity of [the] complainant’s title, (2) reasonably calculated to cause harm, and (3) resulting in special damages’” (39 *Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455 [2006], quoting *Brown v Bethlehem Terrace Assoc.*, 136 AD2d 222, 224 [1988]). “The wrongful filing for record of a document which casts a cloud upon another’s title to or interest in realty is clearly such an act of publication as to give rise to an action for slander of title, if provable damages result” (*Hanbidge v Hunt*, 183 AD2d 700, 701 [1992] [internal quotation marks omitted]). “Special damages ‘must be alleged with sufficient particularity to identify actual losses and be related causally to the alleged tortious acts’” (*Shahid v Slochowsky & Slochowsky, LLP*, 208 AD3d 1381, 1383 [2022], quoting *Luciano v Handcock*, 78 AD2d 943, 944 [1980]). As the court properly determined, the amended complaint failed to sufficiently plead this cause of action. Moreover, Michael’s submissions demonstrated, prima facie, that no liens, notices of pendency, or any other documents were filed against the property that was the subject of the brokerage commission agreement. In opposition, the plaintiff failed to raise a triable issue of fact.

The Supreme Court properly directed dismissal of the cause of action alleging breach of contract as time-barred to the extent that it was based on the CPEX defendants’ acts during the period of the brokerage commission agreement (*see* CPLR 213 [2]; *Filasky v Andover Cos.*, 230 AD3d 1297, 1300 [2024]). To the extent that this cause of action was based on the CPEX defendants’ acts or omissions after the expiration of the brokerage commission agreement, the amended complaint failed to state a cause of action alleging breach of contract (*see* *We*

Transp., Inc. v Westbury Union Free Sch. Dist., 219 AD3d 865, 866 [2023]; *Pierce Coach Line, Inc. v Port Wash. Union Free Sch. Dist.*, 213 AD3d 959, 960 [2023]).

Pursuant to 22 NYCRR 130-1.1 (a), a court may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct (*see GDG Realty, LLC v 149 Glen St. Corp.*, 187 AD3d 994, 995 [2020]). “Conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false” (*id.* [internal quotation marks omitted]; *see* 22 NYCRR 130-1.1 [c]). Here, the Supreme Court providently exercised its discretion in granting that branch of the CPEX defendants’ motion which was pursuant to 22 NYCRR 130-1.1 to impose sanctions upon the plaintiff, as the amended complaint was frivolous.

The parties’ remaining contentions either are without merit or need not be reached in light of our determination. Genovesi, J.P., Ford, Dowling and Taylor, JJ., concur.

3 Mark Barbu et al., Appellants, v Kenneth Doyle, Doing Business as Par 4 Property Management LLC, et al., Respondents. [250 NYS3d 173]—

Labor—Safe Place to Work—Not Hired to Perform Work

Labor—Safe Place to Work—Out-of-Possession Landlord

Negligence—Maintenance of Premises—Open and Obvious Condition—Readily Observable and Familiar with Area

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Conrad D. Singer, J.), entered January 11, 2023. The order, insofar as appealed from, (1) granted that branch of the motion of the defendant Connan Land Company, LLC, which was for summary judgment dismissing the amended complaint insofar as asserted against it, (2) granted that branch of the motion of the defendants Kenneth Doyle and Par 4 Property Management, LLC, which was for summary judgment dismissing the amended complaint insofar as asserted against them, and (3) denied those branches of the plaintiffs’ cross-motion which were for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) and for leave to amend the bill of particulars.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs to the defendants appearing separately and filing separate briefs.

The plaintiff Mark Barbu (hereinafter the injured plaintiff) allegedly was injured on March 29, 2017, when he fell from a pallet rack inside the warehouse portion of a building owned by the defendant Connan Land Company, LLC (hereinafter the owner), and leased to the defendant Par 4 Property Management, LLC (hereinafter Par 4). Par 4 was owned by the injured plaintiff's brother-in-law, the defendant Kenneth Doyle. The injured plaintiff testified at his deposition that, on the date of the accident, he went to the premises to retrieve personal items he stored at the warehouse, including tools and construction materials. He testified that he climbed on top of the pallet rack to look for his property, but he lost his balance and fell approximately 10 feet to the ground.

Thereafter, the injured plaintiff, and his wife suing derivatively, commenced this action against the owner, Par 4, and Doyle, alleging, among other things, common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). The owner moved, *inter alia*, for summary judgment dismissing the amended complaint insofar as asserted against it. Par 4 and Doyle (hereinafter together the Par 4 defendants) moved, among other things, for summary judgment dismissing the amended complaint insofar as asserted against them. The plaintiffs opposed the motions and cross-moved, *inter alia*, for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) and for leave to amend the bill of particulars to assert violations of the Industrial Code. In an order entered January 11, 2023, the Supreme Court, among other things, granted those branches of the separate motions of the owner and the Par 4 defendants and denied those branches of the plaintiffs' cross-motion. The plaintiffs appeal.

The Supreme Court properly granted those branches of the separate motions of the owner and the Par 4 defendants which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 200, 240 (1), and 241 (6) insofar as asserted against each of them and denied that branch of the plaintiffs' cross-motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1). “ ‘[I]n order to invoke the protections afforded by the Labor Law and to come within the special class [of workers] for whose benefit liability is imposed upon contractors, owners and their agents, a plaintiff must demonstrate that he [or she] was both permitted or suffered to work on a building or structure and that he [or she] was hired by someone, be it owner, contractor or their agent’ ”

(*Daeira v Genting N.Y., LLC*, 173 AD3d 831, 834 [2019], quoting *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]). Here, the owner and the Par 4 defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law causes of action insofar as asserted against each of them by demonstrating that the injured plaintiff was not hired to perform work at the premises and was not acting as an employee when he went to retrieve his property from the warehouse (see *Dos Anjos v Palagonia*, 165 AD3d 626, 627 [2018]; *Hill v Country Club Acres, Inc.*, 134 AD3d 1267, 1268 [2015]; *Passante v Peck & Sander Props., LLC*, 33 AD3d 980 [2006]). In opposition, the plaintiffs failed to raise a triable issue of fact.

Furthermore, the Supreme Court properly granted that branch of the owner's motion which was for summary judgment dismissing the common-law negligence cause of action insofar as asserted against it. "An out-of-possession landlord is not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing the duty to repair on the landlord, or a course of conduct by the landlord giving rise to a duty" (*Greco v St. Bridget's Church at Westbury, Queens Co.*, 231 AD3d 1019, 1019-1020 [2024] [internal quotation marks omitted]; see *Marmolejo-Cuellar v Spar Knitwear Corp.*, 236 AD3d 889 [2025]). Here, the owner demonstrated, prima facie, that it was an out-of-possession landlord that was not bound by contract or a course of conduct to maintain the interior of the premises (see *Marmolejo-Cuellar v Spar Knitwear Corp.*, 236 AD3d 889 [2025]; *Miranda v 1320 Entertainment, Inc.*, 230 AD3d 755, 757 [2024]). In opposition, the plaintiffs failed to raise a triable issue of fact.

The Supreme Court also properly granted that branch of the Par 4 defendants' motion which was for summary judgment dismissing the common-law negligence cause of action insofar as asserted against them. "While a possessor of real property has a duty to maintain that property in a reasonably safe condition, there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous" (*Butler v NYU Winthrop Hosp.*, 225 AD3d 658, 659 [2024] [internal quotation marks omitted]; see *Kean-Chong v MBA-Vernon Blvd., LLC*, 228 AD3d 851, 852 [2024]). "A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident" (*Robbins v 237 Ave. X, LLC*, 177 AD3d 799, 799 [2019] [internal quotation marks omitted]).

Here, the Par 4 defendants established, *prima facie*, that the pallet rack was readily observable by those employing the reasonable use of their senses and was not inherently dangerous (see *Rider v Manhattan Monster, Inc.*, 208 AD3d 807, 808-809 [2022]; *Luttenberger v McManus-Lorey Funeral Home, Ltd.*, 200 AD3d 671 [2021]). The evidence demonstrated that the injured plaintiff was familiar with the warehouse, having been there on more than 20 occasions, and with pallet racking systems, which he had previously installed. Additionally, the injured plaintiff testified at his deposition that he did not notice anything wrong with the subject pallet rack. In opposition, the plaintiffs failed to raise a triable issue of fact.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court properly granted those branches of the separate motions of the owner and the Par 4 defendants which were for summary judgment dismissing the amended complaint insofar as asserted against each of them and denied those branches of the plaintiffs' cross-motion which were for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) and for leave to amend the bill of particulars. Barros, J.P., Warhit, Wan and Hom, JJ., concur.

4 BCVAWCH-Doe, Respondent, v Roman Catholic Archdiocese of New York et al., Appellants, et al., Defendant. [250 NYS3d 194]—

**Employment Relationships—Respondeat Superior—Vicarious Liability—Negligent Hiring, Retention, or Supervision
Schools—Students—Injury to Student—Constructive Notice of Abusive Propensities of Teacher**

In an action, *inter alia*, to recover damages for negligence, the defendants Roman Catholic Archdiocese of New York and Church of St. Bernard separately appeal from an order of the Supreme Court, Westchester County (Doris M. Gonzalez, J.), dated November 13, 2024. The order denied those defendants' separate motions for summary judgment dismissing the amended complaint insofar as asserted against each of them.

Ordered that the order is affirmed, with one bill of costs.

In December 2019, the plaintiff commenced this action pursuant to the Child Victims Act (see CPLR 214-g) against the defendants Roman Catholic Archdiocese of New York (hereinafter the Archdiocese) and Church of St. Bernard (hereinafter St. Bernard and, together with the Archdiocese, the defendants), among others. The plaintiff alleged that while he was a child

in school at St. Bernard, he was sexually abused from 1959 to 1961 by Edwin Gaynor, a physical education teacher and coach at St. Bernard. The amended complaint asserted causes of action, inter alia, to recover damages for negligence, negligent supervision, negligent hiring, negligent retention, and negligent training.

The defendants separately moved for summary judgment dismissing the amended complaint insofar as asserted against each of them, arguing, among other things, that they did not have actual or constructive notice of the alleged abuse or of Gaynor's alleged propensity to engage in sexual abuse. The plaintiff opposed the motions. In an order dated November 13, 2024, the Supreme Court denied the separate motions. The defendants separately appeal.

“Although an employer cannot be held vicariously liable for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business, the employer may still be held liable under theories of negligent . . . retention . . . and supervision of the employee” (*Kastel v Patchogue-Medford Union Free Sch. Dist.*, 234 AD3d 741, 742 [2025], quoting *Johansmeyer v New York City Dept. of Educ.*, 165 AD3d 634, 635 [2018]; see *Stanton v Longwood Cent. Sch. Dist.*, 233 AD3d 1010, 1013 [2024]). “To establish a cause of action based on negligent hiring, negligent retention, or negligent supervision, it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury and that there exists a connection between the defendant's negligence . . . and the plaintiff's injuries” (*Sayegh v City of Yonkers*, 228 AD3d 690, 691 [2024] [citations and internal quotation marks omitted]). “The employer's negligence lies in having placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring[, . . . retention[, or supervision] of the employee” (*MCVAWCD-DOE v Columbus Ave. Elementary Sch.*, 225 AD3d 845, 846-847 [2024] [internal quotation marks omitted]).

Moreover, “[a] school owes a duty to adequately supervise the students in its care, and may be held liable for foreseeable injuries proximately related to the absence of adequate supervision” (*Fain v Berry*, 228 AD3d 626, 627 [2024] [internal quotation marks omitted]; see *J.B. v Monroe-Woodbury Cent. Sch. Dist.*, 224 AD3d 722, 723 [2024]). “The duty owed derives from the simple fact that a school, in assuming physical custody and

control over its students, effectively takes the place of parents and guardians” (*Sayegh v City of Yonkers*, 228 AD3d at 691 [internal quotation marks omitted]). “The standard for determining whether a school has breached its duty is to compare the school’s supervision and protection to that of a parent of ordinary prudence placed in the same situation and armed with the same information” (*J.B. v Monroe-Woodbury Cent. Sch. Dist.*, 224 AD3d at 723). “‘Where the complaint alleges negligent supervision due to injuries related to an individual’s intentional acts, the plaintiff generally must allege that the school knew or should have known of the individual’s propensity to engage in such conduct, such that the individual’s acts could be anticipated or were foreseeable’” (*Sayegh v City of Yonkers*, 228 AD3d at 691 [alteration omitted], quoting *Kwitko v Camp Shane, Inc.*, 224 AD3d 895, 896 [2024]). As a result, “[a]ctual or constructive notice to the school of prior similar conduct generally is required” (*Burdo v Cold Spring Harbor Cent. Sch. Dist.*, 219 AD3d 1481, 1482 [2023], quoting *Mathis v Board of Educ. of City of N.Y.*, 126 AD3d 951, 952 [2015]). “Nonetheless, the adequacy of a school’s supervision of its students is generally a question left to the trier of fact to resolve, as is the question of whether inadequate supervision was the proximate cause of the plaintiff’s injury” (*MCVAWCD-DOE v Columbus Ave. Elementary Sch.*, 225 AD3d at 847 [alteration and internal quotation marks omitted]).

Here, the defendants’ submissions failed to eliminate the existence of triable issues of fact as to whether they had constructive notice of the alleged abuse of the plaintiff and of Gaynor’s alleged abusive propensities and whether the defendants’ supervision of Gaynor was negligent (*see Kastel v Patchogue-Medford Union Free Sch. Dist.*, 234 AD3d at 744; *Sayegh v City of Yonkers*, 228 AD3d at 692). Moreover, the defendants failed to demonstrate that they lacked an employer/employee-like relationship with Gaynor (*see Schlesinger v Sisters of the Order of St. Dominic*, 236 AD3d 1074, 1076 [2025]). Since the defendants failed to meet their prima facie burden, the Supreme Court properly denied their respective motions for summary judgment dismissing the amended complaint insofar as asserted against each of them, regardless of the sufficiency of the plaintiff’s opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Genovesi, J.P., Christopher, Taylor and Golia, JJ., concur.

5 Jerome Callands, Appellant, v County of Westchester et al., Respondents. [251 NYS3d 229]—

Motor Vehicles—Injuries to Passengers—Emergency Doctrine—Driver Braked

to Avoid Scooter Illegally Entering Intersection

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Westchester County (Charles D. Wood, J.), dated June 3, 2024. The order granted the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff alleged that he sustained injuries while a passenger on a bus operated by the defendant J. Pitre Ruize and owned by the remaining defendants. After joinder of issue, the defendants moved for summary judgment dismissing the complaint. In an order dated June 3, 2024, the Supreme Court granted the motion. The plaintiff appeals.

"The emergency doctrine provides that 'when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context' " (*Anderson v Metropolitan Transp. Auth.*, 208 AD3d 742, 743 [2022], quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]; see *Aiken v Liotta*, 167 AD3d 826, 827 [2018]). "Both the existence of an emergency and the reasonableness of a party's response thereto will ordinarily present questions of fact' " (*Anderson v Metropolitan Transp. Auth.*, 208 AD3d at 743, quoting *Pavane v Marte*, 109 AD3d 970, 971 [2013]; see *Aiken v Liotta*, 167 AD3d at 827). "Summary judgment may be granted, however, when a party presents sufficient evidence demonstrating 'the existence of an emergency, as well as the reasonableness of the actor's response to it' " (*Anderson v Metropolitan Transp. Auth.*, 208 AD3d at 743, quoting *Wu Kai Ming v Grossman*, 133 AD3d 742, 742 [2015]; see *Wade v Knight Transp., Inc.*, 151 AD3d 1107, 1109-1110 [2017]).

Here, bus surveillance video footage submitted by the defendants in support of their motion established that as the bus was about to travel through an intersection, a motorized scooter illegally entered the intersection, causing Ruize to quickly apply the brakes of the bus in order to avoid a collision and causing the plaintiff to fall. The video established, prima facie, that Ruize was confronted with an emergency not of his own making and reasonably reacted by applying the brakes in the manner in which he did (see *Pappas v New York City Tr. Auth.*, 208 AD3d 890, 891-892 [2022]; *Anderson v Metropolitan Transp. Auth.*, 208 AD3d at 744; *Weber v Monsey New Sq. Trails Corp.*,

191 AD3d 929, 929 [2021]). In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

In light of the foregoing, the plaintiff's remaining contention need not be reached.

Accordingly, the Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint. Iannacci, J.P., Wooten, Warhit and Golia, JJ., concur.

6 Erin Capdevila, Appellant, v Ian Capdevila, Respondent. [247 NYS3d 501]—

Motions and Orders—Vacatur of Order—Arrears Accrued on Mortgage Encumbering Marital Residence

In a consolidated action for a divorce and ancillary relief, the plaintiff appeals from an order of the Supreme Court, Richmond County (Paul Marrone, Jr., J.), dated February 28, 2024. The order, insofar as appealed from, denied that branch of the plaintiff's motion, denominated as one for leave to renew and reargue, but which was, in actuality, one pursuant to CPLR 5015 (a) to vacate so much of an order of the same court dated September 26, 2023, as directed that certain marital debt be shared equally by the parties.

Ordered that the order dated February 28, 2024, is affirmed insofar as appealed from, without costs or disbursements.

Initially, that branch of the plaintiff's motion, denominated as one for leave to renew and reargue, did not relate to a prior motion of the parties and, therefore, provided no basis for renewal or reargument (*see* CPLR 2221).

To the extent that that branch of the plaintiff's motion was, in actuality, pursuant to CPLR 5015 (a) to vacate so much of an order dated September 26, 2023, as directed the parties to share equally certain marital debt in the sum of approximately \$7,500, consisting of arrears that had accrued on a mortgage encumbering the marital residence, that branch of the motion was properly denied (*see Rusachenko v Lipkin*, 228 AD3d 793, 793 [2024]).

The plaintiff's remaining contention is not properly before this Court. Duffy, J.P., Brathwaite Nelson, Warhit and Taylor, JJ., concur.

7 Deutsche Bank National Trust Company, Appellant, v Contact Holdings Corp., Respondent, et al., Defendants. [247 NYS3d 499]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclo-

**sure—Debt Accelerated More than Six Years Prior to Action
Limitation of Actions—Tolling—Foreclosure Abuse Prevention Act—Abandonment of Previous Action**

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated July 24, 2023. The order granted the motion of the defendant Contact Holdings Corp. for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed, with costs.

In August 2005, Jeff Allenstein executed a note in the sum of \$474,050, which was secured by a mortgage on certain real property located in Brooklyn. In February 2010, the plaintiff commenced an action to foreclose the mortgage against Allenstein, among others, alleging that Allenstein failed to make payments due on June 1, 2007, and thereafter (hereinafter the 2010 action). Allenstein and the other defendants were served with the summons and complaint, but failed to answer or appear. Contact Holdings Corp. (hereinafter Contact) purchased the property on September 24, 2012.

In September 2014, the plaintiff moved, inter alia, for leave to enter a default judgment and for an order of reference. In October 2015, the Supreme Court denied the motion with leave to renew upon a showing of a reasonable excuse for the delay in moving for leave to enter a default judgment and a potentially meritorious cause of action. In November 2016, the plaintiff again moved, among other things, for leave to enter a default judgment and for an order of reference. Contact cross-moved for leave to intervene in the 2010 action and to dismiss the complaint as abandoned pursuant to CPLR 3215 (c). In an order dated October 12, 2017, the court, inter alia, granted those branches of the plaintiff's motion which were for leave to enter a default judgment and for an order of reference, and denied Contact's cross-motion. In a second order dated October 12, 2017, the court, among other things, granted the same relief to the plaintiff and appointed a referee to compute the amount due to the plaintiff. Contact appealed, and in a decision and order dated January 19, 2022, this Court reversed the orders insofar as appealed from, denied those branches of the plaintiff's motion which were for leave to enter a default judgment and for an order of reference, and granted Contact's cross-motion for leave to intervene in the 2010 action and to dismiss the complaint as abandoned (*see Deutsche Bank Natl. Trust Co. v Allenstein*, 201 AD3d 783 [2022]).

In March 2022, approximately two months after this Court's decision and order was issued, the plaintiff commenced this ac-

tion to foreclose the mortgage against Contact, among others. Contact interposed an answer asserting various affirmative defenses, including expiration of the statute of limitations. Thereafter, Contact moved for summary judgment dismissing the complaint insofar as asserted against it as time-barred. In an order dated July 24, 2023, the Supreme Court granted Contact's motion. The plaintiff appeals.

The Supreme Court properly granted Contact's motion for summary judgment dismissing the complaint insofar as asserted against it as time-barred. "An action to foreclose a mortgage is governed by a six-year statute of limitations" (*U.S. Bank N.A. v Santos*, 218 AD3d 827, 828 [2023]; see CPLR 213 [4]). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the statute of limitations begins to run on the entire debt" (*Bank of N.Y. Mellon v Mor*, 201 AD3d 691, 694 [2022]). "The entire mortgage debt will be deemed to have been accelerated by . . . the commencement of a mortgage foreclosure action in which the complaint seeks payment of the full outstanding loan balance" (*U.S. Bank N.A. v Connor*, 204 AD3d 861, 863 [2022]).

Here, Contact demonstrated, *prima facie*, that the mortgage debt was accelerated and the six-year statute of limitations began to run in February 2010, when the plaintiff commenced the 2010 action and elected to call due the entire amount secured by the mortgage (see *Deutsche Bank Natl. Trust Co. v Wong*, 218 AD3d 742, 743-744 [2023]). Contact further established, *prima facie*, that since the plaintiff did not commence this action until 2022, more than six years later, this action was time-barred (see CPLR 213 [4]; *U.S. Bank N.A. v Outlaw*, 217 AD3d 721, 722-723 [2023]).

In opposition, the plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether it had commenced this action within the applicable limitations period. The Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821) replaced the savings provision of CPLR 205 (a) with CPLR 205-a in actions, like this one, upon instruments described in CPLR 213 (4) (see *id.* § 205 [c]; *Pryce v U.S. Bank, N.A.*, 226 AD3d 711, 713 [2024]). "Under CPLR 205-a (a), '[i]f an action upon an instrument described under [CPLR 213 (4)] is timely commenced and is terminated in any manner other than . . . a dismissal of the complaint for any form of neglect, including, but not limited to those specified in [CPLR 3215] . . . , the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new ac-

tion upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period' " (*Pryce v U.S. Bank, N.A.*, 226 AD3d at 713). Here, there is no dispute that the 2010 action was dismissed as abandoned pursuant to CPLR 3215 (c). Therefore, under FAPA, the plaintiff is not entitled to the benefit of the savings provision of CPLR 205 (a) or 205-a (*see U.S. Bank Trust, N.A. v Giangrande*, 229 AD3d 834 [2024]; *Pryce v U.S. Bank, N.A.*, 226 AD3d at 713).

The plaintiff's arguments challenging FAPA's retroactive application and constitutionality under the United States Constitution are also without merit (*see Citimortgage, Inc. v Gunn*, 234 AD3d 922, 924 [2025]; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1067 [2024]; 97 *Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038, 1042 [2024]). Chambers, J.P., Christopher, Landicino and McCormack, JJ., concur.

8 Frank Dispensa, Respondent, v Medical Diagnostic Imaging, PLLC, et al., Appellants. [251 NYS3d 235]—

Damages—Inadequate and Excessive Damages—Deviation from Reasonable Compensation—Injuries from Medical Malpractice

In an action, inter alia, to recover damages for medical malpractice, etc., the defendants appeal from a judgment of the Supreme Court, Dutchess County (Thomas Ritchie Davis, J.), dated June 15, 2023. The judgment, insofar as appealed from, upon a jury verdict on the issue of damages awarding the plaintiff the principal sums of \$1,100,000 for past pain and suffering and \$350,000 for future pain and suffering and awarding Kathy Dispensa the principal sum of \$250,000 for loss of services, and upon an order of the same court dated November 27, 2023, among other things, denying that branch of the defendants' motion which was pursuant to CPLR 4404 (a) to set aside, as excessive, the jury verdict on the issue of damages and for a new trial on the issue of damages, is in favor of the plaintiff and Kathy Dispensa and against the defendants in the principal sum of \$1,700,000.

Ordered that the judgment is modified, on the facts and in the exercise of discretion, by deleting the provision thereof awarding Kathy Dispensa the principal sum of \$250,000 for loss of services; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, that branch

of the defendants' motion which was pursuant to CPLR 4404 (a) to set aside, as excessive, so much of the jury verdict on the issue of damages as awarded Kathy Dispensa the principal sum of \$250,000 for loss of services and for a new trial on the issue of damages for loss of services is granted, the order is modified accordingly, and the matter is remitted to the Supreme Court, Dutchess County, for a new trial on the issue of damages for loss of services and for the entry of an appropriate amended judgment thereafter, unless within 30 days after service upon the plaintiff of a copy of this decision and order with notice of entry, the plaintiff serves and files in the office of the Clerk of the Supreme Court, Dutchess County, a written stipulation consenting to reduce the award of damages for loss of services from the principal sum of \$250,000 to the principal sum of \$50,000, and to the entry of an appropriate amended judgment accordingly; in the event that the plaintiff so stipulates, the judgment, as so reduced and amended, is affirmed insofar as appealed from, without costs or disbursements.

Frank Dispensa (hereinafter the plaintiff), and his wife, Kathy Dispensa, suing derivatively, commenced this action, inter alia, to recover damages for medical malpractice based on the defendants' failure to timely diagnose a meningioma, a tumor on the plaintiff's left optic nerve, when they performed a magnetic resonance imaging scan in March 2018. A nonparty physician diagnosed the plaintiff several months later. At trial, the plaintiff presented evidence that, as a result of the delay in treatment, he lost vision in his left eye. At the conclusion of the trial, the jury awarded the plaintiff the principal sum of \$1,100,000 for past pain and suffering and the principal sum of \$350,000 for future pain and suffering and awarded the wife the principal sum of \$250,000 for loss of services. In an order dated November 27, 2023, the Supreme Court, among other things, denied that branch of the defendants' motion which was pursuant to CPLR 4404 (a) to set aside, as excessive, the jury verdict on the issue of damages. Thereafter, the court issued a judgment dated June 15, 2023, in favor of the plaintiff and the wife and against the defendants in the principal sum of \$1,700,000. The defendants appeal. While this appeal was pending, the wife died, and the plaintiff, as the executor of her estate, was substituted for her.

"The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determination will not be disturbed unless the award deviates materially from what would be reasonable compensation" (*Chicoine v*

Mendola, 233 AD3d 841, 844 [2024] [internal quotation marks omitted]; see CPLR 5501 [c]; *Bacchus-Sirju v Hollis Women's Ctr.*, 196 AD3d 670, 673 [2021]).

Here, considering the nature and extent of the plaintiff's injuries, the jury's award of \$1,100,000 for past pain and suffering and \$350,000 for future pain and suffering did not deviate materially from what would be reasonable compensation (see CPLR 5501 [c]; *Devadas v Niksarli*, 120 AD3d 1000, 1010 [2014]). However, the jury's award of \$250,000 to the wife for loss of services deviated materially from what would be reasonable compensation to the extent indicated herein (see *Garcia v Spira*, 273 AD2d 57, 57 [2000]). Duffy, J.P., Wooten, Landicino and Quirk, JJ., concur.

9 Duval Fogg, Appellant, v Turo, Inc., et al., Defendants, and Denise Kingston, Respondent. [250 NYS3d 197]—

Evidence—Authentication of Documents—Video of Accident—Testimony of Witness to Recorded Events

Motor Vehicles—Injuries to Passengers—Failure to Yield Right-of-Way in Intersection—Entitled to Assume Would Obey Requirement to Yield

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Ingrid Joseph, J.), dated April 8, 2024. The order, insofar as appealed from, granted that branch of the motion of the defendant Denise Kingston which was for summary judgment dismissing the complaint insofar as asserted against her.

Ordered that the order is affirmed insofar as appealed from, with costs.

In September 2020, the plaintiff allegedly sustained injuries after a vehicle operated by the defendant Stephon Adams, in which the plaintiff was a passenger, collided with a vehicle owned and operated by the defendant Denise Kingston at an intersection in Staten Island. Kingston was traveling on Arlene Court, which was not controlled by a stop sign, while Adams was traveling on Regis Drive, which was controlled by a stop sign. The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained in the accident. Kingston moved, among other things, for summary judgment dismissing the complaint insofar as asserted against her on the ground that she was not at fault in the happening of the accident. In an order dated April 8, 2024, the Supreme Court, inter alia, granted that branch of Kingston's motion. The plaintiff appeals.

“Pursuant to Vehicle and Traffic Law § 1142 (a), a driver entering an intersection controlled by a stop sign must yield

the right-of-way to any other vehicle that is already in the intersection or that is approaching so closely as to constitute an immediate hazard” (*Cruz v DiSalvo*, 188 AD3d 986, 987 [2020]; see *Brewster v Riseboro Community Partnership, Inc.*, 234 AD3d 810 [2025]). “Even though the driver with the right-of-way is entitled to assume that other drivers will obey the traffic laws requiring them to yield, he or she still has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection” (*Park v Giunta*, 217 AD3d 661, 662 [2023]).

Initially, contrary to the plaintiff’s contention, the Supreme Court providently exercised its discretion in considering a video of the accident recorded by a doorbell camera. A video recording “may be authenticated by the testimony of a witness to the recorded events . . . that the video[] accurately represents the subject matter depicted” (*People v Patterson*, 93 NY2d 80, 84 [1999]; see *Keene v Rosas*, 215 AD3d 938, 939 [2023]). Here, Kingston properly authenticated the video by attesting that it was unedited and fairly and accurately depicted the accident (see *Keene v Rosas*, 215 AD3d at 939; *Nesbitt v Gallant*, 149 AD3d 763, 764 [2017]).

Kingston demonstrated her prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against her by establishing that Adams negligently drove his vehicle into the intersection without yielding the right-of-way to Kingston’s approaching vehicle, which was the sole proximate cause of the accident (see Vehicle and Traffic Law § 1142 [a]; *Israel v Nichols*, 226 AD3d 756, 757 [2024]; *De Pina v Jerrick Assoc., Inc.*, 216 AD3d 934, 935 [2023]; *Cruz v DiSalvo*, 188 AD3d at 987). Kingston was entitled to assume that Adams would obey the traffic laws requiring him to yield (see *Cruz v DiSalvo*, 188 AD3d at 987). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff’s contention that issues of fact remained as to whether Kingston was speeding or had enough time to avoid the collision is speculative and not supported by the record (see *Israel v Nichols*, 226 AD3d at 757; *Cruz v DiSalvo*, 188 AD3d at 987).

Accordingly, the Supreme Court properly granted that branch of Kingston’s motion which was for summary judgment dismissing the complaint insofar as asserted against her. Barros, J.P., Warhit, Wan and Hom, JJ., concur.

10 Dorothy Frissora, Appellant, v Lutheran Housing Development Fund Corporation at Concord Village, Doing Business as Castle Court at Concord Village, Respondent. [248 NYS3d 319]—

Negligence—Maintenance of Premises—Open and Obvious Condition—Curb Colored Differently and Area Well Lit

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Dutchess County (Thomas R. Davis, J.), dated April 19, 2024. The order granted the defendant's motion for summary judgment dismissing the amended complaint and denied the plaintiff's cross-motion for summary judgment on the issue of liability.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action against the defendant to recover damages for personal injuries she allegedly sustained on the afternoon of July 9, 2021, when she tripped and fell on a curb in front of the defendant's residential independent living facility as she was walking from a driveway onto a sidewalk. After issue was joined, the defendant moved for summary judgment dismissing the amended complaint, arguing, *inter alia*, that the condition complained of was open and obvious and not inherently dangerous. The plaintiff cross-moved for summary judgment on the issue of liability. In an order dated April 19, 2024, the Supreme Court granted the defendant's motion and denied the plaintiff's cross-motion. The plaintiff appeals.

"A property owner has a duty to maintain his or her property in a reasonably safe condition" (*Torres v La Borinquena HDFC, Inc.*, 229 AD3d 830, 831 [2024]; *see Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]; *Williams v E & R Jamaica Food Corp.*, 202 AD3d 1028, 1029 [2022]). However, there is no duty to protect or warn against conditions that are not inherently dangerous and that are open and obvious (*see Blackwood v E.S.F. Transp., Inc.*, 231 AD3d 923, 925 [2024]; *Lebron v City of New York*, 208 AD3d 656, 657 [2022]). "[T]o obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous" (*Ferruzzi v Village of Saltaire*, 219 AD3d 1310, 1311 [2023], quoting *Masker v Smith*, 188 AD3d 867, 868 [2020]; *see Torres v La Borinquena HDFC, Inc.*, 229 AD3d at 832; *Cupo v Karfunkel*, 1 AD3d 48, 52 [2003]).

Here, in support of its motion, the defendant established its *prima facie* entitlement to judgment as a matter of law by demonstrating that the alleged hazardous condition was open and obvious and not inherently dangerous (*see Anderson v East Hills Subaru, Inc.*, 222 AD3d 606, 607 [2023]). The defendant's evidence established, among other things, that the plaintiff was aware of the curb, that the curb was readily observable since there existed a clear color differential between the curb and the asphalt driveway, and that the area was well lit (*see*

Ferruzzi v Village of Saltaire, 219 AD3d at 1311; *Rosenman v Siwiec*, 196 AD3d 523, 525 [2021]; *Genefar v Great Neck Park Dist.*, 156 AD3d 762, 763 [2017]). The mere presence of a height differential in portions of the top of the curb did not create an inherently dangerous condition (see *Graffino v City of New York*, 162 AD3d 990, 990-991 [2018]; *Espinosa v Fairfield Props. Group, LLC*, 160 AD3d 927, 927 [2018]; *Mucciariello v A & D Hylan Blvd. Assoc., LLC*, 133 AD3d 726 [2015]).

In opposition, the plaintiff failed to raise a triable issue of fact (see *D.S. v Sachem Cent. Sch. Dist.*, 223 AD3d 925, 926 [2024]; *Lebron v City of New York*, 208 AD3d at 657). Moreover, for similar reasons, the plaintiff failed to establish her prima facie entitlement to judgment as a matter of law on the issue of liability.

Accordingly, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the amended complaint and denied the plaintiff's cross-motion for summary judgment on the issue of liability. Barros, J.P., Ford, Ventura and Golia, JJ., concur.

11 GIT Capital, LLC, Respondent, v Peter Alexis et al., Defendants, and Glenda Alexis et al., Appellants. [251 NYS3d 242]—

Judgments—Default Judgment—Vacatur—Interest of Justice

In an action pursuant to RPAPL article 15 to determine claims to real property and for declaratory relief, the defendants Glenda Alexis and Leotta Alexis Carr, sued herein as Jane Doe, appeal from an order of the Supreme Court, Nassau County (David P. Sullivan, J.), entered December 13, 2022. The order, insofar as appealed from, denied those branches of the motion of those defendants which were pursuant to CPLR 5015 (a), in effect, to vacate their default in appearing or answering the complaint and an amended judgment of the same court (Julianne T. Capeola, J.) entered May 12, 2021, upon their default in appearing or answering the complaint, declaring the plaintiff to be the record holder and owner of all rights, title and interest in and to the subject property, and to cancel a tax deed dated November 20, 2018, conveying the subject property to the plaintiff.

Ordered that the order is modified, on the law and in the exercise of discretion, (1) by deleting the provision thereof denying that branch of the motion of the defendants Glenda Alexis and Leotta Alexis Carr, sued herein as Jane Doe, which was pursuant to CPLR 5015 (a), in effect, to vacate their default in appearing or answering the complaint and the amended judgment, and substituting therefor a provision granting that

branch of the motion, and (2) by adding thereto a provision stating that the denial of that branch of the motion of the defendants Glenda Alexis and Leotta Alexis Carr, sued herein as Jane Doe, which was to cancel the tax deed is without prejudice to renew; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Nassau County, to afford the defendants Glenda Alexis and Leotta Alexis Carr, sued herein as Jane Doe, an opportunity to serve and file an answer within 20 days of service upon them of this decision and order with notice of entry.

In 1979, Peter Alexis and Glenda Alexis purchased certain real property (hereinafter the subject property) situated in the Village of Westbury. Their daughter, Leotta Alexis Carr, sued herein as Jane Doe, resided at the subject property from the age of eight. Peter died in 2007. By warranty deed dated June 6, 2008 (hereinafter the 2008 deed), Glenda, as grantor, conveyed the subject property to herself and Carr, as grantees. The 2008 deed was recorded with the Nassau County Clerk's Office on June 6, 2008. The subject property was designated as Section 11, Block 388, Lots 2 and 19. However, the 2008 deed was erroneously indexed by the Nassau County Clerk's Office as against Section 11, Block 388, Lot 20. Apparently, this misfiling of the deed resulted from the 2008 deed, as although a portion of the 2008 deed described the land, in part, as "Lot 2," the abbreviated legal description indicated, in part, that it was Lot "20."

Allegedly, Village taxes due on the subject property for the 2014 tax year, amounting to \$876.88, were unpaid. In 2015, a tax lien sale was held, resulting in the Village issuing a tax sale certificate to the plaintiff. By tax deed dated November 20, 2018, the Village conveyed the subject property to the plaintiff.

In 2019, the plaintiff commenced this action pursuant to RPAPL article 15. The plaintiff named as the defendants, Peter, Glenda, New York State Department of Tax & Finance, John Doe #1-10, and Jane Doe #1-10. No defendant appeared or answered the complaint. The Supreme Court, in a judgment entered June 6, 2019, declared the plaintiff to be the record holder and owner of all rights, title, and interest in and to the subject property. The court issued an amended judgment entered May 12, 2021, making a correction to the lot designation. Thereafter, Glenda and Carr (hereinafter together the appellants) moved, inter alia, pursuant to CPLR 5015 (a), in effect, to vacate their default in appearing or answering the complaint and the amended judgment and to cancel the tax

deed. In an order entered December 13, 2022, the court, among other things, denied those branches of the appellants' motion. This appeal ensued.

Pursuant to CPLR 5015 (a), a court that rendered a judgment or order may relieve a party from it upon such terms as may be just, upon the grounds of excusable default; newly discovered evidence; fraud, misrepresentation, or other misconduct of an adverse party; lack of jurisdiction to render the judgment or order; or reversal, modification, or vacatur of a prior judgment or order upon which it is based (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). "In addition to the grounds set forth in [CPLR] 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice" (*id.*; *see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 226 [2013]). When a court determines a motion pursuant to CPLR 5015 (a), consideration must be given to the facts of the particular case, the equities affecting each party and others affected by the judgment or order, and the grounds for vacatur (*see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d at 226).

Under the unique circumstances of this case, the Supreme Court improvidently exercised its discretion in denying that branch of the appellants' motion which was pursuant to CPLR 5015 (a), in effect, to vacate their default in appearing or answering the complaint and the amended judgment in the interest of justice (*cf. Dorji v Maruti Ravami, LLC*, 238 AD3d 855 [2025]; *Hudson City Sav. Bank v Cohen*, 120 AD3d 1304, 1305 [2014]).

The parties' remaining contentions either need not be addressed in light of our determination, are without merit, or are not properly before us. Dillon, J.P., Brathwaite Nelson, Voutsinas and Hom, JJ., concur.

12 Hillside Manor Rehabilitation and Extended Care Center, LLC, Respondent, v Sharon Maynard, Individually and as Distributee of the Estate of Eleanor Maynard, Deceased, Appellant. [251 NYS3d 237]—

Process—Service of Process—Affidavit of Process Server—Discrepancies in Party's Appearance

In an action, inter alia, to recover damages for breach of contract, the defendant appeals from an order of the Supreme Court, Queens County (Timothy J. Dufficy, J.), dated June 12, 2023. The order, insofar as appealed from, denied that branch of the defendant's motion which was pursuant to CPLR 5015 (a) to vacate a judgment of the same court entered July 8,

2015, which, upon an order of the same court dated April 29, 2015, granting the plaintiff's unopposed motion for leave to enter a default judgment against the defendant, is in favor of the plaintiff and against the defendant in the principal sum of \$27,192.08.

Ordered that the order dated June 12, 2023, is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff, a limited liability company engaged in the business of providing skilled nursing home care services, commenced this action against the defendant, the daughter of a deceased former resident of the plaintiff (hereinafter the decedent), individually and as distributee of the decedent's estate, to recover the balance for services the plaintiff provided to the decedent. The defendant failed to appear or answer the complaint. Thereafter, the plaintiff moved for leave to enter a default judgment against the defendant. In an order dated April 29, 2015, the Supreme Court granted the plaintiff's unopposed motion. On July 8, 2015, a judgment was entered in favor of the plaintiff and against the defendant in the principal sum of \$27,192.08. In August 2022, the defendant moved, inter alia, pursuant to CPLR 5015 (a) to vacate the judgment. In an order dated June 12, 2023, the court, among other things, denied that branch of the defendant's motion. The defendant appeals.

CPLR 5015 (a) (4) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just," upon the ground of "lack of jurisdiction to render the judgment or order." "Service of process upon a natural person must be made in strict compliance with the statutory methods of service set forth in CPLR 308" (*Globe Trade Capital, LLC v Hoey*, 199 AD3d 769, 771 [2021]; see *Citimortgage, Inc. v Cardali*, 230 AD3d 467, 468 [2024]). "A process server's affidavit of service constitutes prima facie evidence of proper service" (*Taron Partners, LLC v McCormick*, 173 AD3d 927, 928 [2019]; see *Citimortgage, Inc. v Cardali*, 230 AD3d at 468). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by a process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*Taron Partners, LLC v McCormick*, 173 AD3d at 928 [internal quotation marks omitted]). "Minor discrepancies between the appearance of the person allegedly served and the description of the person served in the affidavit of service are generally insufficient to raise an issue of

fact warranting a hearing” (*Deutsche Bank Natl. Trust Co. v Yurowitz*, 181 AD3d 646, 648 [2020]; see *Citimortgage, Inc. v Cardali*, 230 AD3d at 468).

Here, the Supreme Court properly denied vacatur of the judgment pursuant to CPLR 5015 (a) (4). An affidavit of the plaintiff’s process server constituted prima facie evidence of proper service upon the defendant pursuant to CPLR 308 (see *Flanagan v Delaney*, 194 AD3d 694, 696-697 [2021]). The alleged discrepancies between the defendant’s physical appearance at the time of service and the description of the person served contained in the process server’s affidavit were either too minor or insufficiently substantiated to warrant a hearing (see *TD Bank, N.A. v Turbo Group, Inc.*, 226 AD3d 1058, 1059 [2024]; *HSBC Bank USA, N.A. v Rahmanan*, 194 AD3d 792, 794 [2021]), and the defendant failed to swear to specific facts to rebut the statements in the process server’s affidavit (see *Wells Fargo Bank, N.A. v Tricarico*, 139 AD3d 722, 723 [2016]).

Furthermore, the defendant failed to provide any evidence of fraud, mistake, inadvertence, surprise, or excusable neglect that would warrant vacatur of the judgment in the interests of substantial justice (see *Legal Servicing, LLC v Gomez*, 229 AD3d 785, 787 [2024]; *CitiMortgage, Inc. v Maldonado*, 171 AD3d 1007, 1008-1009 [2019]).

Accordingly, the Supreme Court properly denied that branch of the defendant’s motion which was pursuant to CPLR 5015 (a) to vacate the judgment. Dillon, J.P., Chambers, Ventura and McCormack, JJ., concur.

13 Victor C. Klein, Respondent, v Robert F. Klein, Appellant. [251 NYS3d 240]—

Trusts—Creation—Express Trust—Failure to Distribute Proceeds from Property

In an action, inter alia, to recover damages for breach of fiduciary duty, the defendant appeals from (1) an order of the Supreme Court, Nassau County (Dicia T. Pineda-Kirwan, J.), entered October 21, 2022, and (2) a judgment of the same court dated November 28, 2022. The order granted that branch of the plaintiff’s motion which was for summary judgment on the cause of action alleging breach of fiduciary duty. The judgment, upon the order, is in favor of the plaintiff and against the defendant in the principal sum of \$68,044.40. The notice of appeal from the order is deemed also to be a notice of appeal from the judgment (see CPLR 5501 [c]).

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

In 2003, Mildred A. Klein (hereinafter the decedent) executed a will that stated that the plaintiff and the defendant, among others, would receive a portion of her residual estate. In 2007, the decedent entered into an agreement with the defendant in which the decedent transferred title to certain real property to the defendant, and the agreement stated that upon her death, the property should be sold and the proceeds distributed to beneficiaries in accordance with her will. In 2017, prior to the decedent's death, the defendant sold the property to a third party. The decedent died approximately six months later, but the defendant did not distribute the proceeds pursuant to the agreement or the will.

In 2020, the plaintiff commenced this action against the defendant to recover the share of the proceeds from the sale of the property that was allegedly owed to him. Thereafter, the plaintiff moved, among other things, for summary judgment on the cause of action alleging breach of fiduciary duty. In an order entered October 21, 2022, the Supreme Court granted that branch of the motion. On November 28, 2022, a judgment was entered in favor of the plaintiff and against the defendant in the principal sum of \$68,044.40. The defendant appeals.

The Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment on the cause of action alleging breach of fiduciary duty. "An express trust may be created orally or in writing; no particular form of words is necessary, and it may arise by implication from the settlor's conduct" (*Matter of Marcus Trusts*, 2 AD3d 640, 641 [2003] [internal quotation marks omitted]; *see* EPTL 7-1.17 [a]; *Matter of Doman*, 68 AD3d 862, 863 [2009]). Here, the plaintiff established, prima facie, that the agreement between the decedent and the defendant created an express trust, which had not been revoked, and that the defendant sold the property and failed to distribute the proceeds in accordance with the terms of the trust and the decedent's will (*see Matter of Doman*, 68 AD3d at 863; *Matter of Marcus Trusts*, 2 AD3d at 641). In opposition, the defendant failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment on the cause of action alleging breach of fiduciary duty. Chambers, J.P., Wooten, Warhit and Landicino, JJ., concur.

14 Kenneth Mark, Appellant, v Joseph Trimarco, Respondent. [250 NYS3d 614]—

Bills, Notes and Checks—Signatures—Electronic Signature—Automatic Name at Bottom of Email

Limitation of Actions—Six-Year Statute of Limitations—Partial Payments under Promissory Note—Checks Not Acknowledgment of Debt

In an action, inter alia, to recover on a promissory note, the plaintiff appeals from a judgment of the Supreme Court, Suffolk County (Joseph Farneti, J.), entered March 1, 2023. The judgment, upon a decision of the same court dated November 23, 2022, made after a nonjury trial, is in favor of the defendant and against the plaintiff dismissing the complaint.

Ordered that the judgment is affirmed, with costs.

In August 2007, the defendant executed a promissory note in which he promised to pay the plaintiff the sum of \$75,000 by December 31, 2008. In March 2017, the plaintiff commenced this action, inter alia, to recover the outstanding principal balance of \$72,500 due on the note. The defendant interposed an answer in which he asserted, as an affirmative defense, among others, that the action was barred by the statute of limitations.

At a nonjury trial, the plaintiff introduced into evidence an email sent by the defendant to the plaintiff in June 2013 and two checks that the plaintiff testified were partial payments made by the defendant to the plaintiff after the limitations period had ended. The email sent by the defendant included his full name, the name of his business, and the business's web address. The defendant testified that he did not sign the email and that his name and other information were included in the email automatically. He further testified that he made the two payments to the plaintiff to cover dermatological services for which the defendant was never billed and because the plaintiff was experiencing financial difficulties. The two checks did not include a notation or cover letter stating that they were to be used to pay the debt owed on the note. At the close of evidence, the plaintiff argued that the email and the partial payments served to extend and revive the statute of limitations.

In a decision dated November 23, 2022, the Supreme Court concluded that the complaint was barred by the six-year statute of limitations. The court entered a judgment on March 1, 2023, in favor of the defendant and against the plaintiff dismissing the complaint. The plaintiff appeals.

“In reviewing a finding made after a nonjury trial, the power of this Court is as broad as that of the trial court, and this Court may render the judgment that it finds warranted by the facts, taking into account in a close case that the trial judge had the advantage of seeing and hearing the witnesses” (*CANBE Props., LLC v Curatola*, 227 AD3d 654, 656 [2024]). “[W]here the [trial] court’s findings of fact rest in large measure on considerations relating to the credibility of witnesses[,] . . . deference is owed to the trial court’s credibility determinations” (*Miller v Stillwell Rd., Inc.*, 204 AD3d 662, 666 [2022], quoting *HSBC Bank USA, N.A. v Macaulay*, 187 AD3d 721, 723-724 [2020]; see *Matter of Kassab v Kasab*, 195 AD3d 832, 836 [2021]).

The applicable statute of limitations to commence an action to recover on a promissory note is six years (see CPLR 213 [2]). “General Obligations Law § 17-101 effectively revives a time-barred claim when the debtor has signed a writing which validly acknowledges the debt” (*Mosab Constr. Corp. v Prospect Park Yeshiva, Inc.*, 124 AD3d 732, 733 [2015] [internal quotation marks omitted]; see *Yadegar v Deutsche Bank Natl. Trust Co.*, 164 AD3d 945, 947 [2018]). “To constitute an acknowledgment of a debt, a writing must recognize [the] existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it” (*Matter of Hollis*, 180 AD3d 680, 682 [2020] [internal quotation marks omitted]; see *Pugni v Giannini*, 163 AD3d 1018, 1019-1020 [2018]).

Pursuant to State Technology Law § 302 (3), an electronic signature is “an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record” (see *Matter of Battat v Rejwan*, 232 AD3d 889, 891 [2024]). “‘An e-mail sent by a party, under which the sending party’s name is typed, can constitute a [signed] writing for [the] purposes of the statute of frauds’” (*Agosta v Fast Sys. Corp.*, 136 AD3d 694, 695 [2016], quoting *Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC*, 80 AD3d 476, 477 [2011]; see *Forcelli v Gelco Corp.*, 109 AD3d 244, 251 [2013]).

Here, while the June 2013 email included the defendant’s full name, the name of his business, and the business’s web address, the defendant testified that he “didn’t sign” the email and that the closing was an “automatic” message that “comes up” on his computer. Accordingly, the evidence adduced at trial demonstrated that the defendant did not intend to sign the email, and thus, the email did not serve to revive the statute of limitations (see State Technology Law § 302 [3]; *Forcelli v Gelco Corp.*, 109 AD3d at 251).

“There is a ‘long-standing common law rule’ that partial payment of a debt, if made under ‘circumstances from which a promise to honor the obligation may be inferred,’ will operate to start the statute of limitations running anew from the time the partial payment is made” (*Costello v Curan & Ahlers, LLP*, 224 AD3d 734, 736 [2024], quoting *Roth v Michelson*, 55 NY2d 278, 281 [1982]). “To show that the statute of limitations has been renewed by a partial payment, it must be shown that the payment was accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder” (*Matter of Borgia v SCO Family of Servs.*, 236 AD3d 1020, 1022 [2025] [internal quotation marks omitted], quoting *Costello v Curan & Ahlers, LLP*, 224 AD3d at 736; see *RTT Holdings, LLC v Nacht*, 206 AD3d 834, 836 [2022]).

Here, the two checks did not contain a memo, notation, or cover letter indicating that the defendant intended for them to constitute partial payments under the note. Moreover, the defendant testified that he sent the plaintiff the checks to help the plaintiff financially and to reimburse the plaintiff for dermatology services rendered. Thus, the checks were not accompanied by circumstances amounting to an absolute and unqualified acknowledgment of the sum due under the note from which a promise to pay the remainder may be inferred. Accordingly, the Supreme Court properly determined that the evidence submitted by the plaintiff failed to meet this standard (see *RTT Holdings, LLC v Nacht*, 206 AD3d at 836; *Sudit v Eliav*, 181 AD3d 955, 957 [2020]).

Moreover, the plaintiff failed to establish that the defendant should be equitably estopped from invoking the statute of limitations as an affirmative defense (see *Carpenito v Linksman*, 197 AD3d 553, 554 [2021]; *Clark v Ravikumar*, 90 AD3d 971, 972 [2011]).

Accordingly, the Supreme Court properly entered the judgment in favor of the defendant and against the plaintiff dismissing the complaint.

In light of our determination, we need not reach the parties’ remaining contentions. Barros, J.P., Chambers, Warhit and Golia, JJ., concur.

15 Malka Markowitz, Plaintiff, v 420 Kent Avenue, LLC, et al., Appellants, and U.S. Rent A Fence, Inc., Respondent. [248 NYS3d 671]—

Indemnity—When Claim for Indemnification Available—Rental Agreement to Install Fence on Property—Owners Failed to Establish Lack of Negligence

Contracts—Breach or Performance of Contract—Failure to Procure Insurance—Required in Rental Agreement

In an action to recover damages for personal injuries, the defendants 420 Kent Avenue, LLC, and First Service Residential, Inc., appeal from (1) an order of the Supreme Court, Kings County (Peter P. Sweeney, J.), dated April 29, 2024, and (2) an order of the same court dated October 2, 2024. The order dated April 29, 2024, insofar as appealed from, denied those defendants' motion for summary judgment on their cross-claim against the defendant U.S. Rent A Fence, Inc., for common-law indemnification and granted that branch of the cross-motion of the defendant U.S. Rent A Fence, Inc., which was for summary judgment on its cross-claim against the defendant 420 Kent Avenue, LLC, alleging breach of contract for failure to procure insurance. The order dated October 2, 2024, insofar as appealed from, in effect, upon reargument, adhered to the determination in the order dated April 29, 2024, denying the motion of the defendants 420 Kent Avenue, LLC, and First Service Residential, Inc., for summary judgment on their cross-claim against the defendant U.S. Rent A Fence, Inc., for common-law indemnification and granting that branch of the cross-motion of the defendant U.S. Rent A Fence, Inc., which was for summary judgment on its cross-claim against the defendant 420 Kent Avenue, LLC, alleging breach of contract for failure to procure insurance.

Ordered that the appeal from the order dated April 29, 2024, is dismissed, as the portion of the order appealed from was superseded by the order dated October 2, 2024, made, in effect, upon reargument; and it is further,

Ordered that the order dated October 2, 2024, is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the defendant U.S. Rent A Fence, Inc.

In June 2021, the defendant 420 Kent Avenue, LLC (hereinafter 420 Kent), entered into a rental agreement with the defendant U.S. Rent A Fence, Inc. (hereinafter U.S. Fence), pursuant to which U.S. Fence agreed to both install and uninstall a temporary chain-link fence on property owned by 420 Kent. On July 5, 2021, as the fence was being disassembled by U.S. Fence, the plaintiff allegedly was injured when she tripped and fell on one of the fence bases. Thereafter, the plaintiff commenced this personal injury action against U.S. Fence, 420 Kent, and the defendant First Service Residential, Inc. (hereinafter First Service), which also allegedly owned the property on which the fence was located. In their answer, 420 Kent and

First Service (hereinafter together the owners) asserted, *inter alia*, a cross-claim against U.S. Fence for common-law indemnification. In its answer, U.S. Fence asserted, among other things, a cross-claim against 420 Kent alleging breach of contract for failure to procure insurance.

The owners subsequently moved for summary judgment on their cross-claim against U.S. Fence for common-law indemnification. U.S. Fence opposed the motion and cross-moved, *inter alia*, for summary judgment on its cross-claim against 420 Kent alleging breach of contract for failure to procure insurance. In an order dated April 29, 2024, the Supreme Court, among other things, denied the owners' motion and granted that branch of U.S. Fence's cross-motion. Thereafter, the owners moved for leave to reargue their motion for summary judgment on their cross-claim against U.S. Fence for common-law indemnification and their opposition to that branch of U.S. Fence's cross-motion which was for summary judgment on its cross-claim against 420 Kent alleging breach of contract for failure to procure insurance. In an order dated October 2, 2024, the court, in effect, granted the owners leave to reargue but, upon reargument, adhered to the prior determination in the order dated April 29, 2024, denying the owners' motion and granting that branch of U.S. Fence's cross-motion. The owners appeal.

The Supreme Court, in effect, upon reargument, properly adhered to the prior determination denying the owners' motion for summary judgment on their cross-claim against U.S. Fence for common-law indemnification. "[T]o establish a claim for common-law indemnification, a party must prove not only that [it was] not negligent, but also that the proposed indemnitor . . . was responsible for negligence that contributed to the accident" (*Balanta v Guo Lin Wu*, 220 AD3d 720, 721 [2023] [internal quotation marks omitted]; see *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 [2006]). Here, the owners failed to establish, *prima facie*, that they were not negligent and that U.S. Fence was responsible for negligence that contributed to the accident (see *Shaughnessy v Huntington Hosp. Assn.*, 147 AD3d 994, 999 [2017]; *Benedetto v Carrera Realty Corp.*, 32 AD3d at 875). Since the owners failed to demonstrate their *prima facie* entitlement to judgment as a matter of law, the court properly denied their motion, regardless of the sufficiency of the opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]).

The Supreme Court, in effect, upon reargument, also properly adhered to the prior determination granting that branch of U.S. Fence's cross-motion which was for summary

judgment on its cross-claim against 420 Kent alleging breach of contract for failure to procure insurance. “A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with” (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2011] [internal quotation marks omitted]; see *Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 701 [2016]). Here, U.S. Fence demonstrated its prima facie entitlement to judgment as a matter of law by submitting a copy of the rental agreement, which, among other things, required 420 Kent to obtain insurance coverage naming U.S. Fence as an additional insured, and a letter from 420 Kent’s insurer stating that U.S. Fence was not named as an insured party on the general liability insurance policy issued to 420 Kent (see *DiBuono v Abbey, LLC*, 83 AD3d at 652). In opposition, the owners failed to raise a triable issue of fact, since they did not submit any evidence demonstrating that 420 Kent procured an insurance policy naming U.S. Fence as an insured party (see *id.*; *McGill v Polytechnic Univ.*, 235 AD2d 400 [1997]).

The owners’ remaining contention is without merit. Iannacci, J.P., Wooten, Warhit and Golia, JJ., concur.

16 MTGLQ Investors, L.P., Appellant, v Tatsiana Kovaleva, Also Known as Tatiana Kovaleva, Respondent, et al., Defendants. [250 NYS3d 177]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Called Due Entire Amount in Previous Action

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Voluntary Discontinuance of Previous Action

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated November 27, 2023. The order, insofar as appealed from, granted that branch of the motion of the defendant Tatsiana Kovaleva which was for summary judgment dismissing the complaint insofar as asserted against her and, in effect, granted that branch of that defendant’s motion which was for summary judgment on her counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the subject mortgage.

Ordered that the order is affirmed insofar as appealed from, with costs.

On April 27, 2007, the defendant Tatsiana Kovaleva (hereinafter the defendant), executed a note in the sum of \$397,765 in favor of CitiMortgage, Inc. (hereinafter CitiMortgage), which

was secured by a mortgage on certain residential property located in Brooklyn. On September 9, 2010, CitiMortgage commenced an action against, among others, the defendant to foreclose the mortgage (hereinafter the 2010 action). CitiMortgage elected in the complaint to call due the entire amount secured by the mortgage. On February 23, 2011, CitiMortgage filed a stipulation to discontinue the 2010 action. By assignment of mortgage dated April 24, 2012, CitiMortgage assigned the mortgage to Nationstar Mortgage, LLC (hereinafter Nationstar).

On December 4, 2013, Nationstar commenced an action against, among others, the defendant to foreclose the mortgage (hereinafter the 2013 action). In February 2019, Nationstar moved, inter alia, for leave to discontinue the 2013 action. In an order dated May 14, 2019, the Supreme Court granted Nationstar's motion.

On October 5, 2022, the plaintiff, as the alleged holder of the note and assignee of the mortgage, commenced the instant action against, among others, the defendant to foreclose the mortgage. The defendant interposed an answer in which she asserted, among other things, an affirmative defense alleging that the action was barred by the applicable statute of limitations and a counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage.

Thereafter, the defendant moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against her as time-barred and on her counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage. The plaintiff opposed the motion, arguing, among other things, that the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]) did not apply retroactively and that retroactive application of FAPA would violate its due process rights, as well as the Takings and Contracts Clauses of the United States Constitution. In an order dated November 27, 2023, the Supreme Court, inter alia, granted that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against her and, in effect, granted that branch of the defendant's motion which was for summary judgment on her counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage. The plaintiff appeals.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 261 [2019]). “[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the

entire amount is due and the Statute of Limitations begins to run on the entire debt’ ” (*Citimortgage, Inc. v Gunn*, 234 AD3d 922, 923 [2025], quoting *BHMPW Funding, LLC v Lloyd-Lewis*, 194 AD3d 780, 782 [2021]; see *U.S. Bank N.A. v Medianik*, 223 AD3d 935, 937 [2024]). “ ‘Acceleration occurs, inter alia, by the commencement of a foreclosure action wherein the plaintiff elects in the complaint to call due the entire amount secured by the mortgage’ ” (*Citimortgage, Inc. v Gunn*, 234 AD3d at 923, quoting *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2023]; see *U.S. Bank N.A. v Medianik*, 223 AD3d at 937).

Pursuant to RPAPL 1501 (4), a person having an estate or interest in real property subject to a mortgage may maintain an action to secure the cancellation and discharge of the encumbrance, and to adjudge the estate or interest free of it, if the applicable statute of limitations for commencing a foreclosure action has expired (see *U.S. Bank N.A. v Medianik*, 223 AD3d at 938; *Ditmid Holdings, LLC v JPMorgan Chase Bank, N.A.*, 180 AD3d 1002, 1003 [2020]).

Here, in support of her motion, the defendant demonstrated, prima facie, that the six-year statute of limitations began to run on September 9, 2010, when CitiMortgage commenced the 2010 action and elected in the complaint to call due the entire amount secured by the mortgage (see *Citimortgage, Inc. v Gunn*, 234 AD3d at 923; *U.S. Bank N.A. v Medianik*, 223 AD3d at 938). The defendant further demonstrated that the instant action was commenced on October 5, 2022, more than six years later (see *Citimortgage, Inc. v Gunn*, 234 AD3d at 923; *U.S. Bank N.A. v Medianik*, 223 AD3d at 938).

In opposition to the defendant’s prima facie showing, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff’s contention, pursuant to CPLR 3217 (e) and 203 (h), both added with the enactment of FAPA, the voluntary discontinuances of the 2010 action and the 2013 action did not serve to revive or reset the statute of limitations (see CPLR 3217 [e]; 203 [h]; *FV-1, Inc. v Palaguachi*, 234 AD3d 818, 821 [2025]; *Maneri v Residential Funding Co., LLC*, 227 AD3d 796, 798 [2024]; *U.S. Bank N.A. v Medianik*, 223 AD3d at 938).

Further, the plaintiff’s arguments challenging FAPA’s retroactive application and constitutionality under the United States Constitution are without merit (see *FV-1, Inc. v Palaguachi*, 234 AD3d at 822; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1067-1071 [2024]; *97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038, 1042-1043 [2024]).

The plaintiff’s remaining contentions are without merit.

Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing the complaint insofar as asserted against her and, in effect, granted that branch of the defendant's motion which was for summary judgment on her counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage. Connolly, J.P., Wooten, Voutsinas and McCormack, JJ., concur.

17 In the Matter of American Transit Insurance Company, Respondent, v M EL Sayed Physical Therapy, P.C., As Assignee of Carol McGee, Appellant. [247 NYS3d 502]—

Appeal—Appeal as of Right—Order Not Deciding Motion Made on Notice

In a proceeding pursuant to CPLR article 75 to vacate a master arbitration award dated July 10, 2022, M EL Sayed Physical Therapy, P.C., appeals from an order of the Supreme Court, Kings County (Peter P. Sweeney, J.), dated March 18, 2024. The order, insofar as appealed from, denied the application of M EL Sayed Physical Therapy, P.C., for an additional award of attorneys' fees.

Ordered that the appeal is dismissed, without costs or disbursements.

The appeal must be dismissed, as no appeal lies as of right from the portion of the order appealed from, which does not decide a motion made on notice, and we decline to grant leave to appeal (*see* CPLR 5701 [a] [2]; *Kelsey v Rutledge*, 214 AD3d 862, 862 [2023]; *Gamman v Silverman*, 135 AD3d 814, 815 [2016]). Genovesi, J.P., Brathwaite Nelson, Dowling and Hom, JJ., concur.

18 Matter of Raven Bless C. Catholic Guardian Services, Respondent; Tirek C., Appellant, et al., Respondent. [251 NYS3d 244]—

Parent, Child and Family—Termination of Parental Rights—Abandonment—One-Time Contact with Child through Third Party

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from an order of fact-finding and disposition of the Family Court, Queens County (Joan Piccirillo, J.), entered May 14, 2025. The order of fact-finding and disposition, insofar as appealed from, made after a fact-finding hearing, found that the father abandoned the subject child, terminated the father's parental rights, and transferred custody and guardianship of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

Ordered that the order of fact-finding and disposition is affirmed insofar as appealed from, without costs or disbursements.

On February 14, 2024, the petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the father's parental rights to the subject child on the ground of abandonment. The child, born in 2021, had been in foster care since shortly after birth. In an order of fact-finding and disposition entered May 14, 2025, made after a fact-finding hearing, the Family Court, among other things, found that the father abandoned the child, terminated the father's parental rights, and transferred custody and guardianship of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The father appeals.

"Termination of parental rights is authorized by Social Services Law § 384-b (4) (b) when a parent abandons a child for a period of six months immediately prior to the date of the filing of the petition" (*Matter of Kylee I.C. [Thomas C.]*, 213 AD3d 659, 660 [2023] [internal quotation marks omitted]; see *Matter of Abel J.R. [Michael S.]*, 207 AD3d 727, 728 [2022]). "[A] child is abandoned by his or her parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency [within the relevant period], although able to do so and not prevented or discouraged from doing so by the agency" (*Matter of Kylee I.C. [Thomas C.]*, 213 AD3d at 660 [internal quotation marks omitted]; see Social Services Law § 384-b [5] [a]). "Abandonment must be proven by clear and convincing evidence" (*Matter of Ahmad S.M. [Samera M.]*, 238 AD3d 764, 765 [2025]; see *Matter of Kylee I.C. [Thomas C.]*, 213 AD3d at 660). "The burden rests on the parent to maintain contact, and the petitioner need not show diligent efforts to encourage the parent to visit or communicate with the child" (*Matter of Abel J.R. [Michael S.]*, 207 AD3d at 728; see *Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003]). "Once the petitioning agency establishes that the parent failed to maintain contact with his or her child, the burden shifts to the parent to prove an inability to maintain contact or that he or she was prevented or discouraged from doing so by the . . . agency" (*Matter of Ahmad S.M. [Samera M.]*, 238 AD3d at 765 [internal quotation marks omitted]). "A mere showing of sporadic and insubstantial contacts is insufficient to overcome a demonstration of abandonment" (*Matter of Brooke S.M. [Carletta M.]*, 234 AD3d 764, 765 [2025]).

Contrary to the father's contention, the Family Court correctly determined that the petitioner demonstrated by clear and convincing evidence that he abandoned the child. The evi-

dence adduced at the fact-finding hearing reflected that the father did not contact the petitioner or otherwise attempt to contact the child by sending letters, gifts, or cards during the relevant time period (see *Matter of Aliyah S.P. [William L.]*, 163 AD3d 969, 969 [2018]). “The father’s incarceration did not relieve him of his responsibility to maintain contact or communicate with the child or the petitioner” (*id.*; see *Matter of Beatrice A. [Selina A.]*, 158 AD3d 747, 748 [2018]). Although the father testified that the petitioner did not contact him and that he was not able to obtain a phone number for the petitioner, thereby preventing him from maintaining contact, his “testimony was vague and uncorroborated, and insufficient to overcome a showing of abandonment” (*Matter of Anton T.H. [Troy A.H.]*, 212 AD3d 618, 620 [2023] [internal quotation marks omitted]; see *Matter of Aliyah S.P. [William L.]*, 163 AD3d at 969). The father’s minimal, sporadic, and insubstantial contact one time through a third party was insufficient to overcome a finding of abandonment (see *Matter of Brooke S.M. [Carletta M.]*, 234 AD3d at 765; *Matter of Abel J.R. [Michael S.]*, 207 AD3d at 728). Barros, J.P., Brathwaite Nelson, Warhit and Goldberg Velazquez, JJ., concur.

19 In the Matter of Gary Vincent Castaldo, Respondent, v Diana Mondiello, Individually and as Trustee of the Dorothy Castaldo Irrevocable Trust, Appellant. [251 NYS3d 226]—

Trusts—Amendment—Consent—Percentage of Distribution of Trust Remainder

Trusts—Validity—Undue Influence of Trustee—Not Present When Grantor Signed Limited Power of Appointment

In a proceeding, inter alia, pursuant to CPLR article 77 to set aside a limited power of appointment dated April 16, 2019, Diana Mondiello, individually and as trustee of the Dorothy Castaldo Irrevocable Trust, appeals from an order of the Supreme Court, Nassau County (Dawn Jimenez, J.), entered March 14, 2024. The order, insofar as appealed from, denied that branch of the motion of Diana Mondiello, individually and as trustee of the Dorothy Castaldo Irrevocable Trust, which was for summary judgment dismissing the petition.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of Diana Mondiello, individually and as trustee of the Dorothy Castaldo Irrevocable Trust, which was for summary judgment dismissing the petition is granted.

The petitioner commenced this proceeding against Diana

Mondiello, individually and as trustee of the Dorothy Castaldo Irrevocable Trust (hereinafter the trust), inter alia, pursuant to CPLR article 77 to set aside a limited power of appointment dated April 16, 2019 (hereinafter the LPA), executed by Dorothy Castaldo (hereinafter the decedent), alleging that the execution of the LPA failed to comply with the requirements of EPTL 7-1.9 and that the LPA was the product of undue influence on the decedent by Mondiello. Mondiello moved, among other things, for summary judgment dismissing the petition. In an order entered March 14, 2024, the Supreme Court, inter alia, denied that branch of the motion. Mondiello appeals.

“A trust instrument is to be construed as written, and the grantors’ intention is to be determined solely from the unambiguous language of the instrument itself” (*Matter of Arline J. [James J.—Falasco]*, 174 AD3d 604, 606 [2019]). Here, Mondiello established her prima facie entitlement to judgment as a matter of law dismissing the first, second, and third causes of action by demonstrating that the decedent’s execution of the LPA reallocated the trust’s remainder among a specified class of beneficiaries in accordance with the terms of article six of the trust instrument. Contrary to the petitioner’s contention, the decedent’s execution of the LPA did not violate EPTL 7-1.9 (a), which provides, among other things, that the creator of a trust “may revoke or amend the whole or any part [of a trust]” upon the written consent of all persons beneficially interested in the trust (see *Matter of Perosi v LiGreci*, 98 AD3d 230, 234-235 [2012]; *Whitehouse v Gahn*, 84 AD3d 949, 951 [2011]). Under the circumstances, the decedent was not required to obtain the petitioner’s consent to amend the percentage of distribution of the trust remainder, inasmuch as the decedent’s execution of the LPA was permitted under the express terms of the trust instrument (see *Matter of Arline J. [James J.—Falasco]*, 174 AD3d at 606). In opposition, the petitioner failed to raise a triable issue of fact.

“The burden of establishing undue influence rests with the party asserting its existence” (*Henik v Darconte*, 189 AD3d 797, 797 [2020]; see *Hearst v Hearst*, 50 AD3d 959, 962 [2008]). “In order to prove undue influence, a party must show that the influence exerted amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained [a person] to do that which was against his [or her] free will and desire, but which he [or she] was unable to refuse or too weak to resist” (*Henik v Darconte*, 189 AD3d at 797 [internal quotation marks omitted]; see *Matter of Walther*, 6 NY2d 49, 53 [1959]).

Here, Mondiello established, *prima facie*, that the LPA was not the product of undue influence, coercion, or duress. Mondiello demonstrated, *inter alia*, that the decedent was of sound mind despite her physical infirmities, Mondiello was not present when the decedent executed the LPA in her attorney's office, and the decedent and the petitioner had never had a close relationship. Mondiello further demonstrated that the decedent and the petitioner became estranged in 2018, following the petitioner's requests for information concerning the decedent's assets and the petitioner's commencement of a guardianship proceeding against the decedent, and that the decedent expressed a consistent desire to disinherit the petitioner following the commencement of the guardianship proceeding. In opposition, the petitioner failed to raise a triable issue of fact (*see Matter of Cianci*, 165 AD3d 655, 657-658 [2018]; *Bazigos v Krukar*, 140 AD3d 811, 814 [2016]).

Accordingly, the Supreme Court should have granted that branch of Mondiello's motion which was for summary judgment dismissing the petition.

The petitioner's remaining contention is without merit. Duffy, J.P., Brathwaite Nelson, Warhit and Taylor, JJ., concur.

20 In the Matter of David A. Cutner et al., Appellants, v City of Rye Board of Appeals et al., Respondents. [247 NYS3d 502]—

Municipal Corporations—Zoning—Judicial Review—Interpretation of Statute
Municipal Corporations—Zoning—City Code—Definition of Full-Service Restaurant

Municipal Corporations—Zoning—Preexisting Nonconforming Use

In a proceeding pursuant to CPLR article 78 to review a determination of the respondent City of Rye Board of Appeals dated April 20, 2023, which, after a hearing, upheld the issuance of a certificate of occupancy to the respondent 530 Milton Road, LLC, by the City of Rye Department of Buildings, the petitioners appeal from a judgment of the Supreme Court, Westchester County (Susan Cacace, J.), dated November 27, 2023. The judgment denied the petition and dismissed the proceeding.

Ordered that the judgment is reversed, on the law, with one bill of costs, and the matter is remitted to the respondent City of Rye Board of Appeals for further proceedings consistent herewith.

In December 2021, the respondent 530 Milton Road, LLC (hereinafter Milton), purchased a restaurant located in the City of Rye. In January 2022, Milton closed the restaurant to

perform renovations. In June 2022, Milton obtained a permit for interior renovation work. However, that same month, a stop work order halted the renovations because Milton did not have the necessary permits for certain exterior renovations. After obtaining the necessary authorization from the City of Rye Department of Buildings, renovations were resumed and eventually completed. In November 2022, Milton was issued a certificate of occupancy, which stated that the occupancy of the building was for the “continued use of this building as a restaurant.” Milton then resumed using the property as a restaurant.

The petitioners thereafter appealed to the respondent City of Rye Board of Appeals (hereinafter the Board), challenging the issuance of the certificate of occupancy. In a determination dated April 20, 2023, the Board upheld the issuance of the certificate of occupancy, concluding that the restaurant was a permitted use. In May 2023, the petitioners commenced this proceeding pursuant to CPLR article 78 to review the Board’s determination. By judgment dated November 27, 2023, the Supreme Court denied the petition and dismissed the proceeding. The petitioners appeal.

The Supreme Court erred in denying the petition and dismissing the proceeding. Judicial review of a challenged zoning board determination is generally limited to assessing whether the zoning board’s determination was illegal, arbitrary and capricious, or an abuse of discretion (*see Matter of Margulies v Town of Ramapo*, 226 AD3d 783, 784 [2024]). Furthermore, where the zoning board of appeals is authorized to interpret code requirements, such as here (*see Code of the City of Rye* § 197-81 [A]), the zoning board’s interpretation of its zoning ordinance is entitled to great deference (*see Matter of Abramovitz v Zoning Bd. of Appeals of the Inc. Vil. of Bellport*, 194 AD3d 810, 811 [2021]). “However, where the issue involves pure legal interpretation of statutory terms, deference [to the zoning board of appeals] is not required” (*Matter of Bartolacci v Village of Tarrytown Zoning Bd. of Appeals*, 144 AD3d 903, 904 [2016] [internal quotation marks omitted]; *see Matter of Kreger v Town of Southold*, 230 AD3d 781, 782 [2024]). “In such circumstances, the judiciary . . . is free to ascertain the proper interpretation from the statutory language and legislative intent” (*Matter of Kreger v Town of Southold*, 230 AD3d at 782 [alteration omitted], quoting *Matter of Corrales v Zoning Bd. of Appeals of the Vil. of Dobbs Ferry*, 164 AD3d 582, 585 [2018]). In interpreting a statute, the court should attempt to effectuate the intent of the legislature (*see id.* at 783). The starting

point in any case of statutory interpretation must always be the language of the statute itself, giving effect to the plain meaning thereof (*see id.*; *see also Matter of O'Donnell v Erie County*, 35 NY3d 14, 20-21 [2020]). “All parts of a statute are intended to be given effect and a statutory construction which renders one part meaningless should be avoided” (*Matter of Kreger v Town of Southold*, 230 AD3d at 783 [alteration omitted], quoting *Matter of Jun Wang v James*, 40 NY3d 497, 503 [2023]).

Here, the Code of the City of Rye § 197-86, table B, column 1, (B-1) (3) defines a “[f]ull-service restaurant[]” to mean an establishment that, among other things, is situated “on a lot having frontage on an arterial highway or a county road as designated on September 1, 1958, and more than 150 feet from a residence district.” There is no dispute that the property on which the restaurant is situated does not meet the foregoing requirements. Accordingly, full-service restaurant use is not a permitted use of the property based on the clear and unambiguous wording of the Code of the City of Rye. The Board’s determination to uphold the issuance of the certificate of occupancy was therefore affected by an error of law, and it must be annulled.

Because the Board concluded that the restaurant use was a permitted use, it did not consider the question of whether the restaurant use may still warrant the issuance of a certificate of occupancy on the ground that it is a preexisting nonconforming use or whether that preexisting nonconforming use lapsed due to Milton’s renovation work (*see id.* § 197-5 [A] [4]). Accordingly, the matter must be remitted to the Board for a determination on this issue (*see Matter of HV Donuts, LLC v Town of LaGrange Zoning Bd. of Appeals*, 169 AD3d 678 [2019]; *Greentree Realty, LLC v Village of Croton-on-Hudson*, 46 AD3d 511, 513 [2007]).

The petitioners’ remaining contentions either are not properly before this Court or need not be considered in light of our determination. Genovesi, J.P., Ford, Love and Golia, JJ., concur.

21 In the *Matter of Fred Delgrosso et al., Appellants, v Stephen Cole, in His Official Capacity as Town of Red Hook Building Inspector and any Successors in That Position, et al., Respondents*. [251 NYS3d 248]—

Highways—Use of Highway—Traveled Way—Town’s Uses Not Limited to Traveled Way

In a hybrid proceeding pursuant to CPLR article 78 to review

two determinations of the respondent/defendant Stephen Cole, in his official capacity as Town of Red Hook Building Inspector, both dated October 19, 2020, which denied the petitioners/plaintiffs' two applications for building permits, and action, inter alia, for declaratory relief, the petitioners/plaintiffs appeal from a judgment of the Supreme Court, Dutchess County (Edward T. McLoughlin, J.), dated September 1, 2022. The judgment, insofar as appealed from, denied that branch of the petition/complaint which was to annul the determination of the respondent/defendant Stephen Cole, in his official capacity as Town of Red Hook Building Inspector, dated October 19, 2020, denying the petitioners/plaintiffs' "Building Permit Application 2," and dismissed that portion of the proceeding/action.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

The petitioners/plaintiffs (hereinafter the petitioners) are the owners of a home that is located approximately four feet from a two-lane rural road. The petitioners submitted to the respondent/defendant Town of Red Hook a "Building Permit Application 2" (hereinafter the application), seeking permission to erect a four-foot-tall chainlink fence along a white line painted by the Town between the area in front of the petitioners' home and the "traveled way" of the road. After consulting with a professional engineer, the respondent/defendant Stephen Cole, in his official capacity as Town of Red Hook Building Inspector (hereinafter the Building Inspector), denied the application in a determination dated October 19, 2020.

The petitioners then commenced this hybrid proceeding pursuant to CPLR article 78 and action against the Building Inspector and the Town, inter alia, to annul the Building Inspector's determination denying the application. In a judgment dated September 1, 2022, the Supreme Court, among other things, denied that branch of the petition/complaint which was to annul the Building Inspector's determination and dismissed that portion of the proceeding/action. The petitioners appeal.

In reviewing the Building Inspector's determination, this Court must consider only whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*see id.* § 7803 [3]; *Matter of Akesson v Incorporated Vil. of Asharoken*, 227 AD3d 706, 707 [2024]; *Matter of Cernelian Farms, LLC v Village of Muttontown Bldg. Dept.*, 151 AD3d 847, 847-848 [2017]). "In applying the arbitrary and capricious standard, a court inquires whether the determination under

review had a rational basis” (*Matter of Akeson v Incorporated Vil. of Asharoken*, 227 AD3d at 707 [internal quotation marks omitted]; 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, 231 [1974]).

Here, the Building Inspector’s determination had a rational basis and was not arbitrary and capricious. The administrative record indicates that the Building Inspector denied the application on the ground, among others, that the proposed fence would be located within the Town’s right of way in violation of section 117-9 of the Code of the Town of Red Hook and Highway Law § 319. The Building Inspector’s determination stated that this “user road” extended “beyond the traveled way” and included “areas beyond the white line necessary for maintenance and plowing.” Contrary to the petitioners’ contention, the Town’s permissible uses of the road, such as for maintenance and plowing, are not limited to the “traveled way” delineated by the white line (see *Federman v Town of Lorraine*, 213 AD3d 1220, 1222 [2023]; *Hoffman v Town of Shandaken*, 147 AD3d 1275, 1276 [2017]; *Matter of Soldatenko v Village of Scarsdale Zoning Bd. of Appeals*, 138 AD3d 1003 [2016]).

The petitioners’ remaining contentions are without merit.

Accordingly, the Supreme Court properly denied that branch of the petition/complaint which was to annul the Building Inspector’s determination denying the application and dismissed that portion of the proceeding/action. Barros, J.P., Warhit, Wan and Hom, JJ., concur.

22 In the Matter of Theisman N.E. Marie E., Respondent; Tiesha M.N., Appellant. [250 NYS3d 180]—

Attorney and Client—Assignment of Counsel—Request for Substitution—Failure to Identify Shortcomings

Guardian and Ward—Appointment of Guardian—Child Reached Age of Majority

Guardian and Ward—Appointment of Guardian—Best Interests Analysis—Grandmother Provided Safe Home Environment

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an amended order of the Family Court, Kings County (Ilana Gruebel, J.), dated May 22, 2024. The amended order, after a hearing, granted the petition of the paternal grandmother to be appointed guardian of the subject child.

Ordered that the amended order is affirmed, without costs or disbursements.

The subject child was born in March 2006. In January 2021,

the Administration for Children's Services commenced a proceeding pursuant to Family Court Act article 10, alleging that the mother neglected the child. In an order of fact-finding and disposition dated April 20, 2022, the Family Court, inter alia, found that the mother neglected the child.

In August 2023, the child's paternal grandmother (hereinafter the grandmother) filed a petition to be appointed guardian of the child. The Family Court held a bifurcated hearing on the petition. In November 2023, following a hearing on extraordinary circumstances, the court found that extraordinary circumstances existed to warrant an inquiry into whether the appointment of the grandmother as the child's guardian was in his best interests. In April 2024, following a hearing on the best interests of the child, the court determined that it was in the best interests of the child, who had turned 18 years old prior to the best interests hearing and consented to the guardianship, to appoint the grandmother as his guardian until his 21st birthday. In an amended order dated May 22, 2024, the court granted the grandmother's petition to be appointed guardian of the child. The mother appeals.

The Family Court providently exercised its discretion in declining to appoint a new attorney for the mother and in denying her request to proceed pro se. The record reflects that the mother's appointed attorney was her fourth since the inception of the neglect proceeding and that she had failed to work effectively with any of her previous attorneys. Further, the mother failed to identify any specific shortcomings of her attorney constituting good cause for a substitution of counsel (*see Matter of Wiley v Musabyemariya*, 196 AD3d 493, 493 [2021]; *Matter of Tanisha M.M. [Toni D.S.—Anthony M.]*, 170 AD3d 841, 841-842 [2019]; *Matter of Munoz v Edmonds-Munoz*, 123 AD3d 1038, 1039 [2014]). As to her request to proceed pro se, the mother forfeited that right by "engaging in disruptive or obstreperous conduct calculated to undermine, upset or unreasonably delay" the progress of the hearing (*People v Wingate*, 184 AD3d 738, 738 [2020] [internal quotation marks omitted]; *see People v Williams*, 134 AD3d 639, 639 [2015]; *Matter of Aiden XX. [Jesse XX.]*, 104 AD3d 1094, 1097 [2013]).

The mother's contention that the grandmother failed to demonstrate extraordinary circumstances warranting a best interests inquiry has been rendered academic upon the child reaching the age of 18, as, upon the child reaching the age of majority, the mother was entitled to an opportunity to be heard solely on the issue of whether the appointment of the grandmother as guardian of the child would promote the child's best

interests (*see Matter of Melissa B. v Dean S.*, 89 AD3d 1018, 1019 [2011]).

The Family Court's determination that it was in the best interests of the child to appoint the grandmother as guardian of the child is supported by a sound and substantial basis in the record, as the evidence adduced at the hearing established that the grandmother had been providing a safe and stable home environment for the child and was meeting all of his needs (*see Matter of Tanisha M.M. [Toni D.S.—Anthony M.]*, 170 AD3d at 842; *Matter of Angela-Marie C. [Renee C.]*, 162 AD3d 1010, 1012 [2018]).

The parties' remaining contentions either have previously been considered and rejected by the Court or are without merit. Iannacci, J.P., Ford, Ventura and Quirk, JJ., concur.

23 In the *Matter of George Golden et al., Appellants, v Town Board of the Town of Oyster Bay et al., Defendants, and Frank Marino et al., Respondents.* [251 NYS3d 231]—

Injunctions—Permanent Injunction—Enjoining Adjoining Property Owner from Continuing Construction

Appeal—Academic and Moot Questions—Exception to Mootness Doctrine—Action Mainly Fact-Specific

Dismissal and Nonsuit—Discontinuance—No Evidence of Prejudice or Attempt to Avoid Adverse Determination

In a hybrid proceeding pursuant to CPLR article 78 and action, *inter alia*, for injunctive relief, the petitioners/plaintiffs appeal from an order of the Supreme Court, Nassau County (Conrad D. Singer, J.), entered November 15, 2023. The order, insofar as appealed from, granted those branches of the motion of the respondents/defendants Frank Marino and Susan Marino which were for summary judgment dismissing so much of the second cause of action as was for a permanent injunction enjoining them from performing any work on the petitioners/plaintiffs' property and pursuant to CPLR 3217 (b) for leave to discontinue their first, second, third, and sixth counterclaims without prejudice, and denied that branch of the petitioners/plaintiffs' cross-motion which was for summary judgment on so much of the second cause of action as was for a permanent injunction enjoining the respondents/defendants Frank Marino and Susan Marino from performing any work on the petitioners/plaintiffs' property.

Ordered that the order is affirmed insofar as appealed from, with costs.

The petitioners/plaintiffs (hereinafter the plaintiffs) own certain waterfront property in the Town of Oyster Bay. The property shares a common boundary with waterfront property

owned by the respondents/defendants Frank Marino and Susan Marino (hereinafter together the Marinos). In 2020, the respondent/defendant Town Board of the Town of Oyster Bay issued a resolution approving the Marinos' application, inter alia, to remove and replace a groin, which is a structure that extends into the water and prevents beach erosion. In March 2021, the plaintiffs commenced this hybrid proceeding pursuant to CPLR article 78 and action, among other things, for a permanent injunction enjoining the Marinos from performing any work on the plaintiffs' property, including the groin, which the plaintiffs alleged was located on their property. In their answer to the petition/complaint, the Marinos asserted various counterclaims. Their first, second, third, and sixth counterclaims sought declaratory and injunctive relief predicated on the allegations regarding the location and their ownership of the groin.

In December 2022, the Marinos moved, inter alia, for summary judgment dismissing so much of the second cause of action as was for a permanent injunction enjoining them from performing any work on the plaintiffs' property and pursuant to CPLR 3217 (b) for leave to discontinue their first, second, third, and sixth counterclaims without prejudice. In support of their motion, the Marinos submitted evidence demonstrating that during the pendency of the proceeding/action, they had obtained new permits authorizing the construction of a new groin without having to remove the disputed groin and that the new groin had been constructed entirely on their property. The Marinos argued, among other things, that the injunctive relief sought in the petition/complaint had been rendered academic. The plaintiffs cross-moved, inter alia, for summary judgment on so much of the second cause of action as was for a permanent injunction enjoining the Marinos from performing any work on the plaintiffs' property.

In an order entered November 15, 2023, the Supreme Court, among other things, granted those branches of the Marinos' motion which were for summary judgment dismissing so much of the second cause of action as was for a permanent injunction enjoining them from performing any work on the plaintiffs' property and pursuant to CPLR 3217 (b) for leave to discontinue their first, second, third, and sixth counterclaims without prejudice, and denied that branch of the plaintiffs' cross-motion which was for summary judgment on so much of the second cause of action as was for a permanent injunction enjoining the Marinos from performing any work on the plaintiffs' property. The plaintiffs appeal.

"It is a fundamental principle of our jurisprudence that the

power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal” (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]; see *Matter of Kirkland v Annucci*, 150 AD3d 736, 737 [2017]). “Thus, pursuant to the mootness doctrine, courts are precluded ‘from considering questions which, although once live, have become moot by passage of time or change in circumstances’” (*Kennedy v Suffolk County*, 211 AD3d 926, 928 [2022], quoting *City of New York v Maul*, 14 NY3d 499, 507 [2010]; see *Matter of Cody v Verivakis*, 236 AD3d 783 [2025]).

Here, the Marinos established their prima facie entitlement to judgment as a matter of law dismissing so much of the second cause of action as was for a permanent injunction enjoining them from performing any work on the plaintiffs’ property by submitting evidence demonstrating that they had abandoned their plans to replace the disputed groin and had constructed a new groin entirely on their property. The Marinos demonstrated that no further construction work was needed or planned, and thus, enjoining such work would have no practical effect on the parties (see *Matter of Cody v Verivakis*, 236 AD3d at 783; *Quinn v 20 E. Clinton, LLC*, 193 AD3d 893, 894 [2021]).

In opposition, the plaintiffs failed to raise a triable issue of fact. Contrary to the plaintiffs’ contention, the exception to the mootness doctrine does not apply here. “‘An exception to the mootness doctrine may apply . . . where the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts’” (*Matter of Marxuach v New York State Dept. of Corr. & Community Supervision*, 214 AD3d 873, 874 [2023], quoting *Coleman v Daines*, 19 NY3d 1087, 1090 [2012]). Here, there is no likelihood of repetition because the issues underlying so much of the second cause of action as was for a permanent injunction enjoining the Marinos from performing any work on the plaintiffs’ property are fact specific (see *Berger v Prospect Park Residence, LLC*, 166 AD3d 937, 939 [2018]; *Smalls v St. John’s Episcopal Hosp.*, 152 AD3d 629, 630 [2017]). Moreover, the issues are not substantial and novel (see *Berger v Prospect Park Residence, LLC*, 166 AD3d at 939).

Accordingly, the Supreme Court properly granted that branch of the Marinos’ motion which was for summary judgment dismissing so much of the second cause of action as was for a permanent injunction enjoining them from performing any

work on the plaintiffs' property and denied that branch of the plaintiffs' cross-motion which was for summary judgment on so much of the second cause of action as was for a permanent injunction enjoining the Marinos from performing any work on the plaintiffs' property.

"A motion for leave to discontinue an action is addressed to the sound discretion of the court, and generally should be granted unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results" (*Matter of Catherine Commons, LLC v Town of Orangetown*, 157 AD3d 785, 786 [2018] [citations omitted]; see *JPMorgan Chase Bank, N.A. v Starr-Klein*, 221 AD3d 677, 678 [2023]). Under the circumstances, the Supreme Court providently exercised its discretion in granting that branch of the Marinos' motion which was pursuant to CPLR 3217 (b) for leave to discontinue their first, second, third, and sixth counterclaims without prejudice, as there was no evidence that the plaintiffs would be prejudiced by a discontinuance (see *JPMorgan Chase Bank, N.A. v Starr-Klein*, 221 AD3d at 678; *Aurora Loan Servs., LLC v Hunte*, 189 AD3d 1525, 1526 [2020]). Moreover, there was no evidence that the Marinos were attempting to avoid an adverse determination by discontinuing those counterclaims (see *Aurora Loan Servs., LLC v Hunte*, 189 AD3d at 1526-1527).

In light of our determination, we need not reach the parties' remaining contentions. Chambers, J.P., Wooten, Warhit and Landicino, JJ., concur.

24 In the Matter of Zerina H. Administration for Children's Services, Appellant-Respondent; Tishana W., Respondent-Appellant, and Kirk H., Respondent. [250 NYS3d 200]—

Parent, Child and Family—Abused or Neglected Child—Medical Records and Expert Testimony—Injuries of Non-Accidental Nature

Parent, Child and Family—Abused or Neglected Child—Conflicting Expert Testimony—Plausibility

In a proceeding pursuant to Family Court Act article 10, (1) the petitioner appeals, and the mother cross-appeals, from an order of the Family Court, Kings County (Erik S. Pitchal, J.), dated August 15, 2024, and (2) the petitioner appeals from an order of the same court also dated August 15, 2024. The first order, insofar as appealed from, after a fact-finding hearing, and upon a finding that the petitioner failed to establish that the father abused or neglected the subject child, dismissed the petition insofar as asserted against the father and released the subject child to the father's custody under the petitioner's

supervision pending the entry of an order of disposition as to the mother. The first order, insofar as cross-appealed from, found that the mother abused and neglected the subject child. The second order dismissed the petition insofar as asserted against the father.

Ordered that the first order is affirmed insofar as appealed from, without costs or disbursements; and it is further,

Ordered that the first order is reversed insofar as cross-appealed from, on the facts, without costs or disbursements, the petition is denied insofar as asserted against the mother, and the proceeding is dismissed insofar as asserted against the mother; and it is further,

Ordered that the second order is affirmed, without costs or disbursements.

In December 2022, the subject child, who was then two months old, was brought to a hospital emergency room because she had a fever and was exhibiting seizure-like activity. Upon the child's admission to the hospital, evaluations and testing revealed that the child had, among other conditions, subdural hematomas and a parenchymal hemorrhage without any external injuries or retinal hemorrhages. The petitioner commenced this proceeding pursuant to Family Court Act article 10, alleging that the mother and the father abused and neglected the child. Specifically, the petition alleged, inter alia, that the child sustained injuries consistent with abusive head trauma, otherwise known as "shaken baby syndrome." After a fact-finding hearing, the Family Court found that the petitioner established by a preponderance of the evidence that the mother abused and neglected the child but failed to establish that the father abused or neglected the child. The court dismissed the petition insofar as asserted against the father and released the child to the father's custody under the petitioner's supervision pending the entry of an order of disposition as to the mother. The petitioner appeals, and the mother cross-appeals.

"At a fact-finding hearing in a child protective proceeding pursuant to Family Court Act article 10, the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected" (*Matter of Elijah P. [Jane W.]*, 191 AD3d 984, 985 [2021]; see Family Ct Act § 1046 [b] [i]). "Family Court Act § 1046 (a) (ii) provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child that would ordinarily not occur absent an act or omission of the respondents, and (2) that the respondents were the caretakers of the child at the time the injury occurred" (*Matter of Zoey D.*

[*Simona D.*], 148 AD3d 802, 803 [2017]; see *Matter of Philip M.*, 82 NY2d 238, 243 [1993]). Once a petitioner has made a prima facie case of abuse, a respondent may rebut the evidence of culpability by presenting evidence to “(1) establish that during the time period when the child was injured, the child was not in [the] respondent’s care; (2) demonstrate that the injury or condition could reasonably have occurred accidentally, without the acts or omissions of [the] respondent; or (3) counter the evidence that the child had the condition which was the basis for the finding of injury” (*Matter of Philip M.*, 82 NY2d at 244-245 [citations omitted]). Nonetheless, “the burden of proof always remains with the petitioner” (*Matter of Dallas P. [Allison P.]*, 185 AD3d 589, 591 [2020] [internal quotation marks omitted]). “Although deference is to be given to the hearing court’s determinations as to credibility, where that court’s credibility determination is not supported by the record, this Court is free to make its own credibility assessments and overturn the determination of the hearing court” (*Matter of Zamir F. [Ricardo B.]*, 193 AD3d 932, 933-934 [2021] [citation and internal quotation marks omitted]; see *Matter of Landon K. [Stephanie K.]*, 238 AD3d 1145, 1147 [2025]; *Matter of Tazya B. [Curtis B.]*, 180 AD3d 1039, 1040 [2020]).

Here, the petitioner established a prima facie case of abuse by presenting evidence, including medical records and expert testimony, that the child was brought to the hospital with injuries, including subdural hematomas and a parenchymal hemorrhage, that were of such a nature as not to be accidental (see *Matter of Landon K. [Stephanie K.]*, 238 AD3d at 1147; *Matter of Jordan T.R. [David R.]*, 113 AD3d 861, 863 [2014]).

However, contrary to the petitioner’s contention, the mother presented sufficient evidence to rebut the petitioner’s prima facie case of abuse through the testimony of her expert witness. The mother’s expert opined that the injuries sustained by the child were not intentionally inflicted, as there were no external injuries and no retinal hemorrhages, and the patterns and amount of bleeding in the brain were inconsistent with “shaken baby syndrome.” The mother’s expert put forth a reasonable explanation for the child’s injuries by opining that the child had a benign enlargement of the subdural space, which made her “bridging veins” susceptible to tearing by a trivial mechanism. According to the mother’s expert, when the child’s bridging veins tore, they caused an acute subdural hematoma, which irritated her cortex, resulting in a cascade of increasingly severe seizures. The mother’s expert further opined that the child suffered a prolonged seizure that was not recognized,

which led to a hypoxic ischemic event that in turn caused the child to suffer a stroke, and as a result of the stroke, the child suffered a parenchymal hemorrhage. By contrast, the petitioner's expert's opinion was less plausible. As such, we find that the Family Court's decision to credit the testimony of the petitioner's expert over that of the mother's expert is not supported by the record (*see Matter of Landon K. [Stephanie K.]*, 238 AD3d at 1147; *Matter of Zamir F. [Ricardo B.]*, 193 AD3d at 933-934; *Matter of Tazya B. [Curtis B.]*, 180 AD3d at 1040). Moreover, the record demonstrates that the mother is a concerned parent who consistently sought medical attention for the child on multiple occasions in November 2022 when the child displayed symptoms (*see Matter of Landon K. [Stephanie K.]*, 238 AD3d at 1147; *Matter of Jordan T.R. [David R.]*, 113 AD3d at 864).

Accordingly, the petitioner failed to demonstrate by a preponderance of the evidence that the mother abused and neglected the child.

For the same reasons, the Family Court properly dismissed the petition insofar as asserted against the father (*see Matter of Landon K. [Stephanie K.]*, 238 AD3d at 1147).

The petitioner's remaining contentions either need not be reached in light of our determination or are without merit. Dillon, J.P., Dowling, Landicino and McCormack, JJ., concur.

25 In the *Matter of Little Harbor Partners, LLC, Appellant, v Village of Port Jefferson Zoning Board of Appeals, Respondent*. [250 NYS3d 624]—

Municipal Corporations—Zoning—Variance—Negative Precedent in Allowing Construction on Substandard Lots

In a proceeding pursuant to CPLR article 78 to review a determination of the Village of Port Jefferson Zoning Board of Appeals dated August 3, 2023, which, after a hearing, denied the application of the petitioner for certain area variances, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Alison J. Napolitano, J.), dated February 2, 2024. The judgment denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

The petitioner applied to the Village of Port Jefferson Zoning Board of Appeals (hereinafter the ZBA) for certain area variances, in effect, to subdivide a parcel of property into two smaller lots. The parcel is comprised of two lots that share a property line. One lot is owned by the petitioner. The other lot is owned by a separate limited liability company, the sole

member of which is also the sole member of the petitioner. Those lots had been held in common ownership for a substantial period until the petitioner and the separate limited liability company each purchased one lot in an apparent effort to subdivide the parcel. The proposed lots which would result from the subdivision would not conform with the square-foot requirements of the Village—in this case, lots of a minimum of 20,000 square feet (*see* Code of Village of Port Jefferson, ch 250, Attachment 3).

In a determination dated August 3, 2023, made after a hearing, the ZBA denied the petitioner's application for certain area variances. The petitioner commenced this proceeding pursuant to CPLR article 78 to review the ZBA's determination. The Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

“Local zoning boards have broad discretion in considering variance applications, and judicial review is limited to determining whether the action taken by the board was affected by an error of law, arbitrary and capricious, or an abuse of discretion” (*Matter of Bonadonna v Board of Zoning Appeals of the Inc. Vil. of Upper Brookville*, 220 AD3d 855, 856-857 [2023], quoting *Matter of White Birch Circle Realty Corp. v DeChance*, 212 AD3d 729, 730 [2023]). “Where, as here, a zoning board's determination is made after a public hearing, its determination should be upheld if it has a rational basis and is supported by evidence in the record” (*id.* at 857, quoting *Matter of Ogden Land Dev., LLC v Zoning Bd. of Appeals of Vil. of Scarsdale*, 121 AD3d 695, 696 [2014]).

“Pursuant to Village Law § 7-712-b (3) (b), when determining whether to grant an area variance, a zoning board of appeals is required to engage in a balancing test, weighing the benefit of the grant to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted” (*id.*). In making this determination the board must consider the following factors: “(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created; which consideration shall be relevant to the

decision of the board of appeals, but shall not necessarily preclude the granting of the area variance” (Village Law § 7-712-b [3] [b]). “The zoning board, in applying the balancing test, is not required to justify its determination with supporting evidence for each of the five statutory factors as long as its determination balancing the relevant considerations is rational” (*Matter of Humphreys v Somers Zoning Bd. of Appeals*, 206 AD3d 1000, 1002 [2022] [internal quotation marks omitted]).

Here, contrary to the petitioner’s contention, the record reflects that the ZBA engaged in the requisite balancing of interests and considered the appropriate factors pursuant to Village Law § 7-712-b (3) (b) in determining the petitioner’s application. The ZBA’s determination had a rational basis and was supported by the record (*see Matter of Bonadonna v Board of Zoning Appeals of the Inc. Vil. of Upper Brookville*, 220 AD3d at 857). The ZBA rationally concluded that the lot-size variances sought for the proposed lots were substantial in nature. A negative precedent, allowing construction of houses on substandard lots, would have been set by granting the variances (*see* Village Law § 7-712-b [3] [b]). The record further established that the petitioner’s hardship was self-created, since the petitioner’s sole member was abundantly aware, upon the acquisition of the two lots which comprise the parcel, that those two lots had been held in common ownership and therefore had merged by operation of law (*see* Code of Town of Brookhaven § 85-2 [c] [1]).

The petitioner’s remaining contentions are without merit.

Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding (*see Matter of Bonadonna v Board of Zoning Appeals of the Inc. Vil. of Upper Brookville*, 220 AD3d at 857). Barros, J.P., Christopher, Wan and Golia, JJ., concur.

26 In the *Matter of Philip G. Potter, Appellant, v Incorporated Village of Ocean Beach, Respondent, et al., Respondents*. [247 NYS3d 504]—

Injunctions—Preliminary Injunction—Reinstatement of Certificate of Occupancy—Failure to Demonstrate Extraordinary Circumstances

In a proceeding pursuant to CPLR article 78, *inter alia*, in the nature of mandamus to compel the Incorporated Village of Ocean Beach to reinstate a certificate of occupancy, the petitioner appeals from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated April 17, 2024. The order, insofar as appealed from, granted that branch of the cross-

motion of the Incorporated Village of Ocean Beach which was to direct the petitioner to provide the Building Inspector of the Incorporated Village of Ocean Beach with access to the subject property for an inspection pursuant to Code of Village of Ocean Beach § 64-14 and, in effect, denied the petitioner's motion for a preliminary injunction directing the Incorporated Village of Ocean Beach to reinstate the certificate of occupancy.

Motion by the petitioner, *inter alia*, for leave to appeal to this Court from the order dated April 17, 2024. By decision and order on motion of this Court dated September 25, 2024, that branch of the motion which is for leave to appeal to this Court from the order dated April 17, 2024, was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

Ordered that the branch of the motion which is for leave to appeal to this Court from the order dated April 17, 2024, is granted; and it is further,

Ordered that the order is affirmed insofar as appealed from, with costs.

In 2009, the petitioner acquired certain real property located in the Incorporated Village of Ocean Beach and obtained a building permit to demolish the existing structure on the property and to construct a new residence. A certificate of occupancy dated July 2, 2010, was issued for the residence. However, the certificate of occupancy was revoked in July 2011 by the Village Building Inspector. The Building Inspector explained in a letter to the petitioner that in reviewing a recent request by the petitioner, the Building Inspector noticed that a final survey following the construction had never been submitted to the Village. Upon obtaining the final survey, the Building Inspector determined that there were violations of the Code of the Village of Ocean Beach (hereinafter the Village Code) and discrepancies between the plans submitted and what was built, and that the violations needed to be cured before a certificate of occupancy could issue. Subsequently, the petitioner was notified that additional violations of the Village Code, as well as violations of the Residential Code of New York State, had been discovered.

In June 2014, a hearing was held before a hearing officer on the issue of the revocation of the certificate of occupancy. Following the hearing, the hearing officer issued a report and recommendation to the Village Mayor and Village Board of

Trustees in which the hearing officer found that the certificate of occupancy had been issued in error, as there were violations of the Village Code and the Residential Code of New York State, and recommended that the Village revoke the certificate of occupancy.

In 2020, the petitioner and another owner of the property commenced an action, *inter alia*, for a judgment declaring that the certificate of occupancy dated July 2, 2010, is valid and in full force and effect. In an order dated March 2, 2021, the Supreme Court determined that the Village failed to make a final determination as to the revocation of the certificate of occupancy following the hearing officer's report and recommendation. The court denied the petitioner's application for a declaratory judgment as premature and directed the Village Board of Trustees to conduct a public hearing and thereafter make a new determination on the revocation of the certificate of occupancy.

In February 2024, the petitioner commenced this proceeding against the Village, among others, pursuant to CPLR article 78, among other things, in the nature of mandamus to compel the Village to reinstate the certificate of occupancy. The petitioner moved for a preliminary injunction directing the Village to reinstate the certificate of occupancy. The Village cross-moved, *inter alia*, to direct the petitioner to provide the Building Inspector with access to the property for an inspection pursuant to Village Code § 64-14. The Village contended that the Village Board of Trustees had been unable to comply with so much of the order dated March 2, 2021, as directed it to conduct a public hearing and make a new determination on the revocation of the certificate of occupancy because it had been unable to inspect the petitioner's property, which was necessary to render a determination on the issue of the certificate of occupancy. The Village submitted evidence that it had attempted to arrange for an inspection, but the petitioner had not complied with the Village's requests. In an order dated April 17, 2024, the Supreme Court, among other things, granted that branch of the Village's cross-motion and, in effect, denied the petitioner's motion. The petitioner appeals.

Contrary to the petitioner's contention, the Supreme Court properly granted that branch of the Village's cross-motion which was to direct the petitioner to provide the Building Inspector with access to the property for an inspection so that the Village Board of Trustees could conduct a public hearing and make a new determination on the revocation of the certificate of occupancy (*see* Village Code § 64-14).

“The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; see CPLR 6301). The purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties (see *Matter of St. Michael’s Home v Valmas*, 230 AD3d 1320, 1322 [2024]; *Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Group, LLC*, 177 AD3d 924, 927 [2019]). “Absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment” (*Matter of St. Michael’s Home v Valmas*, 230 AD3d at 1322 [alteration and internal quotation marks omitted]; see *Bilgrei v North Shore Tower Apts., Inc.*, 228 AD3d 814, 815 [2024]).

Here, the petitioner failed to demonstrate extraordinary circumstances justifying the relief sought in his motion for a preliminary injunction, which amounted to the ultimate relief sought in the petition (see *Matter of Boening v Nassau County Dept. of Assessment*, 200 AD3d 973, 974 [2021]; *Shake Shack Fulton St. Brooklyn, LLC v Allied Prop. Group, LLC*, 177 AD3d at 927-928). Moreover, the petitioner failed to demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in his favor (see *Matter of Boening v Nassau County Dept. of Assessment*, 200 AD3d at 974-975). The petitioner’s remaining contentions are without merit. Accordingly, the Supreme Court properly, in effect, denied the petitioner’s motion for a preliminary injunction directing the Village to reinstate the certificate of occupancy. Brathwaite Nelson, J.P., Taylor, Ventura and McCormack, JJ., concur.

27 In the Matter of Carmine Schieferstein, Petitioner, v Thomas F. Whelan, as Justice of the Supreme Court of the State of New York, Respondent. [247 NYS3d 511]—

Proceeding against Body or Officer—Mandamus—Clear Legal Right

Proceeding pursuant to CPLR article 78 in the nature of mandamus, inter alia, to compel the respondent, Thomas F. Whelan, a Justice of the Supreme Court, Suffolk County, to sign an order to show cause in an action entitled *U.S. Bank Natl. Assoc. v Schieferstein*, pending in that court under index No. 617683/16, and to stay the sale of the subject property pending hearing and determination of this proceeding.

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear legal right to the relief sought.

The petitioner's remaining contentions either need not be reached in light of our determination or are without merit. Barros, J.P., Voutsinas, Golia and Hom, JJ., concur.

28 In the Matter of William Stewart, Appellant, v Michael Christopher, Respondent. [247 NYS3d 487]—

Parent, Child and Family—Family Offense Proceeding—Harassment

In a proceeding pursuant to Family Court Act article 8, the petitioner appeals from an order of the Family Court, Kings County (Robert A. Markoff, J.), dated April 15, 2024. The order, insofar as appealed from, after a hearing, denied that branch of the petition which alleged that the respondent committed the family offense of harassment in the second degree and dismissed that portion of the proceeding.

Ordered that the order is affirmed insofar as appealed from, with costs.

The petitioner commenced this family offense proceeding pursuant to Family Court Act article 8 against the respondent, his brother-in-law, alleging, inter alia, that the respondent had committed the family offense of harassment in the second degree. After a hearing, the Family Court, among other things, determined that the petitioner failed to establish by a preponderance of the evidence that the respondent committed the family offense of harassment in the second degree against the petitioner, denied that branch of the petition, and dismissed that portion of the proceeding. The petitioner appeals.

“In a family offense proceeding, the petitioner has the burden of establishing the offense by a fair preponderance of the evidence” (*Matter of Ramos v West*, 234 AD3d 773, 773 [2025] [internal quotation marks omitted]; *see* Family Ct Act § 832; *Matter of Richardson v Brown*, 173 AD3d 875, 876 [2019]). “The determination of whether a family offense was committed is a factual issue to be resolved by the hearing court, and its determinations regarding the credibility of witnesses are entitled to great weight on appeal unless clearly unsupported by the record” (*Matter of Ramos v West*, 234 AD3d at 773 [internal quotation marks omitted]; *see Matter of Richardson v Brown*, 173 AD3d at 876).

Here, the Family Court properly determined that the

petitioner failed to establish by a preponderance of the evidence that the respondent committed the family offense of harassment in the second degree (see Penal Law § 240.26; *Matter of Robinson v Benjamin*, 160 AD3d 877, 878 [2018]; *Matter of Johnson v Johnson*, 146 AD3d 956, 956 [2017]; *Matter of Marte v Biondo*, 104 AD3d 947, 948 [2013]).

The petitioner's remaining contention is without merit.

Accordingly, the Family Court properly denied that branch of the petition which alleged that the respondent committed the family offense of harassment in the second degree and dismissed that portion of the proceeding. Iannacci, J.P., Ford, Ventura and Quirk, JJ., concur.

29 In the Matter of Carlos J.G.W., Jr. Lutheran Social Services of Metro New York, Respondent; Carlos G., Sr., et al., Appellants. [250 NYS3d 191]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Failure to Plan for Child's Return

Parent, Child and Family—Termination of Parental Rights—Best Interests Analysis—Freeing Child for Adoption by Foster Parents

In a proceeding pursuant to Social Services Law § 384-b, the mother appeals, and the father separately appeals, from an order of disposition of the Family Court, Queens County (Monica D. Shulman, J.), dated April 16, 2024. The order of disposition, upon an order of fact-finding of the same court dated April 11, 2024, made after a fact-finding hearing, finding that the mother and the father permanently neglected the subject child, and after a dispositional hearing, terminated their parental rights and transferred custody and guardianship of the subject child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption.

Ordered that the order of disposition is affirmed, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the parental rights of the mother and the father to the subject child on the ground of permanent neglect. Following fact-finding and dispositional hearings, the Family Court found that the parents permanently neglected the child, terminated their parental rights, and transferred custody and guardianship of the child to the petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption. The mother and the father separately appeal.

“In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate by clear and

convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship” (*Matter of Ryder S.R. [Shaquana R.]*, 236 AD3d 1045, 1046 [2025] [internal quotation marks omitted]; see Social Services Law § 384-b [4] [d]; [7] [a], [f]). “Once an agency demonstrates that it made diligent efforts to encourage and strengthen the parental relationship, the agency bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child’s future, although physically and financially able to do so” (*Matter of Ryder S.R. [Shaquana R.]*, 236 AD3d at 1046; see Social Services Law § 384-b [7] [a]; *Matter of Jack T. [Carmen H.]*, 234 AD3d 782, 783 [2025]). “‘[T]he planning requirement contemplates that the parent shall take such steps as are necessary to provide a home that is adequate and stable, under the financial circumstances existing, within a reasonable period of time’” (*Matter of Asia M.A. [Nia H.]*, 238 AD3d 1135, 1136 [2025] [internal quotation marks omitted], quoting *Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d 759, 760 [2025]). “[A] parent who has only partially complied with his or her service plan and who has not gained insight into the issues that caused the removal of the child has not planned for the child’s future” (*Matter of Chiamaka B.O. [Stanley N.O.]*, 235 AD3d at 761 [internal quotation marks omitted]).

Here, the petitioner met its burden of establishing that the mother and the father permanently neglected the child. Contrary to the parents’ contention, the petitioner demonstrated that it made diligent efforts to strengthen the parent-child relationship by, among other things, developing a service plan that served the needs of the parents, scheduling regular parental access between the parents and the child, and providing referrals to programs for the parents (see *Matter of Dynasty S.G. [Paula G.]*, 228 AD3d 657, 658 [2024]; *Matter of Navyiah Sarai U. [Erica U.]*, 211 AD3d 959, 961 [2022]). Moreover, the record shows that, despite the petitioner’s diligent efforts, the parents failed to plan for the child’s return, since, among other things, the parents failed to gain insight into the issues that led to the child’s removal (see *Matter of Asia M.A. [Nia H.]*, 238 AD3d at 1137; *Matter of Alice Z. [Lin Z.]*, 225 AD3d 887, 888 [2024]).

The evidence adduced at the dispositional hearing established that termination of the parental rights of the mother and the father was in the best interests of the child (see *Matter of Christian M.L. [Christopher M.L.]*, 238 AD3d 761, 762 [2025]). Contrary to the parents’ contention, a suspended judg-

ment would not be in the child's best interests, as such a disposition would "only prolong the delay of stability and permanenc[y]" (*id.* [internal quotation marks omitted]; see *Matter of Ruth C. [Jaslene C.]*, 226 AD3d 677, 679-680 [2024]). Further, the record supports the Family Court's determination that the best interests of the child would be served by freeing him for adoption by his foster parents, with whom the child has bonded and resided over a prolonged period of time (see *Matter of Christian M.L. [Christopher M.L.]*, 238 AD3d at 763; *Matter of Vincent N.B. [Gregory B.]*, 173 AD3d 855, 856 [2019]).

The mother's remaining contentions are without merit. Chambers, J.P., Dowling, Wan and McCormack, JJ., concur.

30 In the Matter of Viris W. Rosalind W., Respondent; Robert A.C., Nonparty Appellant. [247 NYS3d 492]—

Powers—Power of Attorney—Mental Competence—Diagnosed with Dementia, Cognitive Impairment, and Brain Atrophy

In a proceeding pursuant to Mental Hygiene Law article 81, in which Rosalind W. was appointed guardian of the person and property of Viris W., an incapacitated person, nonparty Robert A.C., Jr., appeals from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated December 21, 2022. The order, insofar as appealed from, after a hearing, granted those branches of the cross-motion of Rosalind W. which were to find Viris W. incapacitated, nunc pro tunc, as of August 7, 2019, and pursuant to Mental Hygiene Law § 81.29 to revoke a power of attorney.

Ordered that the order is affirmed insofar as appealed from, with costs.

On August 7, 2019, Viris W., an incapacitated person, executed a power of attorney in favor of her son, Donovan G.W., Jr., granting him authority with respect to real estate transactions (hereinafter the August 2019 power of attorney). On August 20, 2019, Donovan G.W., Jr., executed a deed transferring title of certain real property located in Brooklyn from Viris W. to nonparty Robert A.C., Jr., one of Viris W.'s grandsons. Robert A.C., Jr., then executed a note dated August 20, 2019, in favor of CrossCountry Mortgage, Inc., which was secured by a mortgage on the property.

Subsequent to the execution of the August 2019 power of attorney and the property transfer, in an order and judgment dated June 3, 2021, the Supreme Court, inter alia, determined that Viris W. was an incapacitated person and appointed Rosalind W. (hereinafter the guardian) as the guardian of the person and property of Viris W.

As is relevant to this appeal, in July 2021, the guardian cross-moved, among other things, to find Viris W. incapacitated, nunc pro tunc, as of August 7, 2019, and pursuant to Mental Hygiene Law § 81.29 to revoke the August 2019 power of attorney. In an order dated December 21, 2022, the Supreme Court, after a hearing, inter alia, granted those branches of the guardian's cross-motion. Robert A.C., Jr., appeals.

As a general rule, “[a] party’s competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function, and the party asserting incapacity bears the burden of proof” (*Matter of Delaney*, 170 AD3d 1008, 1009 [2019] [internal quotation marks omitted]; see *Crawford v Smith*, 219 AD3d 691, 693 [2023]; *Feiden v Feiden*, 151 AD2d 889, 890 [1989]). “However, where there is medical evidence of mental illness or a mental defect, the burden shifts to the opposing party to prove by clear and convincing evidence that the person executing the document in question possessed the requisite mental capacity” at the time the document was executed (*Matter of Rose S.*, 293 AD2d 619, 620 [2002]; see *Matter of Edgar V.L.*, 228 AD3d 549, 552 [2024]).

Here, the guardian established, through the testimony of Viris W.’s treating neurologist, that Viris W. was mentally incompetent at the time the August 2019 power of attorney was executed. The neurologist based this conclusion on his diagnosis of Viris W. in 2017 as suffering from dementia, cognitive impairment, and brain atrophy, which was confirmed by a subsequent MRI, and that her condition was unlikely to have improved in the intervening time between his diagnosis and the execution of the August 2019 power of attorney. In response, Robert A.C., Jr., failed to rebut this medical testimony with clear and convincing evidence that Viris W. possessed the requisite mental capacity to execute the August 2019 power of attorney (see *Matter of Edgar V.L.*, 228 AD3d at 552; *Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [2008]; *Matter of Rose S.*, 293 AD2d at 621).

Accordingly, the Supreme Court did not err in granting those branches of the guardian’s cross-motion which were to find Viris W. incapacitated, nunc pro tunc, as of August 7, 2019, and pursuant to Mental Hygiene Law § 81.29 to revoke the August 2019 power of attorney (see *Matter of Vicki M.A. [Lynda P.—Lisa P.]*, 218 AD3d 769 [2023]). Connolly, J.P., Christopher, Voutsinas and Hom, JJ., concur.

31 In the *Matter of Jimmy Wagner, Appellant, v New York City Department of Health and Mental Hygiene, Respondent*. [250 NYS3d 187]—

Records—Freedom of Information Law—Extensions of Anticipated Date of Production—Exceeded Statutorily Permitted 20 Business Days

Records—Freedom of Information Law—Failure to Inform of Further Administrative Review—Excused Obligation to Exhaust Administrative Remedies

Records—Freedom of Information Law—Counsel Fees

In a proceeding pursuant to CPLR article 78 to compel the production of certain records pursuant to the Freedom of Information Law (Public Officers Law art 6) and for an award of attorneys' fees and litigation costs, the petitioner appeals from a judgment of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), entered March 9, 2023. The judgment, insofar as appealed from, denied that branch of the petition which was for an award of attorneys' fees and litigation costs and dismissed that portion of the proceeding.

Ordered that the judgment is reversed insofar as appealed from, on the law, with costs, that branch of the petition which was for an award of attorneys' fees and litigation costs is granted, and the matter is remitted to the Supreme Court, Queens County, for a determination of the amount of an award of reasonable attorneys' fees and litigation costs to the petitioner and the entry of an appropriate amended judgment thereafter.

On October 9, 2021, the petitioner filed a request pursuant to the Freedom of Information Law (FOIL) (Public Officers Law art 6) with the New York City Department of Health and Mental Hygiene (hereinafter the DOHMH) for the production of various records and correspondence from January 1, 2021, until the date of his request regarding the COVID-19 vaccine. On October 13, 2021, the DOHMH denied the petitioner's FOIL request and advised him that he could file an appeal to challenge the denial. On November 1, 2021, the petitioner filed an amended FOIL request. The DOHMH granted the amended request and set a date certain for production but repeatedly extended its anticipated date of production.

On June 17, 2022, the petitioner commenced this CPLR article 78 proceeding to compel the production of the records sought in his amended FOIL request and for an award of attorneys' fees and litigation costs. On October 13, 2022, the petitioner informed the Supreme Court that the petition had been rendered academic in part, because the DOHMH had partially provided the requested records, but that that branch of the petition which was for an award of attorneys' fees and litigation costs remained at issue. In a judgment entered March 9, 2023, the court, inter alia, denied that branch of the petition which was for an award of attorneys' fees and litigation costs

and dismissed that portion of the proceeding. The petitioner appeals.

“[A] FOIL request is deemed denied if there is no response to the request within five business days” (*Matter of Madden v Village of Tuxedo Park*, 192 AD3d 802, 805 [2021]; see 21 NYCRR 1401.5 [c]; 1401.7 [c]). “If an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure to the person requesting the record or records within twenty business days . . . , the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part” (Public Officers Law § 89 [3] [a]).

Here, after several extensions of its anticipated date of production, on May 12, 2022, the DOHMH replied to the petitioner but failed to set a date certain for production or to inform the petitioner of his appeal rights in violation of Public Officers Law § 89 (3) (a) and (4) (a). Moreover, each of the DOHMH’s extensions of its anticipated date of production exceeded the statutorily permitted 20 business days, and the DOHMH cited the volume and burden of production as the only reason for its delay. That was not a statutorily permissible reason for delay and amounted to a constructive denial of the petitioner’s request (see *id.* § 89 [3] [a]; 21 NYCRR 1401.7 [c]).

“Where, as here, an agency fails to inform the person [or entity] making the FOIL request that further administrative review of the determination is available, the requirement of exhaustion is excused” (*Matter of Law Offs. of Cory H. Morris v Suffolk County*, 216 AD3d 638, 640 [2023] [internal quotation marks omitted]; see *Matter of Lepper v Village of Babylon*, 190 AD3d 738, 742 [2021]). The petitioner’s alleged awareness of the availability of administrative review does not relieve an agency of its responsibility “to advise the petitioner that such review was available, and of the procedures for securing it” (*Matter of Law Offs. of Cory H. Morris v Suffolk County*, 216 AD3d at 640 [internal quotation marks omitted]). Where an agency does not advise the petitioner of the availability of an administrative appeal, the petitioner’s appeal cannot be considered time-barred (see 21 NYCRR 1401.7 [b]; *Matter of Madden v Village of Tuxedo Park*, 192 AD3d at 805).

Here, in its May 12, 2022 response, the DOHMH failed to inform the petitioner that administrative review of the determination was available, which excused the petitioner’s obligation to exhaust his administrative remedies (see *Matter of Law*

Offs. of Cory H. Morris v Suffolk County, 216 AD3d at 640). Similarly, since the DOHMH failed to specify a date certain for production, the petitioner's time to appeal never started running (see *Matter of Madden v Village of Tuxedo Park*, 192 AD3d at 805). Thus, contrary to the DOHMH's contention, this proceeding was not time-barred (see *id.*).

"[T]he court . . . shall assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of Public Officers Law § 89 in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access" (*Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d 1012, 1013 [2022] [internal quotation marks omitted]; see Public Officers Law § 89 [4] [c] [ii]). "A petitioner has substantially prevailed within the meaning of Public Officers Law § 89 (4) (c) when the commencement of the CPLR article 78 proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure" (*Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d at 1013 [internal quotation marks omitted], quoting *Matter of McDevitt v Suffolk County*, 183 AD3d 826, 828 [2020]).

Here, the petitioner succeeded in obtaining the records responsive to the FOIL request only after commencing this CPLR article 78 proceeding. The DOHMH failed to cite a statutorily permitted basis for its constructive denial, and the production of records occurred only after the petitioner commenced this proceeding (see Public Officers Law § 89 [3] [a]). Since the petitioner "substantially prevailed," and the DOHMH did not have a reasonable basis for denying access, the petitioner was statutorily entitled to an award of attorneys' fees and litigation costs (*id.* § 89 [4] [c] [ii]; see *Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d at 1013).

Accordingly, we grant that branch of the petition which was for an award of attorneys' fees and litigation costs and remit the matter to the Supreme Court, Queens County, for a determination of the amount of an award of reasonable attorneys' fees and litigation costs to the petitioner and the entry of an appropriate amended judgment thereafter. Connolly, J.P., Wooten, Voutsinas and McCormack, JJ., concur.

32 In the Matter of Jimmy Wagner, Appellant, v New York City Department of Health and Mental Hygiene, Respondent. [250 NYS3d 182]—

**Agency Exemptions—Failure to Provide Specific Evidence
Records—Freedom of Information Law—Counsel Fees**

In a proceeding pursuant to CPLR article 78 to compel the production of certain records pursuant to the Freedom of Information Law (Public Officers Law art 6) and for an award of attorneys' fees and litigation costs, the petitioner appeals from a judgment of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), entered June 13, 2023. The judgment, insofar as appealed from, denied those branches of the petition which were to compel the production of certain records and for an award of attorneys' fees and litigation costs and dismissed those portions of the proceeding.

Ordered that the judgment is modified, on the law, (1) by deleting the provision thereof denying that branch of the petition which was to compel the production of certain records and dismissing that portion of the proceeding, and substituting therefor a provision granting that branch of the petition only to the extent of compelling the production of (a) a document referred to in the petition as 33 and attachments thereto, (b) a document referred to in the petition as 81-82 and attachments thereto, (c) a document referred to in the petition as 576-577 and attachments thereto, (d) a document referred to in the petition as 664, (e) a document referred to in the petition as 669 and attachments thereto, and (f) a document referred to in the petition as 913-920 and attachments thereto, and (2) by deleting the provision thereof denying that branch of the petition which was for an award of attorneys' fees and litigation costs and dismissing that portion of the proceeding, and substituting therefore a provision granting that branch of the petition; as so modified, the judgment is affirmed insofar as appealed from, with costs to the petitioner, and the matter is remitted to the Supreme Court, Queens County, for a determination of the amount of an award of reasonable attorneys' fees and litigation costs to the petitioner and the entry of an appropriate amended judgment thereafter.

In November 2021, the petitioner filed an amended Freedom of Information Law (FOIL) (Public Officers Law art 6) request with the New York City Department of Health and Mental Hygiene (hereinafter the DOHMH) for the production of various records and correspondence regarding the COVID-19 vaccine from July 21, 2021, until the date of his request. On August 19, 2022, the DOHMH granted in part and denied in part the petitioner's request. The DOHMH produced some documents with redactions and withheld certain attachments from other documents. The petitioner filed an administrative

appeal with respect to the partial denial, which included challenges to certain redactions and the DOHMH's withholding of certain attachments. On September 12, 2022, the DOHMH, inter alia, upheld its determinations regarding certain redactions and the withholding of attachments on the ground that disclosure would be an unwarranted invasion of personal privacy and/or the requested documents constituted inter-agency or intra-agency materials (*see id.* §§ 87 [2] [b], [g]; 89 [2] [b]).

The petitioner commenced this CPLR article 78 proceeding to compel, among other things, the production of (1) a document referred to in the petition as 33 and attachments thereto (hereinafter together documents 33), (2) a document referred to in the petition as 81-82 and attachments thereto (hereinafter together documents 81-82), (3) a document referred to in the petition as 576-577 and attachments thereto (hereinafter together documents 576-577), (4) a document referred to in the petition as 664 (hereinafter document 664), (5) a document referred to in the petition as 669 and attachments thereto (hereinafter together documents 669), and (6) a document referred to in the petition as 913-920 and an attachment thereto (hereinafter together documents 913-920), and for an award of attorneys' fees and litigation costs pursuant to Public Officers Law § 89 (4) (c). After an in camera inspection, the Supreme Court, inter alia, denied those branches of the petition and dismissed those portions of the proceeding. The petitioner appeals.

"In order to promote open government and public accountability, FOIL imposes a broad duty on government to make its records available to the public" (*Matter of Lane v County of Suffolk*, 236 AD3d 791, 792 [2025] [internal quotation marks omitted]; *see Matter of Tuckahoe Common Sch. Dist. v Town of Southampton*, 179 AD3d 929, 930 [2020]). "An agency must 'make available for public inspection and copying all records' unless it can claim a specific exemption to disclosure" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 462 [2007], quoting Public Officers Law § 87 [2]). "[T]he agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" (*Matter of Lane v County of Nassau*, 221 AD3d 1008, 1010 [2023] [internal quotation marks omitted]).

The privacy exemption authorizes an agency to deny access to records or portions of such records that "if disclosed would constitute an unwarranted invasion of personal privacy" (Pub-

lic Officers Law § 87 [2] [b]; see § 89 [2]; *Matter of Gannett Co., Inc. v Town of Greenburgh Police Dept.*, 229 AD3d 789, 791 [2024]). The inter-agency or intra-agency exemption provides, among other things, that an agency may deny access to records or portions thereof that “are inter-agency or intra-agency materials which are not . . . statistical or factual tabulations or data; . . . instructions to staff that affect the public; [or] . . . final agency policy or determinations” (Public Officers Law § 87 [2] [g]; see *Matter of Newsday, LLC v Nassau County Police Dept.*, 222 AD3d 85, 95 [2023]).

Here, the DOHMH failed to sustain its burden of proving that the personal privacy exemption or the inter-agency or intra-agency exemption applied to documents 33 (see Public Officers Law §§ 87 [2] [b], [g]; 89 [2] [b]). The DOHMH did not provide specific, persuasive evidence that the information requested in documents 33 fell within either exemption (see *Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 567 [1984]; *Matter of Gannett Co., Inc. v Town of Greenburgh Police Dept.*, 229 AD3d at 792). As such, the petitioner was entitled to the information requested in documents 33.

The DOHMH also failed to sustain its burden of proving that the inter-agency or intra-agency exemption applied to documents 81-82, documents 576-577, document 664, documents 669, and documents 913-920, as the DOHMH only provided conclusory assertions without factual support (see Public Officers Law § 87 [2] [g]; *Matter of Newsday, LLC v Nassau County Police Dept.*, 222 AD3d at 96). This was insufficient “to meet [its] burden of demonstrating that the exemption applied to any of the requested material” (*Matter of Newsday, LLC v Nassau County Police Dept.*, 222 AD3d at 94; see *Church of Scientology of N.Y. v State of New York*, 46 NY2d 906, 908 [1979]). As such, the petitioner was entitled to the information requested in documents 81-82, documents 576-577, document 664, documents 669, and documents 913-920.

Further, the Supreme Court should have granted that branch of the petition which was for an award of attorneys’ fees and litigation costs. “In order to create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL, the Legislature has provided for the assessment of an attorney’s fee and other litigation costs in FOIL proceedings” (*Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d 1012, 1013 [2022], quoting *Matter of Cook v Nassau County Police Dept.*, 140 AD3d 1059, 1060

[2016]; see *Matter of Lane v County of Nassau*, 221 AD3d at 1011). Thus, “[t]he court . . . shall assess, against such agency involved, reasonable attorney’s fees and other litigation costs reasonably incurred by such person in any case under the provisions of” Public Officers Law § 89 “in which such person has substantially prevailed and the court finds that the agency had no reasonable basis for denying access” (*id.* § 89 [4] [c] [ii]; see *Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d at 1013). “‘A petitioner has “substantially prevailed” within the meaning of Public Officers Law § 89 (4) (c) when the commencement of the CPLR article 78 proceeding ultimately succeeds in obtaining the records responsive to the FOIL request, whether by court order or by voluntary disclosure’” (*Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d at 1013, quoting *Matter of McDevitt v Suffolk County*, 183 AD3d 826, 828 [2020]). Here, the petitioner substantially prevailed in this CPLR article 78 proceeding by obtaining a significant portion of the information responsive to his FOIL request after the commencement of this proceeding (see *Matter of Lane v County of Nassau*, 221 AD3d at 1012; *Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d at 1014). Moreover, the record reflects that the DOHMH did not have a reasonable basis for denying access (see *Matter of Lane v County of Nassau*, 221 AD3d at 1012; *Matter of McNerney v Carmel Cent. Sch. Dist.*, 204 AD3d at 1013; *Matter of Bottom v Fischer*, 129 AD3d 1604, 1605 [2015]).

The parties’ remaining contentions are either not properly before this Court or without merit. Connolly, J.P., Wooten, Voutsinas and McCormack, JJ., concur.

33 The People of the State of New York, Respondent, v Jeffrey Annunziata, Appellant. [247 NYS3d 507]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Jane Tully, J.), imposed January 16, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

Contrary to the defendant’s contention, the record demonstrates that he knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant’s valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (see *People v Lopez*, 6 NY3d at 255-256). Connolly, J.P., Brathwaite Nelson, Warhit, Ventura and Quirk, JJ., concur.

34 The People of the State of New York, Respondent, v Andre Barnaby, Appellant. [247 NYS3d 507]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Evelyn L. Braun, J.), imposed June 6, 2019, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Connolly, J.P., Brathwaite Nelson, Warhit, Ventura and Quirk, JJ., concur.

35 The People of the State of New York, Respondent, v Cynell Brown, Appellant. [247 NYS3d 493]—

Crimes—Verdict—Sufficiency of Evidence

Appeal by the defendant from a judgment of the County Court, Westchester County (George E. Fufidio, Jr., J.), rendered January 12, 2023, convicting him of murder in the second degree, criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the fourth degree, and tampering with physical evidence (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we are satisfied that the verdict convicting the defendant of murder in the second degree was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633, 645 [2006]).

The defendant's remaining contention is not preserved for appellate review (*see* CPL 470.05 [2]). Duffy, J.P., Christopher, Wan and Goldberg Velazquez, JJ., concur.

36 The People of the State of New York, Respondent, v Nasier Codett, Appellant. [247 NYS3d 488]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant from a judgment of the County Court, Orange County (Hyun Chin Kim, J.), rendered February 26, 2025, convicting him of robbery in the first degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, the record demonstrates that he validly waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Archer*, 239 AD3d 763,

764 [2025]). His valid appeal waiver precludes appellate review of his contentions that the sentence imposed was excessive and constituted cruel and unusual punishment (*see People v Lopez*, 6 NY3d at 256; *People v Foy*, 238 AD3d 785 [2025]). Dillon, J.P., Dowling, Landicino and McCormack, JJ., concur.

37 The People of the State of New York, Respondent, v Denis A. Diaz-Zuniga, Appellant. [247 NYS3d 488]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Dutchess County (Jessica Z. Segal, J.), imposed November 21, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 255). Iannacci, J.P., Christopher, Voutsinas, Love and Goldberg Velazquez, JJ., concur.

38 The People of the State of New York, Respondent, v Tevon Dickey, Appellant. [251 NYS3d 252]—

**Crimes—Appeal—Preservation of Issue for Review—Orders of Protection
Crimes—Order of Protection—Failure to Credit for Jail Time Served—
Exceeded Maximum Time Limit**

Appeal by the defendant from a judgment of the County Court, Orange County (Craig Stephen Brown, J.), rendered April 17, 2023, convicting him of assault in the second degree and criminal possession of a weapon in the second degree (two counts), upon his plea of guilty, and imposing sentence. The appeal brings up for review three orders of protection issued at the time of sentencing.

Ordered that upon the appeal from the judgment, so much of the three orders of protection as directed that they remain in effect until and including April 17, 2044, are vacated, on the law, and the matter is remitted to the County Court, Orange County, for a new determination of the duration of the orders of protection consistent herewith; and it is further,

Ordered that pending a new determination as to the duration of the orders of protection, the orders of protection shall remain in effect; and it is further,

Ordered that the judgment is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

The defendant's contention that three orders of protection issued at the time of sentencing should be vacated because the County Court failed to articulate on the record its reasons for issuing the orders of protection, as required by CPL 530.13 (4), is unpreserved for appellate review, as the defendant failed to raise this issue at sentencing or move to amend the orders of protection on this ground (*see id.* § 470.05 [2]; *People v Nieves*, 2 NY3d 310, 316-317 [2004]). The defendant's contention that two of these orders of protection were improperly issued is also unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Nieves*, 2 NY3d at 316-317). Under the circumstances, we decline to exercise our interest of justice jurisdiction to review these contentions (*see People v Beaubrun*, 234 AD3d 869, 870 [2025]; *People v Funderburk*, 208 AD3d 1250 [2022]; *People v Gonzalez*, 207 AD3d 656, 657 [2022]).

Although the defendant did not object to the duration of the orders of protection on the ground that he was not credited for jail time served, he had no practical ability to register a timely objection on that basis, since the County Court did not announce the duration of the orders of protection at either the plea or sentencing proceedings (*see People v Daniel*, 233 AD3d 704, 705 [2024]; *People v Gonzalez*, 207 AD3d at 657). Thus, the rule of preservation does not apply (*see People v Williams*, 235 AD3d 1017, 1017 [2025]; *People v Newman*, 234 AD3d 877, 878 [2025]). The duration of the orders of protection issued at the time of sentencing exceeded the maximum time limit set forth in CPL 530.13 (4), since they did not take into account the defendant's jail-time credit (*see People v Velasquez*, 239 AD3d 1004, 1005 [2025]; *People v Khedr*, 234 AD3d 991 [2025]). Accordingly, we vacate so much of the orders of protection as directed that they remain in effect until and including April 17, 2044, and remit the matter to the County Court, Orange County, for a new determination of the duration of the orders of protection (*see People v Newman*, 234 AD3d at 878; *People v Gonzalez*, 207 AD3d at 658). Iannacci, J.P., Ford, Ventura and Quirk, JJ., concur.

39 The People of the State of New York, Respondent, v Chet Dileo, Appellant. [250 NYS3d 621]—

Attorney and Client—Withdrawal from Representation—Sufficiency of Brief—

Failure to Adequately Analyze Appellate Issues

Appeal by the defendant from an amended judgment of the County Court, Nassau County (Robert A. Schwartz, J.), rendered July 30, 2024, revoking a sentence of probation previously imposed by the same court, upon a finding that he violated conditions thereof, upon his admission, and imposing a sentence of imprisonment upon his previous conviction of attempted criminal possession of a controlled substance in the fourth degree. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which he moves for leave to withdraw as counsel for the appellant.

Ordered that the motion of Martin Goldberg for leave to withdraw as counsel for the appellant is granted, and he is directed to turn over all papers in his possession to new counsel assigned herein; and it is further,

Ordered that Joseph DeFelice, 125-10 Queens Blvd., Suite 302, Kew Gardens, NY 11415, is assigned as counsel to prosecute the appeal; and it is further,

Ordered that the respondent is directed to furnish a copy of the certified transcript of the proceedings to the appellant's new assigned counsel; and it is further,

Ordered that new counsel shall serve and file a brief on behalf of the appellant within 90 days of the date of this decision and order on motion, and the respondent shall serve and file its brief within 30 days after the brief on behalf of the appellant is served and filed. By prior decision and order on motion of this Court dated September 11, 2024, pursuant to CPL 380.55 (2), this Court directed that the appeal be heard on the original papers, including a certified transcript of the proceedings, and on the briefs of the parties. The parties are directed to upload, through the digital portal on this Court's website, digital copies of their respective briefs, with proof of service of one hard copy on each other (*see* 22 NYCRR 670.9 [a]).

In reviewing an attorney's motion to be relieved pursuant to *Anders v California* (386 US 738 [1967]), this Court first "must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the . . . appeal" (*McCoy v Court of Appeals of Wis., Dist. 1*, 486 US 429, 442 [1988]; *see Penson v Ohio*, 488 US 75, 83 [1988]). An adequate *Anders* brief "must, at a minimum, draw the Court's attention to the relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference

to the facts of the case and relevant legal authority” (*Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252, 258 [2011]). “[W]here counsel has failed in his or her role as advocate by filing a deficient brief, on this basis alone, new counsel will be assigned to represent the appellant on the appeal” (*id.*; see *People v Collins*, 239 AD3d 990, 991 [2025]).

The brief submitted by the defendant’s counsel pursuant to *Anders v California* is deficient because it fails to adequately analyze potential appellate issues with reference to legal authority, including, but not necessarily limited to, whether the defendant’s admission that he violated conditions of his probation was knowingly, voluntarily, and intelligently entered (see *People v Ramirez*, 215 AD3d 984, 985 [2023]), whether the defendant waived his right to a revocation hearing (see CPL 410.70; *People v Montenegro*, 153 AD3d 553, 554 [2017]), and whether the resentence was excessive (see *People v Lisbon*, 233 AD3d 799, 801 [2024]; *People v Ramirez*, 215 AD3d at 985). The brief also fails to contain an adequate statement of the facts, as, among other deficiencies, it does not identify the conditions of probation that were imposed on the defendant at the time of sentencing (see *People v Gumbs*, 234 AD3d 791, 793 [2025]; *People v Areizaga*, 198 AD3d 981, 982 [2021]).

Since the brief does not demonstrate that assigned counsel fulfilled his obligations under *Anders v California*, we must assign new counsel to represent the defendant (see *People v Haynesworth*, 240 AD3d 512, 513 [2025]; *People v Reyes-Fuentes*, 228 AD3d 686, 688 [2024]). Dillon, J.P., Brathwaite Nelson, Landicino and Quirk, JJ., concur.

40 The People of the State of New York, Respondent, v Constantinos J. Doonan, Appellant. [247 NYS3d 508]—Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Rockland County (Anne B. Bianchi, J.), imposed December 3, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

Contrary to the defendant’s contention, the sentence imposed was not excessive (see *People v Sutte*, 90 AD2d 80 [1982]). Iannacci, J.P., Christopher, Voutsinas, Love and Goldberg Velazquez, JJ., concur.

41 The People of the State of New York, Respondent, v Sinai Fearon, Appellant. [247 NYS3d 508]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Michael Yavinsky, J.), imposed December 8, 2022, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Barros, J.P., Chambers, Dowling, Landicino and Hom, JJ., concur.

42 The People of the State of New York, Respondent, v Quansae Herring, Appellant. [247 NYS3d 494]—

Crimes—Sentence—Mandatory Surcharge and Fees

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Toni M. Cimino, J.), rendered September 7, 2022, convicting him of unauthorized use of a motor vehicle in the third degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that the mandatory surcharge and fees imposed at sentencing (*see* Penal Law § 60.35 [1] [a]) should be waived pursuant to CPL 420.35 (2-a) is unpreserved for appellate review (*see People v Mejia*, 243 AD3d 684 [2025]; *People v Clarke*, 243 AD3d 582 [2025]). In any event, the defendant's contention is without merit, as the record does not demonstrate that a waiver of the mandatory surcharge and fees was warranted under any of the grounds enumerated in CPL 420.35 (2-a) (a)-(c) (*see People v Mejia*, 243 AD3d 684 [2025]; *People v Forero*, 236 AD3d 816, 817 [2025]; *People v Acevedo*, 210 AD3d 1106, 1107 [2022]; *People v Attah*, 203 AD3d 1063, 1064 [2022]).

The defendant's remaining contention is without merit. Iannacci, J.P., Ford, Ventura and Quirk, JJ., concur.

43 The People of the State of New York, Respondent, v Jamaal Jackson, Appellant. [250 NYS3d 618]—

Crimes—Right to Speedy Trial—Certificate of Compliance—Exercise of Due Diligence

Crimes—Proof of Other Crimes—Testimony of Uncharged Sexual Abuse—Inextricably Interwoven and Necessary Background Information

Crimes—Witnesses—Failure to Call Witness—Noncumulative Testimony

Appeal by the defendant from a judgment of the County Court, Westchester County (Susan Cacace, J.), rendered May 31, 2022, convicting him of sexual abuse in the first degree, rape in the first degree, incest in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant moved pursuant to CPL 30.30 (1) (a) to dismiss the indictment on the ground that he was deprived of

his statutory right to a speedy trial. The defendant contends that the People's initial certificate of compliance (hereinafter COC) was improper and their statement of readiness dated September 2, 2021, was illusory, based upon the People's subsequent COCs.

In felony cases such as this one, CPL 30.30 requires the People to be ready for trial within six months of the commencement of the action (*see id.* § 30.30 [1] [a]). Absent an individualized finding of special circumstances, “the prosecution shall not be deemed ready for trial for [the] purposes of [CPL 30.30] until it has filed a valid [COC]” (*id.* § 245.50 [3]). The COC “shall state that, after exercising due diligence and making reasonable inquiries and efforts to ascertain the existence of . . . material and information subject to discovery [under CPL 245.20], the prosecution has disclosed and made available all known material and information . . . subject to discovery” (*id.* § 245.50 [1]).

CPL 245.20 (1) requires the prosecutor to automatically disclose to the defendant certain enumerated “material and information in the possession, custody or control of the prosecution or persons under the prosecution’s direction or control.” Further, the prosecutor is obligated to “make a diligent, good faith effort to ascertain the existence of material or information discoverable under [CPL 245.20 (1)] and to cause such material or information to be made available for discovery where it exists but is not within the prosecutor’s possession, custody or control” (*id.* § 245.20 [2]).

“When a defendant moves pursuant to CPL 30.30 to dismiss an indictment on the ground that the People failed to exercise due diligence and therefore did not file a proper COC, ‘the People bear the burden of establishing that they did, in fact, exercise due diligence and made reasonable inquiries prior to filing the initial COC despite a belated or missing disclosure’ ” (*People v Henderson*, 237 AD3d 853, 854 [2025], quoting *People v Bay*, 41 NY3d 200, 213 [2023]). “ ‘If the prosecution fails to make such a showing, the COC should be deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed’ ” (*People v Drayton*, 231 AD3d 1057, 1060 [2024], quoting *People v Bay*, 41 NY3d at 213).

Here, the People’s initial COC was proper, and the statement of readiness was not illusory. The record demonstrates that the People “exercis[ed] due diligence and ma[de] reasonable inquiries and efforts to ascertain the existence of . . . ma-

terial and information subject to discovery,” as evidenced by the extensive, voluminous documents provided to the defendant with the initial COC and statement of readiness (CPL 245.50 [1]). The belated disclosures that accompanied the supplemental COCs were made in good faith and with due diligence (see *People v Macaluso*, 230 AD3d 1158, 1160 [2024]; *People v Williams*, 224 AD3d 998, 1006 [2024]). Notably, the defendant requested no additional sanctions or accommodations based upon the delayed disclosures, short of dismissal of the indictment (see CPL 245.80). Accordingly, inasmuch as the People’s initial COC was proper, and the statement of readiness therefore was not illusory, the County Court properly denied the defendant’s motion pursuant to CPL 30.30 (1) (a) to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial (see *People v Macaluso*, 230 AD3d at 1160).

The defendant’s contention that the County Court erred in admitting evidence of prior bad acts (see *People v Molineux*, 168 NY 264 [1901]) is without merit. To the extent the defendant contends that the admission of that evidence violated his federal constitutional right to a fair trial, that contention is unpreserved for appellate review and, in any event, without merit. The court providently exercised its discretion in allowing testimony pertaining to the defendant’s acts of sexual abuse toward the complainant that took place in the Bronx, even though the defendant was not charged with a crime based on those acts (see *People v Cedillo*, 242 AD3d 1107, 1107-1108 [2025]; *People v Patierno*, 240 AD3d 516, 517 [2025]). The testimony described events that took place during the course of sexual conduct for which the defendant was charged, was inextricably interwoven with the narrative of events, and provided necessary background information, as well as an appropriate context in which to evaluate the case (see *People v Nicholson*, 26 NY3d 813, 829-830 [2016]; *People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Tomlinson*, 174 AD3d 929, 929-930 [2019]). Further, the probative value of the evidence outweighed the risk of prejudice to the defendant (see *People v Alvino*, 71 NY2d 233, 242 [1987]; *People v Darby*, 196 AD3d 643, 643 [2021]). Moreover, any prejudicial impact was minimized by the court’s instruction that the jury was not permitted to consider such prior uncharged crime as evidence of the defendant’s guilt in this case or evidence that the defendant is a person disposed to commit such crimes, and that the evidence was offered as background material that was inextricably interwoven with the narrative of events in the case (see *People v Morris*, 21 NY3d 588, 598 [2013]; *People v*

Danon, 167 AD3d 930, 931 [2018]). The jury is presumed to have followed those instructions (see *People v Morris*, 21 NY3d at 598).

The defendant's contention that he was deprived of his constitutional right to present a complete defense by the County Court's application of the Rape Shield Law (CPL 60.42) is unpreserved for appellate review (see *id.* § 470.05 [2]; *People v Shaw*, 126 AD3d 1016, 1016 [2015]). In any event, the court properly limited additional inquiry or comment about this matter, and the defendant's right to present a defense was not unduly curtailed thereby (see *People v Bernard*, 203 AD3d 945, 945-946 [2022]; *People v Simmons*, 106 AD3d 1115, 1116 [2013]).

Contrary to the defendant's contention, the County Court did not err in declining his request for a missing witness charge regarding the People's failure to call the sole outcry witness. The defendant failed to show that the uncalled witness would provide noncumulative testimony (see *People v Mayes*, 200 AD3d 718, 719 [2021]; *People v Williams*, 195 AD3d 1050, 1051 [2021]), and defense counsel was permitted to comment during summation on the People's failure to call the witness in question (see *People v Morris*, 207 AD3d 477, 478 [2022]; *People v Grant*, 170 AD3d 888, 890 [2019]). We note that the People cannot raise the issue of untimeliness of the defendant's request for a missing witness charge for the first time on appeal (see *People v Read*, 97 AD3d 702, 703 [2012]; *People v Jones*, 23 AD3d 399, 399 [2005]; *People v Young*, 4 AD3d 441, 441-442 [2004]).

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 348 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). In this regard, neither the absence of additional witnesses to the abuse, nor minor inconsistencies in the complainant's trial testimony, rendered her account incredible (see *People v Robertson*, 240 AD3d 617, 618 [2025]; *People v Turse*, 150 AD3d 1158, 1159 [2017]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (see *People v Danielson*, 9 NY3d at 348-349).

The sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]). Chambers, J.P., Dowling, Wan and McCormack, JJ., concur.

44 The People of the State of New York, Respondent, v Naajib Jackson, Appellant. [247 NYS3d 490]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant from a judgment of the County Court, Orange County (Craig Stephen Brown, J.), rendered February 5, 2024, convicting him of criminal possession of a weapon in the second degree and criminal sale of a controlled substance in the third degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Thomas*, 34 NY3d 545, 560 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (see *People v Lopez*, 6 NY3d at 255; *People v Washington*, 214 AD3d 910, 911 [2023]). Dillon, J.P., Dowling, Landicino and McCormack, JJ., concur.

45 The People of the State of New York, Respondent, v Christopher Johnson, Appellant. [247 NYS3d 510]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant from a judgment of the County Court, Orange County (Craig S. Brown, J.), rendered March 14, 2024, convicting him of criminal sexual act in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that judgment is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Thomas*, 34 NY3d 545 [2019]; *People v Batista*, 167 AD3d 69 [2018]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (see *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Batista*, 167 AD3d at 75). Dillon, J.P., Dowling, Landicino and McCormack, JJ., concur.

46 The People of the State of New York, Respondent, v Mohammed U. Kidwai, Appellant. [247 NYS3d 495]—

Crimes—Appeal—Invalid Waiver of Right to Appeal—Failure to Offer Reason for Demanding Appeal Waiver

Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Suffolk County (Karen M. Wilutis, J.), imposed July 18, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

Contrary to the People's contention, the record does not demonstrate that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]). The record reflects that the County Court made its own offer of sentence to the defendant and required that the defendant waive his right to appeal, but the court did not set forth any reason for demanding an appeal waiver, and none is apparent on the record (*see People v Esposito*, 187 AD3d 781 [2020]; *People v Sutton*, 184 AD3d 236, 244-245 [2020]). Accordingly, the purported appeal waiver does not preclude appellate review of the defendant's excessive sentence claim (*see People v Sutton*, 184 AD3d at 244-245).

However, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Duffy, J.P., Genovesi, Ford, Taylor and McCormack, JJ., concur.

47 The People of the State of New York, Respondent, v Douglas Leon, Appellant. [247 NYS3d 509]—

Crimes—Appeal—Preservation of Issue for Review—Order of Protection Exceeded Maximum Period

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Toni M. Cimino, J.), rendered March 2, 2023, convicting him of robbery in the third degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review an order of protection issued at the time of sentencing.

Ordered that upon the appeal from the judgment, the order of protection is modified, on the law, by deleting the provision thereof directing that it shall remain in effect until and including March 1, 2032, and substituting therefor a provision directing that it shall remain in effect until and including March 1, 2031; and it is further,

Ordered that the judgment is affirmed.

The defendant's contention that, in light of the immigration consequences of his sentence, his sentence constitutes cruel and unusual punishment under the State and Federal Constitutions is unpreserved for appellate review (*see CPL 470.05* [2]; *People v Samaroo*, 239 AD3d 892, 892 [2025]). In any event, this contention is without merit (*see People v Samaroo*, 239 AD3d at 892; *People v Yentes*, 233 AD3d 806, 807 [2024]).

Furthermore, the sentence imposed was not excessive (*see People v Brissett*, 196 AD3d 642, 642-643 [2021]; *People v Janvier*, 186 AD3d 1247, 1252 [2020]).

Although the defendant did not object to the duration of the

order of protection, he had no practical ability to register a timely objection on this ground, since the Supreme Court did not announce the duration of the order of protection during either the plea or sentencing (see *People v Delaurentis*, 216 AD3d 664, 665 [2023]; *People v Gonzalez*, 207 AD3d 656, 657 [2022]). Thus, contrary to the People's contention, the rule of preservation does not apply (see *People v Delaurentis*, 216 AD3d at 665; *People v Gonzalez*, 207 AD3d at 657). Furthermore, the duration of the order of protection exceeded the maximum period permissible under CPL 530.13 (4) (A). Therefore, we modify the order of protection by providing that it shall remain in effect until and including March 1, 2031 (see *People v Villan*, 234 AD3d 717, 718 [2025]; *People v Isaacs*, 177 AD3d 770, 770 [2019]). Genovesi, J.P., Christopher, Taylor and Golia, JJ., concur.

48 The People of the State of New York, Respondent, v Andres Lezama, Appellant. [247 NYS3d 490]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Leigh K. Cheng, J.), imposed April 1, 2024, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]). Barros, J.P., Chambers, Dowling, Landicino and Hom, JJ., concur.

49 The People of the State of New York, Respondent, v Isaiah Morales, Appellant. [247 NYS3d 495]—

Crimes—Appeal—Preservation of Issue for Review—Waiver of Right to Appeal

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Jerry M. Iannece, J.), rendered December 19, 2023, convicting him of assault in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that his plea of guilty was not knowing and voluntary because the Supreme Court failed to inquire into a possible justification defense is unpreserved for appellate review, as he did not move to withdraw his plea or otherwise raise the issue before the court (see *People v Pastor*, 28 NY3d 1089, 1090 [2016]; *People v Lopez*, 71 NY2d 662, 665 [1988]), and the narrow exception to the preservation requirement is inapplicable to this case (see *People v Pastor*, 28 NY3d at 1090-1091; *People v Lopez*, 71 NY2d at 667-668). In any event, the record establishes that the defendant's plea was

knowingly, voluntarily, and intelligently entered (*see People v Goldstein*, 12 NY3d 295, 301 [2009]; *People v Rico-Valencia*, 217 AD3d 781, 781 [2023]). Barros, J.P., Brathwaite Nelson, Warhit and Goldberg Velazquez, JJ., concur.

50 The People of the State of New York, Respondent, v Christopher Ransom, Appellant. [247 NYS3d 496]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Kenneth C. Holder, J.), imposed November 17, 2021, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

Contrary to the defendant's contention, the record demonstrates that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 255-256). Connolly, J.P., Brathwaite Nelson, Warhit, Ventura and Quirk, JJ., concur.

51 The People of the State of New York, Respondent, v Andres F. Rayo-Lugo, Appellant. [247 NYS3d 489]—

Crimes—Appeal—Preservation of Issue for Review—Waiver of Right to Appeal

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Terence P. Murphy, J.), rendered August 5, 2024, convicting him of burglary in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that his plea of guilty was not knowing, voluntary, and intelligent is unpreserved for appellate review, as he did not move to withdraw his plea or otherwise raise the issue before the Supreme Court (*see People v Lopez*, 71 NY2d 662, 665 [1988]; *People v Argueta*, 233 AD3d 703, 703-704 [2024]). Further, the exception to the preservation requirement does not apply here because the defendant's plea allocution did not cast significant doubt upon his guilt, negate an essential element of the crime, or call into question the voluntariness of his plea (*see People v Mauro*, 197 AD3d 502, 502-503 [2021]; *People v Mack*, 168 AD3d 1100, 1101 [2019]).

In any event, the defendant's contention that his plea of guilty was not knowing, voluntary, and intelligent is without merit. The record of the plea proceeding demonstrates that the defendant, through an interpreter, understood the charge to which he entered a plea of guilty and made an intelligent decision to enter a plea of guilty (see *People v Goldstein*, 12 NY3d 295, 301 [2009]; *People v Marinos*, 209 AD3d 875, 876 [2022]). Moreover, "the defendant's monosyllabic, one-word responses did not render the plea invalid" (*People v Persaud*, 212 AD3d 654, 655 [2023] [internal quotation marks omitted]; see *People v Rico-Valencia*, 217 AD3d 781, 781 [2023]; *People v Smith*, 201 AD3d 822, 823 [2022]).

The defendant's contentions that the evidence before the grand jury was legally insufficient, that his arrest was not supported by probable cause, and that his statements to law enforcement officials should have been suppressed were forfeited by his plea of guilty, which was entered prior to a hearing on his suppression motion (see *People v Hansen*, 95 NY2d 227, 230 [2000]; *People v Fernandez*, 67 NY2d 686, 688 [1986]; *People v Brown*, 170 AD3d 878, 880 [2019]; cf. CPL 710.70 [2]). Connolly, J.P., Ford, Voutsinas and Love, JJ., concur.

52 The People of the State of New York, Respondent, v Brandon Williams, Appellant. [247 NYS3d 491]—

Crimes—Verdict—Sufficiency of Evidence

Crimes—Fair Trial—Prosecutor's Statements

Appeal by the defendant from a judgment of the County Court, Westchester County (George E. Fufidio, J.), rendered December 5, 2022, convicting him of murder in the second degree and criminal possession of a weapon in the second degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant was convicted, upon a jury verdict, of one count of murder in the second degree and two counts of criminal possession of a weapon in the second degree in connection with the murder of the victim in a parking lot in Westchester County. The defendant appeals.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *People v Mateo*, 2 NY3d 383 [2004]; *People v Bleakley*, 69 NY2d 490 [1987]). Upon

reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]; *People v Stewart*, 222 AD3d 781, 782 [2023]).

The defendant's contention that he was deprived of a fair trial by various comments made by the prosecutor during summation is unpreserved for appellate review, as the defendant failed to object, failed to request curative instructions, and did not timely move for a mistrial on the specific grounds now claimed (*see* CPL 470.05 [2]; *People v Romero*, 7 NY3d 911, 912 [2006]; *People v Flippen*, 236 AD3d 815, 816 [2025]). In any event, to the extent that any of the challenged comments were improper, they were not so pervasive or egregious as to have deprived the defendant of a fair trial (*see People v Escalona*, 237 AD3d 968, 970 [2025]; *People v Flippen*, 236 AD3d at 816).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Duffy, J.P., Christopher, Warhit and Goldberg Velazquez, JJ., concur.

53 The People of the State of New York, Respondent, v Ray Eastwood, Appellant. [251 NYS3d 256]—

Crimes—Sex Offenders—Sex Offender Registration Act—Behavior while Incarcerated Insufficient for Downward Departure

Appeal by the defendant from an order of the County Court, Orange County (Hyun Chin Kim, J.), dated January 30, 2025, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon a jury verdict, of five counts of assault in the first degree (Penal Law § 120.10 [3], [4]), two counts of aggravated sexual abuse in the second degree (*id.* § 130.67 [1] [a]), one count of aggravated criminal contempt (*id.* § 215.52), one count of unlawful imprisonment in the first degree (*id.* § 135.10), and one count of resisting arrest (*id.* § 205.30).

After a hearing pursuant to the Sex Offender Registration Act (SORA) (Correction Law art 6-C), the County Court assessed the defendant a total of 60 points on the risk assessment instrument. The court also applied an automatic override based on the defendant's infliction of serious physical injury, which is an element of assault in the first degree (Penal Law § 120.10 [3], [4]), resulting in a presumptive designation as a level three sex offender (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 3-4 [2006]

[hereinafter Guidelines]), and the designation of the defendant as a level three sex offender. The defendant appeals.

Contrary to the defendant's contention, a downward departure from his presumptive risk level was not warranted. " 'A defendant seeking a downward departure from the presumptive risk level has the initial burden of (1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the . . . Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence' " (*People v Cronin*, 235 AD3d 914, 914 [2025] [internal quotation marks omitted], quoting *People v Medina*, 209 AD3d 775, 776 [2022]). " 'If the defendant makes that twofold showing, the SORA court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an over-assessment of the defendant's dangerousness and risk of sexual recidivism' " (*id.* at 914-915 [internal quotation marks omitted], quoting *People v Medina*, 209 AD3d at 776). Here, the mitigating circumstances alleged by the defendant, including his behavior while incarcerated, which included his good behavior commendations and successful completion of programs and services, do not warrant a downward departure (*see People v Bonet*, 225 AD3d 633, 635 [2024]; *People v Pareja-Hidalgo*, 222 AD3d 892 [2023]; *People v Musmacker*, 213 AD3d 784, 786 [2023]).

The defendant's remaining contentions are without merit.

Accordingly, the County Court properly designated the defendant a level three sex offender. LaSalle, P.J., Voutsinas, Love and Hom, JJ., concur.

54 The People of the State of New York, Respondent, v Richard Gardner, Appellant. [251 NYS3d 254]—

Crimes—Sex Offenders—Sex Offender Registration Act—Risk Assessment
Crimes—Sex Offenders—Sex Offender Registration Act—Downward
Departure

Appeal by the defendant from an order of the County Court, Suffolk County (Karen M. Wilutis, J.), dated February 24, 2025, which, after a hearing, designated him a level three sexually violent offender pursuant to Correction Law article 6-C.

Ordered that the order is modified, on the law, by deleting the provision thereof designating the defendant a level three sexually violent offender, and substituting therefor a provision designating the defendant a level three sex offender; as so modified, the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of one count of knowingly receiving depictions of minors engaged in sexually explicit conduct (*see* 18 USC § 2252 [a] [2]). Following a hearing pursuant to the Sex Offender Registration Act (Correction Law art 6-C), the defendant was designated a level three sexually violent offender. The defendant appeals.

Contrary to the People's contention, the defendant preserved for appellate review his contention that the assessment of 15 points under risk factor 11 was not supported by clear and convincing evidence. However, clear and convincing evidence, including the defendant's inpatient admission to a substance abuse treatment facility, supported the County Court's determination under risk factor 11 (*see People v Edmee*, 205 AD3d 938, 939 [2022]; *People v West*, 189 AD3d 1481, 1482 [2020]). The court also properly assessed the defendant 15 points under risk factor 12 based on his expulsion from a sex offender treatment program (*see People v Gregory*, 244 AD3d 1259, 1260-1261 [2025]; *People v Staton*, 186 AD3d 1735, 1736 [2020]).

Contrary to the defendant's further contention, the County Court providently exercised its discretion in denying his application for a downward departure. Although the assessment of points under risk factor 3 can result in an overassessment of a defendant's level of risk in some cases involving possession of child pornography (*see People v Gillotti*, 23 NY3d 841, 860 [2014]), a downward departure was not warranted under the totality of the circumstances presented in this case, as there was no overassessment of the defendant's risk level (*see People v Musarra*, 240 AD3d 624, 625 [2025]; *People v Benchocron*, 226 AD3d 832, 833 [2024]).

However, as the People correctly concede, the defendant should not have been designated a sexually violent offender (*see* Correction Law § 168-a [3]; *People v Sherlock*, 44 NY3d 224, 229-230 [2025]). Accordingly, we modify the order to remove that designation.

The People's remaining contention need not be reached in light of our determination. Genovesi, J.P., Christopher, Taylor and Golia, JJ., concur.

55 U.S. Bank National Association, Respondent, v Emma Valencia, Also Known as Emma L. Valencia, et al., Appellants, et al., Defendants. [251 NYS3d 689]—

Appeal—Academic and Moot Questions—Leave to Renew Motion for Summary Judgment—Determination That Failed to Comply with RPAPL 1304 Notice Requirement

In an action to foreclose a mortgage, the defendants Emma

Valencia and Hugo Valencia appeal from an order of the Supreme Court, Queens County (Lance Evans, J.), entered December 19, 2023. The order, insofar as appealed from, denied those branches of those defendants' motion which were for leave to renew their opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against them and for an order of reference, which had been granted in an order of the same court (Rudolph E. Greco, J.) dated November 8, 2017, and for leave to renew their opposition to the plaintiff's prior motion to confirm a referee's report and for a judgment of foreclosure and sale, which had been granted in an order and judgment of foreclosure and sale (one paper) of the same court (Mojgan Cohanin Lancman, J.) entered June 7, 2019.

Ordered that the order entered December 19, 2023, is affirmed insofar as appealed from, with costs.

On October 31, 2006, the defendants Emma Valencia and Hugo Valencia (hereinafter together the defendants) executed a note in the sum of \$604,000. The loan was secured by a mortgage on certain real property located in Queens. In December 2013, the plaintiff commenced this action to foreclose the mortgage against, among others, the defendants. The plaintiff subsequently moved, *inter alia*, for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference. In an order dated November 8, 2017 (hereinafter the November 2017 order), the Supreme Court, among other things, granted those branches of the plaintiff's motion and appointed a referee to compute the amount due to the plaintiff.

Thereafter, the plaintiff moved to confirm the referee's report and for a judgment of foreclosure and sale. The defendants opposed the motion and cross-moved, *inter alia*, in effect, for leave to renew their opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against them and for an order of reference. In an order and judgment of foreclosure and sale entered June 7, 2019, the Supreme Court, among other things, granted the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, denied that branch of the defendants' cross-motion which was, in effect, for leave to renew their opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against them and for an order of reference, confirmed the referee's report, and directed the sale of the property. The defendants appealed from the or-

der and judgment of foreclosure and sale. In a decision and order dated August 30, 2023, this Court, inter alia, modified the order and judgment of foreclosure and sale so as to deny the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, determining that the plaintiff failed to demonstrate that it had complied with RPAPL 1304 (see *U.S. Bank N.A. v Valencia*, 219 AD3d 890, 893 [2023]).

While the appeal was pending, the defendants moved, among other things, for leave to renew their opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against them and for an order of reference and the plaintiff's prior motion to confirm the referee's report and for a judgment of foreclosure and sale based upon the plaintiff's failure to comply with RPAPL 1304. In an order entered December 19, 2023, the Supreme Court, inter alia, denied those branches of the defendants' motion. The defendants appeal.

On appeal, the defendants contend that the Supreme Court should have granted those branches of their motion which were for leave to renew their opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against them and for an order of reference and their opposition to the plaintiff's prior motion to confirm the referee's report and for a judgment of foreclosure and sale, since they established that there had been a change in the law such that the plaintiff was not entitled to summary judgment on the complaint insofar as asserted against them due to the plaintiff's failure to comply with RPAPL 1304 (see CPLR 2221 [e] [2]; *Wells Fargo Bank, N.A. v Yapkowitz*, 199 AD3d 126, 131 [2021]). However, the defendants' contentions have been rendered academic given this Court's determination in the prior appeal that the plaintiff failed to demonstrate its compliance with RPAPL 1304 (see *U.S. Bank N.A. v Valencia*, 219 AD3d at 893; see also *Shkreli v Shkreli*, 214 AD3d 686, 689 [2023]; *Matter of Colon v Annucci*, 151 AD3d 1061, 1062 [2017]).

The parties' remaining contentions either are without merit or need not be reached in light of our determination. Brathwaite Nelson, J.P., Taylor, Ventura and McCormack, JJ., concur.

56 Wilmington Trust, National Association, Respondent, v Pacific Street Services, Inc., et al., Defendants, and 55 Chester, LLC, Appellant. [247 NYS3d 497]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Commenced within Six Years of Acceleration of Debt

Mortgages—Foreclosure—Judgment as Matter of Law—Affidavit of Loan Servicer

In an action to foreclose a mortgage, the defendant 55 Chester, LLC, appeals from an order of the Supreme Court, Kings County (Mark I. Partnow, J.), dated July 1, 2022. The order, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant 55 Chester, LLC, to strike that defendant's affirmative defenses and counterclaims, and for an order of reference, and appointed a referee to ascertain and compute the amount due on the mortgage loan.

Ordered that the order is affirmed insofar as appealed from, with costs.

In July 2019, the plaintiff commenced this action against the defendant 55 Chester, LLC (hereinafter the defendant), among others, to foreclose a mortgage on certain real property located in Brooklyn. The defendant interposed an answer asserting various affirmative defenses, including, inter alia, the statute of limitations, and counterclaims, including, among other things, to cancel and discharge of record the mortgage pursuant to RPAPL 1501 (4). Thereafter, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike its affirmative defenses and counterclaims, and for an order of reference. The defendant opposed, contending, among other things, that the action was time-barred. The defendant also contended that the plaintiff failed to establish, prima facie, its standing and the borrower's default in payment. By order dated July 1, 2022, the Supreme Court, inter alia, granted those branches of the plaintiff's motion and appointed a referee to ascertain and compute the amount due on the mortgage loan. The defendant appeals.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 261 [2019]; *Wells Fargo Bank, N.A. v Weinberg*, 229 AD3d 840, 841 [2024]). “[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt” (*Wells Fargo Bank, N.A. v Weinberg*, 229 AD3d at 841, quoting *BHMPW Funding, LLC v Lloyd-Lewis*, 194 AD3d 780, 782 [2021]; *see GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2023]). “Acceleration occurs, inter alia, by the commencement of a foreclosure action wherein the holder of the note elects in the complaint to call

due the entire amount secured by the mortgage” (*Wells Fargo Bank, N.A. v Frankel*, 220 AD3d 973, 974 [2023]; see *Freedom Mtge. Corp. v Engel*, 37 NY3d 1, 22 [2021]).

Here, contrary to the defendant’s contention, the plaintiff established, prima facie, that this action was not time-barred. The plaintiff demonstrated that this action, commenced in July 2019, was timely commenced within six years of the acceleration of the mortgage debt in August 2013, when the plaintiff’s predecessor in interest commenced a prior action to foreclose the mortgage (see *Wells Fargo Bank, N.A. v Weinberg*, 229 AD3d at 841; *Wells Fargo Bank, N.A. v Frankel*, 220 AD3d at 974).

Contrary to the defendant’s other contentions, the plaintiff established its prima facie entitlement to judgment as a matter of law. “In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of the default” (*Zarabi v Movahedian*, 136 AD3d 895, 895 [2016]; see *Citimortgage, Inc. v Doomes*, 202 AD3d 752, 753 [2022]). Additionally, where, as here, the plaintiff’s standing has been placed in issue by a defendant, the plaintiff must prove its standing as part of its prima facie showing on a motion for summary judgment (see *Citimortgage, Inc. v Doomes*, 202 AD3d at 753). “A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced” (*id.*; see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident” (*Citimortgage, Inc. v Doomes*, 202 AD3d at 753 [internal quotation marks omitted]; see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d at 361-362).

Here, the plaintiff established, prima facie, that it had standing to commence the action by attaching a copy of the note, endorsed in blank, to the summons and complaint (see *JPMorgan Chase Bank, N.A. v Newton*, 203 AD3d 902, 905 [2022]; *Citimortgage, Inc. v Doomes*, 202 AD3d at 754).

The plaintiff also established, prima facie, the borrower’s default in payment. In support of its motion, the plaintiff submitted, among other things, an affidavit of an employee of the plaintiff’s loan servicer at the time the action was commenced. The affiant attested to the borrower’s default in payment based upon the affiant’s familiarity with the record-keeping practices and procedures of the loan servicer, identified

the business records he relied upon, and attached those records to his affidavit. The affiant also attested that, to the extent any of the servicing records were created by prior loan servicers, such records were incorporated into the loan servicer's records and relied upon in the ordinary course of its business (*see Deutsche Bank Natl. Trust Co. v Pirozzi*, 230 AD3d 736, 738 [2024]; *Bank of Am., N.A. v Greene*, 216 AD3d 718, 719 [2023]).

In opposition to the plaintiff's prima facie showing of its entitlement to judgment as a matter of law, the defendant failed to raise a triable issue of fact (*see Deutsche Bank Natl. Trust Co. v Pirozzi*, 230 AD3d at 738; *Citimortgage, Inc. v Doomes*, 202 AD3d at 754).

Accordingly, the Supreme Court properly granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike its affirmative defenses and counterclaims, and for an order of reference, and appointed a referee to ascertain and compute the amount due on the mortgage loan.

The defendant's remaining contention is without merit. Duffy, J.P., Wooten, Voutsinas and Ventura, JJ., concur.

57 Wilmington Trust, National Association, Appellant, v Pacific Street Services, Inc., et al., defendants, 55 Chester, LLC, Respondent. [251 NYS3d 691]—

Motions and Orders—Reargument or Renewal—Mortgage Foreclosure—Enactment of Foreclosure Abuse Prevention Act

Mortgages—Foreclosure—Foreclosure Abuse Prevention Act—Change to Savings Provisions

Mortgages—Foreclosure—Referee's Report—Substantially Supported by Record

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Derefin B. Neckles, J.), dated May 13, 2024. The order (1) denied the plaintiff's motion to confirm a referee's report and for a judgment of foreclosure and sale, (2) granted the cross-motion of the defendant 55 Chester, LLC, for leave to renew its opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against that defendant, to strike that defendant's affirmative defenses and counterclaims, and for an order of reference, which had been granted in an order of the same court (Mark I. Partnow, J.), dated July 1, 2022, and, upon renewal, to deny those branches of the plaintiff's prior motion and to award that defendant summary judgment dismissing the complaint insofar as asserted against it, and, (3) upon renewal,

in effect, vacated so much of the order dated July 1, 2022, as granted those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against that defendant, to strike that defendant's affirmative defenses and counterclaims, and for an order of reference, and appointed a referee to ascertain and compute the amount due on the mortgage loan, and thereupon, denied those branches of the plaintiff's prior motion and awarded that defendant summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order dated May 13, 2024, is reversed, on the law, with costs, the plaintiff's motion to confirm a referee's report and for a judgment of foreclosure and sale is granted, the cross-motion of the defendant 55 Chester, LLC, for leave to renew its opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against that defendant, to strike that defendant's affirmative defenses and counterclaims, and for an order of reference, and, upon renewal, to deny those branches of the plaintiff's prior motion and to award that defendant summary judgment dismissing the complaint insofar as asserted against it is denied, and so much of the order dated July 1, 2022, as granted those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against that defendant, to strike that defendant's affirmative defenses and counterclaims, and for an order of reference, and appointed a referee to ascertain and compute the amount due on the mortgage loan is reinstated.

The underlying facts of this appeal are set forth in a decision and order on a related appeal affirming so much of an order of the Supreme Court dated July 1, 2022 (hereinafter the July 2022 order), as granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendant 55 Chester, LLC (hereinafter the defendant), to strike the defendant's affirmative defenses and counterclaims, and for an order of reference, and appointed a referee to ascertain and compute the amount due on the mortgage loan (*see Wilmington Trust, N.A. v Pacific St. Servs., Inc.*, 246 AD3d 774 [2026] [decided herewith]).

Following the July 2022 order, the plaintiff moved to confirm the referee's report and for a judgment of foreclosure and sale. The defendant opposed and cross-moved for leave to renew its opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as

asserted against the defendant, to strike the defendant's affirmative defenses and counterclaims, and for an order of reference, and, upon renewal, to deny those branches of the plaintiff's prior motion and to award the defendant summary judgment dismissing the complaint insofar as asserted against it as time-barred. The defendant contended, *inter alia*, that renewal was warranted based upon the enactment of the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]), including CPLR 205-a, which provides that a plaintiff is not entitled to the benefit of the savings provision of CPLR 205 (a) for purposes of commencing an action to foreclose a mortgage after the six-year limitations period has run. By order dated May 13, 2024, the Supreme Court denied the plaintiff's motion, granted the defendant's cross-motion, and, upon renewal, in effect, vacated so much of the July 2022 order as granted those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's affirmative defenses and counterclaims, and for an order of reference, and appointed a referee to ascertain and compute the amount due on the mortgage loan, and thereupon, denied those branches of the plaintiff's prior motion and awarded the defendant summary judgment dismissing the complaint insofar as asserted against it. The plaintiff appeals. We reverse.

On its cross-motion for leave to renew, the defendant was required to demonstrate that there had been a change in the law that would change the prior determination (*see id.* § 2221 [e] [2]; *U.S. Bank N.A. v Hall-Davis*, 232 AD3d 696, 697 [2024]; *Pryce v Nationstar Mtge., LLC*, 224 AD3d 857, 858 [2024]).

Here, the Supreme Court should have denied the defendant's cross-motion for leave to renew, as the enactment of FAPA, including CPLR 205-a, had no effect on the determination in the July 2022 order. The July 2022 order properly granted those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against the defendant and to strike the defendant's counterclaims and affirmative defenses, as the plaintiff established its *prima facie* entitlement to judgment as a matter of law, the six-year limitations period (*see id.* § 213 [4]) had not expired when this action was commenced, and the defendant did not raise a triable issue of fact in opposition (*see Wilmington Trust, N.A. v Pacific St. Servs., Inc.*, 246 AD3d 774 [2026]).

Likewise, since the savings provisions of CPLR 205 (a) and 205-a are inapplicable to the determination in the July 2022

order, FAPA's change to the savings provision does not affect the determination in the July 2022 order, and thus, the enactment of that provision of FAPA did not provide a basis for the defendant to renew its opposition (*see id.* § 2221 [e] [2]; *Amtrust-NP SFR Venture, LLC v Thompson*, 181 AD3d 762, 765 [2020]).

Contrary to the defendant's contention, the operative date for determining whether a claim was interposed within the limitations period is the date of commencement; an action is commenced upon the filing of the summons and complaint, not service thereof (*see* CPLR 203 [c]; 304 [a]; *HSBC Bank USA, N.A. v Francis*, 214 AD3d 58, 61 [2023]).

Accordingly, the Supreme Court should have denied the defendant's cross-motion, *inter alia*, for leave to renew its opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against the defendant and to strike the defendant's affirmative defenses and counterclaims.

The Supreme Court also should have granted the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale. The report of a referee should be confirmed whenever the findings are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility (*see Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 790-791 [2017]).

Here, the referee's findings with respect to the total amount due upon the mortgage loan were substantially supported by the record. The referee, in computing the amount due, properly relied upon, among other things, an affidavit of an employee of the loan servicer for the plaintiff, which laid a proper foundation (*see* CPLR 4518 [a]) for the admission of the business records that were relied upon and were annexed to the affidavit.

The defendant's remaining contention is without merit (*see Wilmington Trust, N.A. v Reed*, 210 AD3d 731 [2022]).

Accordingly, the Supreme Court should have granted the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale and denied the defendant's cross-motion for leave to renew its opposition to those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike the defendant's affirmative defenses and counterclaims, and for an order of reference, and, upon renewal, to deny those branches of the plaintiff's prior motion and to award the defendant summary judgment dismissing the complaint insofar

as asserted against it. Duffy, J.P., Wooten, Voutsinas and Ventura, JJ., concur.

(February 5, 2026)

1 The People of the State of New York ex rel. Laura Solinger, on Behalf of Donovan Stewart, Petitioner, v Lynelle Maginley-Liddie, Respondent. [247 NYS3d 747]—

Habeas Corpus—When Remedy Available

Writ of habeas corpus in the nature of an application to release Donovan Stewart upon his own recognizance or, in the alternative, to set reasonable bail upon Kings County indictment No. 70939/2025.

Adjudged that the writ is dismissed, without costs or disbursements.

The determination of the Supreme Court, Kings County, did not violate “constitutional or statutory standards” (*People ex rel. Klein v Krueger*, 25 NY2d 497, 499 [1969]; see *People ex rel. Rosenthal v Wolfson*, 48 NY2d 230 [1979]). Dillon, J.P., Dowling, Taylor and McCormack, JJ., concur.

(February 9, 2026)

1 The People of the State of New York ex rel. Anna Boksenbaum, on Behalf of Edwin Henao, Petitioner, v Lynelle Maginley-Liddie, Respondent. [250 NYS3d 203]—

Habeas Corpus—When Remedy Appropriate—Terms for Immediate Release

Writ of habeas corpus in the nature of an application to release Edwin Henao upon his own recognizance or, in the alternative, to set reasonable bail upon Queens County indictment No. 74034/2025.

Adjudged that the writ is sustained, without costs or disbursements, to the extent that bail upon Queens County indictment No. 74034/2025 is set in the sum of \$250,000 posted in the form of an insurance company bail bond, the sum of \$250,000 posted in the form of a partially secured bond, with the requirement of 10% down, or the sum of \$100,000 deposited as a cash bail alternative, on condition that, in addition to posting a bond or depositing the cash alternative set forth above, Edwin Henao shall (1) wear an electronic monitoring bracelet, with monitoring services to be provided by a qualified entity pursuant to CPL 510.40 (4) (c), and any violations of the

conditions set forth herein relating to the electronic monitoring shall be reported by the electronic monitoring service provider to the Office of the District Attorney of Queens County, and further proceedings pursuant to CPL 510.40 (4) (d), if any, shall be conducted by the Supreme Court, Queens County; (2) remain confined to his residence, except for visits to his place of employment, his attorney, his doctors, or court, and he must travel directly from his home to his place of employment, his attorney, his doctors, or court, and directly back to his home, when conducting those visits; (3) surrender all passports, if any, he may have to the Office of the District Attorney of Queens County, or, if he does not possess a passport, he shall provide to the Office of the District Attorney of Queens County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Queens County, in which he attests that he does not possess a passport, and shall not apply for any new or replacement passports; and (4) provide to the Office of the District Attorney of Queens County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Queens County, in which he attests that if he leaves the jurisdiction he agrees to waive the right to oppose extradition from any foreign jurisdiction; and it is further,

Ordered that upon receipt of a copy of this decision, order and judgment together with proof that Edwin Henao (1) has given an insurance company bail bond in the sum of \$250,000, has given a partially secured bond in the sum of \$250,000, with the requirement of 10% down, or has deposited the sum of \$100,000 as a cash bail alternative; (2) has arranged for electronic monitoring with a qualified entity pursuant to CPL 510.40 (4) (c); (3) has surrendered all passports, if any, he may have to the Office of the District Attorney of Queens County, or, if he does not possess a passport, has provided to the Office of the District Attorney of Queens County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Queens County, in which he attests that he does not possess a passport, and shall not apply for any new or replacement passports; and (4) has provided to the Office of the District Attorney of Queens County an affidavit or affirmation, in a form approved by the Office of the District Attorney of Queens County, in which he attests that if he leaves the jurisdiction he agrees to waive the right to oppose extradition from any foreign jurisdiction, the Warden of the facility at which Edwin Henao is incarcerated, or his or her agent, is directed to immediately release Edwin Henao from incarceration. Chambers, J.P., Wooten, Wan and Hom, JJ., concur.

2 The People of the State of New York ex rel. Howard D. Lee, on Behalf of Lianu Luis Delgado, Petitioner, v Commissioner of the New York City Department of Corrections et al., Respondents. [247 NYS3d 748]—

Habeas Corpus—When Remedy Available

Writ of habeas corpus in the nature of an application to release Lianu Luis Delgado upon his own recognizance or, in the alternative, to set reasonable bail upon Queens County indictment No. 74407/2025.

Adjudged that the writ is dismissed, without costs or disbursements.

The determination of the Supreme Court, Queens County, did not violate “constitutional or statutory standards” (*People ex rel. Klein v Krueger*, 25 NY2d 497, 499 [1969]; see *People ex rel. Rosenthal v Wolfson*, 48 NY2d 230 [1979]). Genovesi, J.P., Warhit, Love and Quirk, JJ., concur.

(February 10, 2026)

1 The People of the State of New York ex rel. Caitlyn Collins, on Behalf of Trenton Freeman, Petitioner, v Lynelle Maginley-Liddie, Respondent. [247 NYS3d 748]—

Habeas Corpus—When Remedy Appropriate

Writ of habeas corpus in the nature of an application to release Trenton Freeman pursuant to CPL 30.30 (2) (a), or, in the alternative, to set reasonable bail upon Kings County indictment No. 75266/2025.

Adjudged that the writ is dismissed, without costs or disbursements.

The petitioner failed to demonstrate entitlement to relief pursuant to CPL 30.30 (2) (a).

The determination of the Supreme Court, Kings County, did not violate “constitutional or statutory standards” (*People ex rel. Klein v Krueger*, 25 NY2d 497, 499 [1969]; see *People ex rel. Rosenthal v Wolfson*, 48 NY2d 230 [1979]). Brathwaite Nelson, J.P., Christopher, Ventura and Golia, JJ., concur.

(February 11, 2026)

1 Bank of America, N.A., Respondent, v Moses Greenfield, Appellant. [252 NYS3d 171]—

Trial—Evidence—Prejudice of Substantial Right—Video Surveillance Footage Created for Hearing
Abatement and Revival—Another Action Pending—Substantial Similarity—Not Party to Prior Action

In an action to recover on a personal guaranty, the defendant appeals from (1) an order of the Supreme Court, Kings County (Reginald A. Boddie, J.), dated May 15, 2023, and (2) an order and judgment (one paper) of the same court dated October 18, 2023. The order, after a hearing to determine the validity of service of process upon the defendant, in effect, denied the defendant's motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint. The order and judgment, upon an order of the same court dated September 21, 2023, granting the plaintiff's motion for summary judgment on the complaint and denying the defendant's cross-motion pursuant to CPLR 3211 (a) (4) to dismiss the complaint, granted the same relief to the plaintiff and is in favor of the plaintiff and against the defendant in the total sum of \$2,774,431.16.

Ordered that the appeal from the order dated May 15, 2023, is dismissed; and it is further,

Ordered that the order and judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The appeal from the order dated May 15, 2023, must be dismissed because the right of direct appeal therefrom terminated with entry of the order and judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the order and judgment (*see* CPLR 5501 [a] [1]).

In July 2021, the plaintiff commenced an action against Dollar Phone Corp. (hereinafter DPC), the defendant, Moses Greenfield, and several other business entities (hereinafter the prior action). In the amended complaint in the prior action, the plaintiff alleged, inter alia, that DPC had defaulted under the terms of a 2013 commercial line of credit agreement with the plaintiff (hereinafter the loan agreement) and that Greenfield had executed a personal guaranty of DPC's obligations under the loan agreement. In an order dated April 7, 2022, the Supreme Court granted Greenfield's motion to dismiss the amended complaint insofar as asserted against him in the prior action, determining that he had not been properly served with process. In that same order, the court "afforded [the plaintiff] 120 days from receipt of this order to effectuate and file proper service and proof of service." On May 2, 2022, the plaintiff filed

a notice of discontinuance as to Greenfield in the prior action. However, by order dated May 23, 2022, the court determined, among other things, that the notice of discontinuance was invalid. It is undisputed that the plaintiff did not attempt to reserve Greenfield in the prior action.

In an order and judgment dated June 15, 2023, the Supreme Court granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendants other than Greenfield in the prior action and entered judgment in favor of the plaintiff and against those defendants in the total sum of \$2,773,981.28.

Meanwhile, in September 2022, the plaintiff commenced this action against Greenfield to enforce the personal guaranty. Greenfield interposed an answer and asserted several affirmative defenses, including that this action was barred by the pendency of the prior action.

In January 2023, Greenfield moved pursuant to CPLR 3211 (a) (8) to dismiss the complaint based on lack of personal jurisdiction. In an order dated May 15, 2023, after a hearing to determine the validity of service of process upon Greenfield, the Supreme Court determined that service of process on Greenfield in this action was valid and, in effect, denied the motion.

In August 2023, the plaintiff moved for summary judgment on the complaint and for a judgment in its favor and against Greenfield in the principal sum of \$2,200,000, plus interest, late charges, attorneys' fees, and costs and expenses, for a total sum of \$2,824,007.35. Greenfield opposed the plaintiff's motion and cross-moved pursuant to CPLR 3211 (a) (4) to dismiss the complaint on the ground that the prior action remained pending against him, and thus, the complaint should be dismissed. In an order dated September 21, 2023, the Supreme Court granted the plaintiff's motion to the extent of directing a judgment equal to the total sum of the order and judgment dated June 15, 2023, in the prior action and denied Greenfield's cross-motion. The court issued an order and judgment dated October 18, 2023, granting the same relief to the plaintiff as the order dated September 21, 2023, and in favor of the plaintiff and against Greenfield in the total sum of \$2,774,431.16, representing the principal sum of \$2,773,981.28, plus disbursements in the amount of \$449.88. Greenfield appeals.

“‘[T]rial courts are accorded wide discretion in making evidentiary rulings and those rulings should not be disturbed on appeal absent an improvident exercise of discretion or a showing of prejudice to a substantial right pursuant to CPLR 2002’ ”

(*6 Harbor Park Dr., LLC v Town of N. Hempstead*, 230 AD3d 721, 723 [2024], quoting *Dyszkiewicz v City of New York*, 218 AD3d 546, 550 [2023]). Contrary to Greenfield's contention, here, there is nothing in the record to support a finding that the Supreme Court improvidently exercised its discretion in denying Greenfield's request to admit into evidence at the hearing a compilation of video surveillance footage that Greenfield created for the purpose of the hearing. Further, Greenfield failed to allege that a substantial right was prejudiced pursuant to CPLR 2002. Thus, we decline to disturb the court's evidentiary ruling declining Greenfield's request to admit the subject video footage on this appeal (see *6 Harbor Park Dr., LLC v Town of N. Hempstead*, 230 AD3d at 723).

CPLR 3211 (a) (4) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against [them] on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States" (see *Quinones v Z & B Trucking, Inc.*, 220 AD3d 901, 902 [2023]). However, "the court need not dismiss upon this ground but may make such order as justice requires" (CPLR 3211 [a] [4]). "Pursuant to CPLR 3211 (a) (4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*Melis v Blake Stone, LLC*, 227 AD3d 882, 884-885 [2024], quoting *DAIJ, Inc. v Roth*, 85 AD3d 959, 959 [2011]).

Here, this action and the prior action possessed a substantial identity of parties and were substantially similar in that they concern the same underlying facts and agreements, and the relief sought against Greenfield was substantially the same as that sought against him in the prior action. However, as noted by the Supreme Court in its order dated September 21, 2023, Greenfield was not a party to the order and judgment dated June 15, 2023, in the prior action because he had "obtained dismissal of the [p]rior [a]ction against him," and since the plaintiff did not re-serve him in the prior action. Under these circumstances, Greenfield failed to demonstrate that the court improvidently exercised its discretion in denying his cross-motion pursuant to CPLR 3211 (a) (4) to dismiss the complaint based on the pendency of the prior action (see *Quinones v Z & B Trucking, Inc.*, 220 AD3d at 902; *Hempstead Hous. Auth. v Middle County Resources Mgt., Inc.*, 216 AD3d 621, 622 [2023]).

The parties' remaining contentions either are without merit

or need not be reached in light of our determination. Genovesi, J.P., Dowling, Wan and Taylor, JJ., concur.

2 Edgewater Ventures, LLC, as Nominee of LL Edgewater Holdings LLC, Respondent, v SI Funding, LLC, et al., Appellant. [251 NYS3d 712]—

Injunctions—Preliminary Injunction—Met Necessary Requirements—Enjoined from Transferring or Encumbering Interest in Property

In an action, inter alia, for specific performance of an option to purchase a 50% interest in a certain business, the defendant and the nominal defendant appeal from an order of the Supreme Court, Richmond County (Lizette Colon, J.), dated December 8, 2021. The order granted the plaintiff's motion for a preliminary injunction enjoining the defendant and those acting in concert with it from transferring or encumbering its interest in the nominal defendant and in certain real property owned by the nominal defendant or from taking any distributions from the nominal defendant or entering into any agreement raising the property management or asset management fees relating to the nominal defendant or certain property owned by the nominal defendant without prior permission of the court.

Ordered that the order is affirmed, with costs.

In November 2021, the plaintiff commenced this action against the defendant, SI Funding, LLC (hereinafter SI Funding), and the nominal defendant, Edgewater Owner, LLC (hereinafter Edgewater, LLC), inter alia, for specific performance of an option to purchase a 50% interest in a certain business. The plaintiff moved for a preliminary injunction enjoining SI Funding and those acting in concert with it from transferring or encumbering its interest in Edgewater, LLC, and in certain real property owned by Edgewater, LLC, or from taking any distributions from Edgewater, LLC, or entering into any agreement raising the property management or asset management fees relating to Edgewater, LLC, or certain property owned by Edgewater, LLC, without prior permission of the Supreme Court. The defendants opposed the motion. In an order dated December 8, 2021, the court granted the plaintiff's motion. The defendants appeal. We affirm.

“To establish the right to a preliminary injunction, a movant must demonstrate (1) the likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in the movant's favor” (17455 128 Ave., Inc. v HSBC Bank USA, N.A., 228 AD3d 602, 603 [2024], quoting *Benaim v S2 Corona, LLC*, 214 AD3d 760, 761

[2023]; see CPLR 6301). “[T]he purpose of a preliminary injunction is to maintain the status quo and not to determine the ultimate rights of the parties” (*Cong. Machon Chana v Machon Chana Women’s Inst., Inc.*, 162 AD3d 635, 637 [2018]; see *17455 128 Ave., Inc. v HSBC Bank USA, N.A.*, 228 AD3d at 603). The mere fact that there may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction (see CPLR 6312 [c]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605 [2004]). “Generally, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Boyd v Assanah*, 210 AD3d 855, 856 [2022]; see *Cushing v Sanford Equities Corp.*, 223 AD3d 870 [2024]). “Absent unusual or compelling circumstances, appellate courts are reluctant to disturb that determination” (*Benaim v S2 Corona, LLC*, 214 AD3d at 761; *Cong. Machon Chana v Machon Chana Women’s Inst., Inc.*, 162 AD3d at 637).

Contrary to the defendants’ contention, the Supreme Court properly considered the plaintiff’s late-submitted copy of a fully executed nominee agreement, which it had failed to include with its reply papers (see CPLR 2001, 2214; *Scarsella v Liberty Coca-Cola Beverages, LLC*, 232 AD3d 644, 645 [2024]; *J.P. Morgan Mtge. Acquisition Corp. v Tamaklo*, 221 AD3d 873, 874-875 [2023]). The nominee agreement was referred to in the plaintiff’s motion papers and the plaintiff submitted a copy of the agreement to the court and to the defendants on the day that the motion was argued.

Here, the plaintiff established a likelihood of success on the merits, irreparable injury absent a preliminary injunction, and that the equities balanced in its favor. Thus, the Supreme Court providently exercised its discretion in granting the plaintiff’s motion for a preliminary injunction to the extent of enjoining SI Funding from transferring or encumbering its interest in Edgewater, LLC, and in certain real property owned by Edgewater, LLC, or from taking any distributions from Edgewater, LLC, or entering into any agreement raising the property management or asset management fees relating to Edgewater, LLC, or certain property owned by Edgewater, LLC, without prior permission of the court (see *Boyd v Assanah*, 210 AD3d at 856; *Jones v State Farm Fire & Cas. Co.*, 189 AD3d 1565, 1568 [2020]).

The defendants’ remaining contentions are either without merit or improperly raised for the first time on appeal. Duffy, J.P., Brathwaite Nelson, Warhit and Taylor, JJ., concur.

3 Alex Gordon et al., Appellants, et al., Plaintiffs, v Simon Field et al., Respondents, et al., Defendants. [252 NYS3d 163]—

Disclosure—Supervision of Disclosure—Referee's Order—Denial of Application to Reopen Discovery

In an action, inter alia, to recover damages for fraud, the plaintiffs Alex Gordon and Lana Gordon appeal, and the plaintiff Anna Dykshteyn separately appeals, from an order of the Supreme Court, Nassau County (Timothy S. Driscoll, J.), entered January 5, 2024. The order, insofar as appealed from by the plaintiffs Alex Gordon and Lana Gordon, denied that branch of their motion which was, in effect, pursuant to CPLR 3104 (d) to review so much of an order of the same court (John P. McEntee, Ref.) dated September 13, 2023, as denied their application, in effect, to reopen discovery to obtain documents withheld as privileged. The appeal by the plaintiff Anna Dykshteyn was deemed dismissed pursuant to 22 NYCRR 1250.10 (a).

Ordered that the order entered January 5, 2024, is affirmed insofar as appealed from, with costs.

In 2018, the plaintiffs Alex Gordon and Lana Gordon (hereinafter together the Gordons) and another plaintiff commenced this action, inter alia, to recover damages for fraud. The Supreme Court appointed a referee to supervise disclosure pursuant to CPLR 3104. On July 27, 2021, the defendant Kim Volman produced a privilege log of documents withheld from disclosure (hereinafter the 2021 privilege log). In an order dated November 18, 2021, the referee directed the parties to complete all disclosure by January 31, 2022. On January 27, 2022, a nonparty attorney produced documents and a privilege log pursuant to a subpoena served by the plaintiffs (hereinafter the 2022 privilege log). In 2023, the referee conducted an in camera review of the documents listed in the 2022 privilege log and made determinations as to whether the documents were properly withheld as privileged.

In September 2023, the Gordons made an application to the referee, in effect, to reopen discovery for the purpose of obtaining documents withheld as privileged in the 2021 and 2022 privilege logs. In an order dated September 13, 2023, the referee, among other things, denied the application. The Gordons thereafter moved, inter alia, in effect, pursuant to CPLR 3104 (d) to review so much of the order dated September 13, 2023, as denied their application. The Supreme Court denied that branch of the motion, and the Gordons appeal.

Pursuant to CPLR 3104 (d), any party may make a motion to review a referee's order regarding disclosure. CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action,

regardless of the burden of proof.” “However, unlimited disclosure is not mandated, and the rules provide that the court may issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (*Slapo v Winthrop Univ. Hosp.*, 186 AD3d 1281, 1282-1283 [2020] [internal quotation marks omitted], citing CPLR 3103 [a]; see *Berkowitz v 29 Woodmere Blvd. Owners’, Inc.*, 135 AD3d 798, 799 [2016]).

“The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed” (*Berkowitz v 29 Woodmere Blvd. Owners’, Inc.*, 135 AD3d at 799 [internal quotation marks omitted]; see *Slapo v Winthrop Univ. Hosp.*, 186 AD3d at 1283). Here, the Supreme Court providently exercised its discretion in denying that branch of the Gordons’ motion which was, in effect, pursuant to CPLR 3104 (d) to review so much of the order dated September 13, 2023, as denied their application, in effect, to reopen discovery to obtain documents withheld as privileged.

The Gordons’ remaining contentions are without merit. Chambers, J.P., Christopher, Ford and Golia, JJ., concur.

4 Demetra Haji-Georgi et al., Respondents, v Steven G. Wishner et al., Defendants, and NYU Langone Huntington Medical Group et al., Appellants. [252 NYS3d 168]—

Corporations—Liability of Successor Corporation—Documentary Evidence—Refuted Allegation of De Facto Merger

In an action to recover damages for personal injuries, etc., the defendants NYU Langone Huntington Medical Group and NYU Langone Health System appeal from an order of the Supreme Court, Suffolk County (Deanna D. Panico, J.), dated January 14, 2025. The order, insofar as appealed from, denied that branch of those defendants’ motion which was pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendants NYU Langone Huntington Medical Group and NYU Langone Health System which was pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them is granted.

In 2023, the plaintiff Demetra Haji-Georgi (hereinafter the

injured plaintiff), and her husband suing derivatively, commenced this action against the defendants Steven G. Wishner and Huntington Medical Group, P.C. (hereinafter HMG), and the defendants NYU Langone Huntington Medical Group and NYU Langone Health System (hereinafter together the NYU defendants), inter alia, to recover damages for personal injuries pursuant to the Adult Survivors Act (CPLR 214-j) based upon allegations that Wishner forcibly touched and sexually abused the injured plaintiff during a medical examination that Wishner performed on the injured plaintiff in 2005 (hereinafter the 2005 examination). The plaintiffs alleged that at the time of the 2005 examination, Wishner was employed by HMG and that the NYU defendants were vicariously liable for Wishner's misconduct because sometime after the 2005 examination, the NYU defendants acquired, merged with, or otherwise became the successor to HMG.

The NYU defendants moved, among other things, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them. In an order dated January 14, 2025, the Supreme Court, inter alia, denied that branch of the motion. The NYU defendants appeal.

A motion pursuant to CPLR 3211 (a) (1) to dismiss a complaint on the ground that the action is barred by documentary evidence may only be granted where the documentary evidence utterly refutes the factual allegations in the complaint, thereby conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *IPA Asset Mgt., LLC v Schuman*, 239 AD3d 619 [2025]). To qualify as documentary evidence, the evidence must be unambiguous, authentic, and undeniable, such as judicial records and documents reflecting out-of-court transactions, including mortgage agreements, deeds, contracts, and any other papers, the contents of which essentially are undeniable (*see Yan Ping Xu v Van Zwienen*, 212 AD3d 872, 874 [2023]; *Philips v Taco Bell Corp.*, 152 AD3d 806, 807 [2017]).

Here, the NYU defendants' documentary evidence utterly refuted the plaintiffs' allegations as to the NYU defendants' successor liability, thereby warranting dismissal of the complaint insofar as asserted against them pursuant to CPLR 3211 (a) (1). In general, a corporation that acquires the assets of another is not liable for the torts of its predecessor (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245 [1983]). However, "[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or

merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations” (*id.* at 245).

The NYU defendants’ documentary evidence demonstrated, among other things, that (1) the NYU defendants did not expressly or impliedly assume HMG’s tort liability, (2) HMG and the NYU defendants did not formally consolidate into a new entity, and (3) HMG was not extinguished but rather survived the transaction (*see Barth v Wishner*, 244 AD3d 1040 [2025]). To the extent the complaint may be viewed as pleading a de facto merger of HMG and the NYU defendants (*see Menche v CDx Diagnostics, Inc.*, 199 AD3d 678, 680-681 [2021]; *Bonanni v Horizons Invs. Corp.*, 179 AD3d 995, 999 [2020]), the NYU defendants’ documentary evidence refuted any such allegation (*see Barth v Wishner*, 244 AD3d 1040 [2025]; *Aguilar v Wishner*, 244 AD3d 1033 [2025]; *Steffens v Wishner*, 244 AD3d 1159 [2025]; *see also Oorah, Inc. v Covista Communications, Inc.*, 139 AD3d 444, 445 [2016]).

Accordingly, the Supreme Court should have granted that branch of the NYU defendants’ motion which was pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them. Dillon, J.P., Chambers, Wan and Love, JJ., concur.

5 Elizabeth M. Kairey, Appellant, v Elliot M. Hirsch, Respondent. [247 NYS3d 752]—

Arbitration—Judicial Review—Modification of Award for Child Support—Failure to Comply with Child Support Standards Act

In an action for divorce and ancillary relief, the plaintiff appeals from a judgment of divorce of the Supreme Court, Kings County (Joanne D. Quiñones, J.), dated July 26, 2023. The judgment of divorce, insofar as appealed from, upon an order of the same court (Delores J. Thomas, J.) dated December 8, 2020, inter alia, denying that branch of the plaintiff’s motion which was pursuant to CPLR 7510 to confirm so much of an arbitration award dated May 3, 2018, as amended February 14, 2019, as determined the duration of the defendant’s child support obligation, and thereupon, modifying that portion of the arbitration award, provided that the defendant’s child support obligation would continue only until the parties’ child reached 21 years of age. By decision and order on motion of this Court dated July 25, 2025, the notice of appeal from the order dated December 8, 2020, was deemed to be a premature notice of appeal from the judgment of divorce (*see* CPLR 5520 [c]).

Ordered that the judgment of divorce is reversed insofar as appealed from, on the law, with costs, that branch of the plaintiff's motion which was pursuant to CPLR 7510 to confirm so much of the arbitration award as determined the duration of the defendant's child support obligation is granted, the order is modified accordingly, and the matter is remitted to the Supreme Court, Kings County, for the entry of an appropriate amended judgment of divorce consistent herewith.

The plaintiff and the defendant were married in November 2013. In November 2017, they agreed to submit to binding arbitration before the Bet Din Ohr Halacha (hereinafter the Bet Din) to determine certain marital issues between them, including the issue of child support. The Bet Din issued a decision dated May 3, 2018, as amended February 14, 2019 (hereinafter the arbitration award), determining, inter alia, that the defendant's child support obligation would terminate upon the subject child reaching 24 years of age or the child's marriage, whichever came first. In June 2018, the plaintiff commenced this action for divorce and ancillary relief.

The plaintiff subsequently moved pursuant to CPLR 7510 to confirm the arbitration award. In an order dated December 8, 2020, the Supreme Court, among other things, denied that branch of the plaintiff's motion which was to confirm so much of the arbitration award as determined the duration of the defendant's child support obligation, and thereupon, modified that portion of the arbitration award such that the defendant's child support obligation would terminate upon the child reaching 21 years of age. A judgment of divorce dated July 26, 2023, inter alia, provided that the defendant's child support obligation would continue until the child reached 21 years of age. The plaintiff appeals.

"Judicial review of an arbitration award is extremely limited" (*Zar v Yaghoobzar*, 161 AD3d 815, 817 [2018], citing CPLR 7510, 7511; see *Matter of Reddy v Schaffer*, 123 AD3d 935, 936 [2014]). Outside of the narrowly circumscribed exceptions of CPLR 7511, "courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact" (*Dedvukaj v Parlato*, 136 AD3d 733, 733-734 [2016] [internal quotation marks omitted]).

An arbitration award concerning child support may be vacated on public policy grounds if it fails to comply with the Child Support Standards Act (CSSA) (see CPLR 7511; Domestic Relations Law § 240 [1-b]) and is not in the best interests of the child (see *Berg v Berg*, 85 AD3d 952, 953-954 [2011]; *Matter of Hirsch v Hirsch*, 4 AD3d 451, 453 [2004]; *Hampton v Hamp-*

ton, 261 AD2d 362, 363 [1999]). Here, the Supreme Court erred in modifying the arbitration award, as the arbitration award is not incompatible with the objectives of the CSSA, and there is no evidence in the record that the arbitration award was not in the best interest of the child (*see Matter of Goldberg v Goldberg*, 124 AD3d 779, 781 [2015]).

Accordingly, the Supreme Court should have granted that branch of the plaintiff's motion which was to confirm so much of the arbitration award as determined the duration of the defendant's child support obligation, and the matter must be remitted to the Supreme Court, Kings County, for the entry of an appropriate amended judgment of divorce consistent herewith. Barros, J.P., Wooten, Ford and Warhit, JJ., concur.

6 Constance Kemp, Appellant, v 1000 Broadway, LLC, Respondent, et al., Defendants. [251 NYS3d 286]—

Motions and Orders—Reargument or Renewal—Misapprehension of Pertinent Facts—Identification of Location of Accident

Negligence—Maintenance of Premises—Judgment as Matter of Law—Inability to Identify Location of Trip-and-Fall

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Robin S. Garson, J.), dated July 20, 2023. The order granted that branch of the motion of the defendant 1000 Broadway, LLC, which was for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, which had been denied in an order of the same court dated December 21, 2022, and, upon reargument, in effect, vacated the determination in the order dated December 21, 2022, denying that branch of that defendant's prior motion, and thereupon granted that branch of the prior motion.

Ordered that the order dated July 20, 2023, is affirmed, with costs.

In April 2016, while walking down Willoughby Avenue in Brooklyn at approximately 9:30 p.m., the plaintiff allegedly tripped and fell as a result of a missing drainage grate on a sidewalk which allegedly abutted premises owned by the defendant 1000 Broadway, LLC (hereinafter 1000 Broadway). The plaintiff commenced this action against, among others, 1000 Broadway to recover damages for personal injuries. Subsequently, 1000 Broadway moved, inter alia, for summary judgment dismissing the amended complaint insofar as asserted against it on the ground, among other things, that the accident did not occur on the sidewalk in front of any premises

it owned. By order dated December 21, 2022, the Supreme Court, inter alia, denied that branch of 1000 Broadway's motion.

Thereafter, 1000 Broadway moved, among other things, for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it on the ground that the Supreme Court overlooked evidence which demonstrated that the plaintiff's accident did not occur in front of premises owned by 1000 Broadway. By order dated July 20, 2023, the Supreme Court granted leave to reargue, and, upon reargument, in effect, vacated the determination in the order dated December 21, 2022, denying that branch of 1000 Broadway's prior motion, and thereupon granted that branch of the prior motion. The plaintiff appeals.

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]; see *Milennium Dev. & Constr., LLC v Pick*, 235 AD3d 737 [2025]; *D'Amico Constr., Inc. v Cow Bay Sprinkler Corp.*, 233 AD3d 1024, 1025 [2024]; *Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2019]). While the determination to grant leave to reargue lies within the sound discretion of the court (see *D'Amico Constr., Inc. v Cow Bay Sprinkler Corp.*, 233 AD3d at 1025; *Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d at 773; *Barnett v Smith*, 64 AD3d 669, 670-671 [2009]), a motion for leave to reargue "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v Goldman*, 261 AD2d 593, 594 [1999]; see *Garcia v Cali CW Realty Assoc., L.P.*, 230 AD3d 1231, 1232 [2024]; *Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d at 773). Here, the Supreme Court providently exercised its discretion in granting that branch of 1000 Broadway's motion which was for leave to reargue that branch of its prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it, as it established that, in determining the prior motion, the court misapprehended the pertinent facts regarding the plaintiff's failure to identify the location of the accident (see *Rides Unlimited of N.Y., Inc. v Engineered Energy Solutions, LLC*, 184 AD3d 695 [2020]; *Newkirk-Briggs v County of Putnam*, 60 AD3d 829 [2009]).

Moreover, upon reargument, the Supreme Court properly

granted that branch of 1000 Broadway's prior motion which was for summary judgment dismissing the amended complaint insofar as asserted against it. A defendant can establish its prima facie entitlement to judgment as a matter of law in a premises liability case by showing that the plaintiff cannot identify the cause and/or location of his or her accident without resorting to speculation (*see Singh v City of New York*, 136 AD3d 641, 642 [2016]; *see also Dubois v Jenrich*, 234 AD3d 932, 932 [2025]). Here, 1000 Broadway established its prima facie entitlement to judgment as a matter of law dismissing the amended complaint insofar as asserted against it by submitting, inter alia, a transcript of the plaintiff's deposition testimony, photographs, and a certified copy of a fire department prehospital care report, which demonstrated that the plaintiff could not identify the location where she tripped and fell without resorting to speculation (*see Singh v City of New York*, 136 AD3d at 642; *see also Williams v Vines*, 128 AD3d 1056, 1057 [2015]). In opposition, the plaintiff failed to raise a triable issue of fact.

The plaintiff's remaining contentions have been rendered academic in light of our determination. Connolly, J.P., Chambers, Voutsinas and Landicino, JJ., concur.

7 In the Matter of Vincent DeFonte, Respondent, v New York City Fire Department et al., Appellants. [251 NYS3d 703]—

**Administrative Law—Administrative Interpretation—Sound Basis
Civil Rights—New York City Human Rights Law—Process for Resolving
Requests for Vaccine Mandate Accommodations—More Robust or Individual-
ized Dialogue**

In a proceeding pursuant to CPLR article 78 to review a determination of the City of New York Reasonable Accommodation Appeals Panel dated October 24, 2022, which upheld a determination of the New York City Fire Department dated December 8, 2021, denying the petitioner's request for a reasonable accommodation from a vaccine mandate based on his religion, the New York City Fire Department and the City of New York appeal from a judgment of the Supreme Court, Richmond County (Ralph J. Porzio, J.), entered June 28, 2023. The judgment granted the petition, annulled the determination dated October 24, 2022, directed that the petitioner was entitled to a religious exemption from the vaccine mandate, and awarded the petitioner back pay and attorneys' fees.

Ordered that the judgment is reversed, on the law, with costs, the petition is denied, and the proceeding is dismissed.

In November 2021, the petitioner, a firefighter employed by

the New York City Fire Department (hereinafter the FDNY), was placed on leave without pay status for noncompliance with a COVID-19 vaccine mandate implemented for employees of the City of New York in October 2021. On November 5, 2021, the petitioner submitted a request for a reasonable accommodation from the vaccine mandate based on his religion. On December 8, 2021, the FDNY denied the petitioner's request. Thereafter, the petitioner appealed from the FDNY's denial of his request. In an email dated January 7, 2022, the FDNY provided the petitioner with supplemental information regarding the denial of his request for a reasonable accommodation. In a determination dated October 24, 2022, the City of New York Reasonable Accommodation Appeals Panel (hereinafter the Panel) upheld the FDNY's denial of the petitioner's request for a reasonable accommodation.

On February 12, 2023, the petitioner commenced this proceeding pursuant to CPLR article 78 against the FDNY and the City (hereinafter together the appellants) to annul the determination dated October 24, 2022, to be reinstated to his position with the FDNY with a reasonable accommodation, to recover back pay for the period during which he was on leave without pay, and for an award of attorneys' fees. Subsequently, the FDNY reinstated the petitioner to his position on March 1, 2023, after the New York City Board of Health amended the vaccine mandate on February 9, 2023, inter alia, by repealing the requirement that City employees without proof of vaccination be excluded from their work premises.

In an order dated April 27, 2023, the Supreme Court determined that the denial of the petitioner's reasonable accommodation request was made in violation of lawful procedure because the appellants failed to engage in a cooperative dialogue with the petitioner, as required under the New York City Human Rights Law (NYCHRL). The court also determined that the denial of the petitioner's reasonable accommodation request was arbitrary and capricious. In a judgment entered June 28, 2023, the court granted the petition, annulled the determination dated October 24, 2022, directed that the petitioner was entitled to a religious exemption from the vaccine mandate, and awarded the petitioner back pay and attorneys' fees. This appeal ensued.

“The standard of judicial review in the instant proceeding pursuant to CPLR article 78 is whether the action was arbitrary and capricious, an abuse of discretion, in violation of [a] lawful procedure, or affected by an error of law” (*Matter of Van Dunk v Orange-Ulster Bd. of Coop. Educ. Servs. [BOCES]*,

219 AD3d 1434, 1436 [2023], quoting *Matter of Still v City of Middletown*, 133 AD3d 864, 865 [2015]). “ ‘Administrative action is arbitrary when it is without a sound basis in reason and is taken without regard to the facts’ ” (*id.* [internal quotation marks omitted], quoting *C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52, 69 [2020]). Here, the Panel’s determination had a sound basis because the requested accommodation would cause an undue hardship on the FDNY (see Administrative Code of City of NY § 8-107 [3] [b]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Lebowitz v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 220 AD3d 537, 537 [2023]; *Matter of Marsteller v City of New York*, 217 AD3d 543, 544 [2023]).

Further, the petitioner failed to establish that the City’s process for resolving requests for accommodations from the vaccine mandate fell short of the requirements of the NYCHRL. The NYCHRL makes it an “unlawful discriminatory practice for an employer . . . to refuse or otherwise fail to engage in a cooperative dialogue . . . with a person who has requested an accommodation” (Administrative Code of City of NY § 8-107 [28] [a]; see *Alvarez v New York City Tr. Auth.*, 230 AD3d 541, 542 [2024]; *Matter of Marsteller v City of New York*, 217 AD3d at 545). Here, the City publically offered information on its process for reviewing accommodation requests related to the vaccine mandate and informed employees on how to apply to their agency’s equal employment opportunity office and how to appeal denials. The petitioner availed himself of this process, communicating with the FDNY throughout the administrative appeals process. The appellants also submitted evidence about the volume of requests for accommodations to the vaccine mandate from FDNY employees alone, which the City had to resolve under a constrained timeline during an evolving public emergency. Under these circumstances, the petitioner failed to establish that the NYCHRL “required a more robust or individualized dialogue than the process he received” (*Matter of Marsteller v City of New York*, 217 AD3d at 545; see *Matter of Ansbrosio v Nigro*, 235 AD3d 525, 525 [2025]; *Matter of Lebowitz v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 220 AD3d at 538; *Matter of Hogue v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 220 AD3d 416, 417 [2023]).

The parties’ remaining contentions either are without merit, are academic, or need not be reached in light of our determination.

Accordingly, the Supreme Court should have denied the peti-

tion and dismissed the proceeding. Barros, J.P., Warhit, Wan and Hom, JJ., concur.

8 In the Matter of Joseph A. Farco, Appellant, v Lauren M. Farco, Respondent. [251 NYS3d 700]—

Parent, Child and Family—Custody—Abuse of Judicial Process—Prohibition from Filing Additional Petitions without Court's Permission

Parent, Child and Family—Custody—Modification—Deterioration of Parent's Mental Health and Forfeited Parental Access Time

In a proceeding pursuant to Family Court Act article 6, the father appeals from (1) an order of the Family Court, Nassau County (Darlene D. Harris, J.), dated October 24, 2024, and (2) an order of dismissal of the same court also dated October 24, 2024. The order, insofar as appealed from, prohibited the father from filing any additional petitions relating to custody and parental access without first obtaining prior written permission from the Family Court. The order of dismissal, insofar as appealed from, without a hearing, dismissed the father's petition to modify a so-ordered stipulation of settlement dated December 22, 2021, so as to award him sole legal and residential custody of the parties' child.

Ordered that on the Court's own motion, the notice of appeal from so much of the order as prohibited the father from filing any additional petitions relating to custody or parental access without first obtaining prior written permission from the Family Court is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* Family Ct Act § 1112 [a]); and it is further,

Ordered that the order is reversed insofar as appealed from, on the law and in the exercise of discretion, without costs or disbursements; and it is further,

Ordered that the order of dismissal is reversed insofar as appealed from, on the law, without costs or disbursements, the father's petition is reinstated, and the matter is remitted to the Family Court, Nassau County, for a hearing in accordance herewith and a new determination thereafter of the father's petition.

The parties were divorced by a judgment entered March 5, 2019, which incorporated, but did not merge, a stipulation of settlement of the parties dated May 22, 2018 (hereinafter the 2018 stipulation). Pursuant to the 2018 stipulation, the parties would share joint legal custody of their child, and the father would have primary residential custody. In July 2019, the father moved to modify the 2018 stipulation, and the mother cross-moved to modify the 2018 stipulation. By stipulation of

settlement, which was so-ordered on December 22, 2021, the 2018 stipulation was modified (hereinafter the 2021 order).

In September 2024, the father filed the instant petition to modify the 2021 order so as to award him sole legal and residential custody of the child, and the mother filed a cross-petition to modify the 2021 order so as to award her increased parental access and greater decision-making authority. Thereafter, the father moved to dismiss the mother's cross-petition, to impose sanctions upon the mother, and to prohibit her from filing any additional custody enforcement or modification petitions. In an order dated October 24, 2024, the Family Court, inter alia, prohibited the father from filing any additional petitions relating to custody or parental access without first obtaining prior written permission from the court. In an order of dismissal also dated October 24, 2024, the court, among other things, without a hearing, dismissed the father's petition. The father appeals.

The Family Court improvidently exercised its discretion in prohibiting the father from filing any additional petitions relating to custody or parental access without first obtaining prior written permission from the court. "While public policy generally mandates free access to the courts" (*Matter of Stones v VanDenberge*, 167 AD3d 909, 910 [2018]; see *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 404 [1975]), "a party may forfeit that right if he or she abuses the judicial process by engaging in meritless litigation motivated by spite or ill will" (*Matter of Wieser v Wieser*, 83 AD3d 950, 950 [2011]; see *Matter of Unger v Koren Ha*, 234 AD3d 783, 785 [2025]). Under the circumstances presented here, the father did not abuse the judicial process by filing the petition to modify the 2021 order, as there is no basis in the record to demonstrate that the father filed frivolous motions or petitions or filed motions or petitions out of ill will or spite (see *Matter of Genao-Archibald v Archibald*, 208 AD3d 1185, 1187 [2022]; *Matter of Stones v VanDenberge*, 167 AD3d at 910; *Matter of Price v Jenkins*, 99 AD3d 915, 915 [2012]). Furthermore, the father's motion, inter alia, to dismiss the mother's cross-petition did not contradict his petition for modification (see *Matter of Stefas v Sierra*, 90 AD3d 762, 763-764 [2011]).

"Modification of a court-approved stipulation setting forth the terms of custody or parental access is permissible only upon a showing that there has been a sufficient change in circumstances such that modification is necessary to ensure the best interests and welfare of the child" (*Matter of Burke v*

Squires, 202 AD3d 784, 785 [2022]; see *Matter of Fiore v Gima*, 227 AD3d 1071, 1073 [2024]). “The paramount concern when making such a determination is the best interests of the child under the totality of the circumstances” (*Matter of Shepherd v Mirukaj*, 235 AD3d 769, 770 [2025]; see *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). “Custody determinations should generally be made only after a full and plenary hearing” (*Matter of Liang v O’Brien*, 216 AD3d 1101, 1101 [2023]). “Before subjecting children and their parents to additional litigation, courts require that, before a full hearing is ordered, the parent seeking a change of custody must make an evidentiary showing of a change in circumstances demonstrating a need to conduct a full hearing into whether a change of custody is appropriate in order to insure the child’s best interests” (*Matter of Newton v McFarlane*, 174 AD3d 67, 76-77 [2019]; see *Matter of Liang v O’Brien*, 216 AD3d at 1102).

Here, the Family Court improperly dismissed, without a hearing, the father’s petition. The father’s allegations, which were supported by the requisite threshold evidentiary showing, demonstrated factual issues so as to require a hearing on the issue of whether the 2021 order continued to serve the child’s best interests (see *Matter of Sanna v Delong*, 238 AD3d 880, 881 [2025]; *Matter of McCabe v Truglio*, 214 AD3d 811, 812 [2023]; *Chukwuemeka v Chukwuemeka*, 207 AD3d 432, 434 [2022]). Among other things, the father sufficiently alleged that since the 2021 order was issued, the mother’s mental health had deteriorated such that the parties’ existing custody arrangement may no longer be in the child’s best interests (see *Pettei v Pettei*, 207 AD3d 670, 672 [2022]), and the mother had willingly forfeited scheduled parental access time with the child (see *Matter of Jean v Washington*, 71 AD3d 1145, 1146 [2010]). Because facts material to the best interests analysis and the circumstances surrounding such facts remain in dispute, a hearing is required (see *S.L. v J.R.*, 27 NY3d 558, 564 [2016]; *Matter of Liang v O’Brien*, 216 AD3d at 1102).

The mother’s remaining contention is without merit.

Accordingly, we reverse the order of dismissal insofar as appealed from, reinstate the father’s petition, and remit the matter to the Family Court, Nassau County, for a hearing and a new determination thereafter of the father’s petition. Iannacci, J.P., Ford, Ventura and Quirk, JJ., concur.

9 In the Matter of Rose G.-M. Administration for Children’s Services, Respondent; Jonathan Z., Appellant. (Proceeding No. 1.) In the Matter of David Z. Administration for Children’s Services, Respondent; Jonathan Z., Appellant. (Proceeding No.

2.) In the Matter of Cyruzz Z. Administration for Children's Services, Respondent; Jonathan Z., Appellant. (Proceeding No. 3.) In the Matter of Joshuan G.-M. Administration for Children's Services, Respondent; Jonathan Z., Appellant. (Proceeding No. 4.) [247 NYS3d 754]—

Parent, Child and Family—Abused or Neglected Child—Person Legally Responsible—Preclusion from Parental Access

In related proceedings pursuant to Family Court Act article 10, Jonathan Z. appeals from an order of disposition of the Family Court, Kings County (Erik S. Pitchal, J.), dated February 3, 2025. The order of disposition, insofar as appealed from, upon an order of fact-finding of the same court dated January 28, 2025, made after a fact-finding hearing, finding that Jonathan Z. was a person legally responsible for the subject children Rose G.-M. and Joshuan G.-M. and that Jonathan Z. abused and neglected the subject child Rose G.-M. and derivatively abused and neglected the subject children Joshuan G.-M., David Z., and Cyruzz Z., directed that Jonathan Z. be precluded from parental access with the subject children David Z. and Cyruzz Z. while incarcerated.

Ordered that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced these child protective proceedings against Jonathan Z. (hereinafter the appellant) alleging, inter alia, that he abused and neglected the child Rose G.-M., for whom he allegedly was a person legally responsible. The petitioner also alleged that the appellant derivatively abused and neglected the child Joshuan G.-M., for whom the appellant allegedly was a person legally responsible. In addition, the petitioner alleged that the appellant derivatively abused and neglected the children David Z. and Cyruzz Z., both of whom he is the father.

Contrary to the appellant's contention, the evidence adduced at the fact-finding hearing supported the Family Court's finding that the appellant was a person legally responsible for Rose G.-M. and Joshuan G.-M. The evidence showed that the appellant lived with the mother of those children and all four of the subject children for six years, providing financial support and childcare (*see Matter of Tony C. [Kristine S.—Jadriel L.]*, 226 AD3d 1008, 1010 [2024]).

Contrary to the appellant's further contention, under the circumstances of this case, there was a sound and substantial basis in the record for the Family Court to direct that the appellant be precluded from parental access with David Z. and

Cyruzz Z. while incarcerated (*see Matter of Velasquez v Kattau*, 167 AD3d 912, 913 [2018]; *Matter of Smith v Smith*, 92 AD3d 791, 792 [2012]). Barros, J.P., Voutsinas, Golia and Hom, JJ., concur.

10 In the Matter of Storm A.H. Graham Windham, Respondent; Jahmel W., Appellant, et al., Respondent. [251 NYS3d 275]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Failure to Plan for Return of Child

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from an order of fact-finding and disposition of the Family Court, Queens County (Joan Piccirillo, J.), dated July 18, 2023. The order of fact-finding and disposition, insofar as appealed from, after fact-finding and dispositional hearings, found that the father permanently neglected the subject child, terminated the father's parental rights, and transferred guardianship and custody of the subject child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption.

Ordered that the order of fact-finding and disposition is affirmed insofar as appealed from, without costs or disbursements.

The petitioner commenced this proceeding pursuant to Social Services Law § 384-b, inter alia, to terminate the father's parental rights on the ground of permanent neglect. Following fact-finding and dispositional hearings, the Family Court, among other things, found that the petitioner established by clear and convincing evidence that the father permanently neglected the child, terminated the father's parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of the Administration for Children's Services of the City of New York for the purpose of adoption. The father appeals.

"In a proceeding to terminate parental rights because of permanent neglect, the agency must demonstrate by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to encourage and strengthen the parent-child relationship" (*Matter of Dynasty S.G. [Paula G.]*, 228 AD3d 657, 658 [2024] [internal quotation marks omitted]; *see Matter of Alexis M.B. [Jaclyn R.P.]*, 224 AD3d 679, 680 [2024]). Diligent efforts may include counseling, making suitable arrangements for parental visitations, exploring the possibility of having a proposed family member care for the child, and advising the parents of the child's progress and development (*see Matter of Benz G. [Nadia B.]*, 241 AD3d 684, 685

[2025]; *Matter of Drevon L. [Tiron L.]*, 180 AD3d 909, 910 [2020]). “Once the agency demonstrates that it made diligent efforts to strengthen the parental relationship, it bears the burden of proving that, during the relevant period of time, the parent failed to maintain contact with the child or plan for the child’s future, although physically and financially able to do so” (*Matter of Dynasty S.G. [Paula G.]*, 228 AD3d at 658 [internal quotation marks omitted]; see *Matter of Orazio R. [Nanci P.]*, 233 AD3d 689, 690 [2024]). A period of incarceration does not obviate the obligation to plan for the child’s future (see *Matter of Benz G. [Nadia B.]*, 241 AD3d at 687).

Here, contrary to the father’s contention, the petitioner established, by clear and convincing evidence, that it made diligent efforts to encourage and strengthen the parent-child relationship. The petitioner established that it kept the father apprised of the child’s welfare, explored the possibility of having the paternal grandmother care for the child, as the father proposed, and scheduled consistent visitation between the father and the child (see *Matter of Drevon L. [Tiron L.]*, 180 AD3d at 910; *Matter of Justin A.G.M. [Richard G.V.]*, 167 AD3d 1016, 1017 [2018]). Further, the petitioner established that, despite its diligent efforts, the father failed to plan for the return of the child. The father failed to consistently attend scheduled visits with the child, suggest viable planning resources, or provide the petitioner with information to assist in assessing whether the father had suitable housing. Contrary to the father’s contention, a suspended judgment is not appropriate where, as here, a child has lived with his or her foster parent for most of the child’s life, is strongly bonded to the foster parent, and is well cared for in the foster parent’s home (see *Matter of Ahking-Tyheem C.J. [Letitia M.E.]*, 238 AD3d 754, 757 [2025]; *Matter of Amira W.H. [Tamara T.H.]*, 207 AD3d 546, 548 [2022]).

Accordingly, the Family Court properly found that the father permanently neglected the child, terminated the father’s parental rights, and transferred guardianship and custody of the child to the petitioner and the Commissioner of the Administration for Children’s Services of the City of New York for the purpose of adoption. Genovesi, J.P., Ford, Landicino and Quirk, JJ., concur.

11 In the Matter of Viola J., Respondent, v Baron A., Respondent, Nathalia M., Appellant, and Administration for Children’s Services, Respondent. [251 NYS3d 278]—

Parent, Child and Family—Custody—Claim of Grandparent—Parent’s Persis-

tent Neglect

Parent, Child and Family—Custody—Sole Custody to Grandparent—Child's Best Interests

Parent, Child and Family—Visitation—Supervised Parental Access

In a proceeding pursuant to Family Court Act article 6, the mother appeals from (1) an order of the Family Court, Kings County (Ilana Gruebel, J.), dated November 22, 2024, (2) an order of the same court dated December 6, 2024, and (3) an order of the same court also dated December 6, 2024. The order dated November 22, 2024, awarded temporary legal and physical custody of the child to the maternal grandmother. The first order dated December 6, 2024, after a hearing, granted the maternal grandmother's petition for sole legal and physical custody of the child, limited the mother's parental access with the child to supervised parental access, and directed the issuance of a final order of protection in favor of the maternal grandmother and the child and against the mother for a period of two years. The second order dated December 6, 2024, granted the same relief to the maternal grandmother, limited the mother's parental access with the child to supervised parental access, and directed the issuance of a final order of protection in favor of the maternal grandmother and the child and against the mother for a period of two years.

Ordered that the appeal from the order dated November 22, 2024, is dismissed, without costs or disbursements, as that order was superseded by the orders dated December 6, 2024; and it is further,

Ordered that the orders dated December 6, 2024, are affirmed, without costs or disbursements.

The petitioner (hereinafter the maternal grandmother) is the maternal grandmother of a child. In August 2022, while a neglect proceeding pursuant to Family Court Act article 10 was pending against the mother, the maternal grandmother commenced this proceeding pursuant to Family Court Act article 6 for sole legal and physical custody of the child, alleging that the mother was unfit and had persistently neglected the child. The child had been in the care and custody of the maternal grandmother since July 2021 after he was placed following an order of removal. In an order dated November 22, 2024, the Family Court awarded temporary legal and physical custody of the child to the maternal grandmother. Thereafter, in an order dated December 6, 2024, after a hearing, the court granted the maternal grandmother's petition for sole legal and physical custody of the child, limited the mother's parental access with the child to supervised parental access, and directed the issuance of a final order of protection in favor of the maternal

grandmother and the child and against the mother for a period of two years. In a second order dated December 6, 2024, the court granted the same relief to the maternal grandmother, limited the mother's parental access with the child to supervised parental access, and directed the issuance of a final order of protection in favor of the maternal grandmother and the child and against the mother for a period of two years. The mother appeals.

The Family Court properly determined that the maternal grandmother established the existence of extraordinary circumstances such that the mother relinquished her superior right to custody of the child. In a child custody dispute between a parent and a nonparent, "the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or similar extraordinary circumstances" (*Matter of Jamison v Britton*, 141 AD3d 522, 524 [2016]; see *Matter of Bennett v Jeffreys*, 40 NY2d 543, 546 [1976]). Here, the evidence established the mother's persistent neglect of the child based, inter alia, on her inability to control her temper, words, and actions in front of the child and her failure to abide by the supervising agency's rules (see *Matter of Pierce v Joyner*, 240 AD3d 786, 787 [2025]). Moreover, the maternal grandmother demonstrated that she had amply provided for the child's physical, emotional, and financial needs for an extended period of time (see *Matter of Robinson v McNair*, 90 AD3d 759, 760 [2011]).

Contrary to the mother's contention, the Family Court's determination that an award of sole legal and physical custody of the child to the maternal grandmother was in the child's best interests has a sound and substantial basis in the record (see *Matter of Madelyn E.P. [Christine L.-B.—Kevin O.]*, 196 AD3d 489 [2021]; *Matter of Brown v Elfaiz*, 191 AD3d 871 [2021]). The record established that the child had been in the custody of the maternal grandmother for more than two years and the maternal grandmother had proven herself to be a stable influence in the child's life by being the child's primary caregiver and providing for his food, clothing, medical, and dental needs (see *Matter of Pierce v Joyner*, 240 AD3d at 787). Accordingly, the court properly granted the maternal grandmother's petition for sole legal and physical custody of the child.

The Family Court properly limited the mother's parental access with the child to supervised parental access. Determinations regarding parental access should be based on the best interests of the child under the totality of the circumstances

(see *Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Matter of Skeete v Hamilton*, 78 AD3d 1187 [2010]). Supervised parental access is appropriate only where it is established that unsupervised parental access would be detrimental to the child (see *Liverance v Liverance*, 148 AD3d 695, 695 [2017]; *Matter of Mikell v Bermejo*, 139 AD3d 954, 955 [2016]). Here, the record established that the mother had made increasingly threatening statements to both the maternal grandmother and the child. Accordingly, the court's determination that parental access should be supervised is supported by a sound and substantial basis in the record and should not be disturbed (see *Matter of Tecza v Alija*, 138 AD3d 872 [2016]; *Matter of Bonet v Bonet*, 121 AD3d 978, 978 [2014]). For the same reasons, the court also properly directed the issuance of a final order of protection in favor of the maternal grandmother and the child and against the mother for a period of two years.

The mother's remaining contention is without merit. Dillon, J.P., Dowling, Landicino and McCormack, JJ., concur.

12 In the Matter of Jalisa James, Appellant, v Sean Bailey, Respondent. [247 NYS3d 749]—

Parent, Child and Family—Family Offense Proceeding—Harassment—True Threat of Intended Physical Harm

In a proceeding pursuant to Family Court Act article 8, the petitioner appeals from an order of the Family Court, Queens County (Monica D. Shulman, J.), dated February 21, 2025. The order, after a hearing, in effect, denied the petition and dismissed the proceeding.

Ordered that the order is affirmed, without costs or disbursements.

The petitioner and the respondent have one child in common. In June 2024, the petitioner commenced this family offense proceeding against the respondent, alleging that he had committed, inter alia, various family offenses against her, including harassment in the second degree, and seeking an order of protection. Following a hearing, the Family Court determined that the credible evidence failed to support a finding that a family offense was committed, and, in effect, denied the petition and dismissed the proceeding. The petitioner appeals, asserting that the credible evidence established that the father committed the family offense of harassment in the second degree.

“In a family offense proceeding, the petitioner has the burden of establishing the offense by a fair preponderance of the evidence” (*Matter of Martinez v Toole*, 239 AD3d 855, 857

[2025], quoting *Matter of Davis v Wright*, 140 AD3d 753, 754 [2016]). “The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and that court’s determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record” (*Matter of Levay v Gur-rera*, 236 AD3d 1032, 1033 [2025], quoting *Matter of Mitchell-George v George*, 234 AD3d 969, 969 [2025]).

Contrary to the petitioner’s contention, the Family Court did not err in finding that the credible evidence failed to establish that the respondent committed the family offense of harassment in the second degree (Penal Law § 240.26). “A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person[,] [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same” (*id.*). Contrary to the petitioner’s contention, a threatening statement must be a “true threat” of intended physical harm in order to establish the family offense of harassment in the second degree pursuant to Penal Law § 240.26 (1) (*People v Lagano*, 39 NY3d 108, 112 [2022] [internal quotation marks omitted]). The petitioner also failed to show that the respondent’s conduct during an incident in 2009 was committed with the requisite intent “to harass, annoy or alarm” the petitioner (*Matter of Et-man v Adjoor*, 144 AD3d 678, 679 [2016]; see Penal Law § 240.26 [1]). Therefore, the petitioner failed to establish, by a fair preponderance of the evidence, that the respondent committed the family offense of harassment in the second degree (see *Matter of Butler-Moore v Butler*, 149 AD3d 1070, 1071 [2017]; *Matter of Johnson v Johnson*, 146 AD3d 954, 955 [2017]; *Matter of Davis v Wright*, 140 AD3d at 754). Accordingly, we affirm. Chambers, J.P., Dowling, Wan and McCormack, JJ., concur.

13 In the Matter of Adelaide Mackey, Appellant, v Jerome Reaves, Respondent. (Proceeding No. 1.) In the Matter of Jerome Reaves, Respondent, v Adelaide Mackey, Appellant. (Proceeding No. 2.) [250 NYS3d 626]—

Parent, Child and Family—Custody—Relocation with Child—Sole Physical Custody to Remaining Parent

In related proceedings pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Queens County (Caterina De Peralta, Ct. Atty. Ref.), dated October 1, 2024. The order, insofar as appealed from, after a hearing, granted that branch of the father’s petition which was

for sole physical custody of the parties' child and denied those branches of the mother's petition which were for sole physical custody of the parties' child and for permission to relocate with the parties' child to Maryland.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

The parties are the parents of one child, born in 2015. In September 2023, the father commenced a proceeding, inter alia, for sole physical custody of the child. In October 2023, the mother commenced a separate proceeding, among other things, for sole physical custody of the child and for permission to relocate with the child to Maryland. After a hearing, in an order dated October 1, 2024, the Family Court, inter alia, granted that branch of the father's petition which was for sole physical custody of the child and denied those branches of the mother's petition which were for sole physical custody of the child and for permission to relocate with the child to Maryland. The mother appeals.

"The paramount consideration in any custody dispute is the best interests of the child" (*Matter of Pacheco v Maldonado*, 221 AD3d 822, 822 [2023] [internal quotation marks omitted]; see *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). "The determination of the child's best interests is to be made based on all the relevant circumstances" (*Matter of Chung v Toppin*, 209 AD3d 647, 648 [2022] [internal quotation marks omitted]). "In determining the child's best interests, the court must consider, among other things, (1) which alternative will best promote stability; (2) the available home environments; (3) the past performance of each parent; (4) each parent's relative fitness, including his or her ability to guide the child, provide for the child's overall well being, and foster the child's relationship with the noncustodial parent; and (5) the child's desires" (*Rosenstock v Rosenstock*, 162 AD3d 702, 703 [2018] [internal quotation marks omitted]; see *Eschbach v Eschbach*, 56 NY2d at 172-173). "Since the Family Court's determination with respect to custody and parental access depends to a great extent upon its assessment of the credibility of the witnesses and upon the character, temperament, and sincerity of the parties, its findings are generally accorded great deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Bristow v Patrice*, 221 AD3d 684, 685 [2023]).

"A parent seeking to relocate with a child bears the burden of establishing by a preponderance of the evidence that the proposed move would be in the child's best interests" (*Matter*

of *Squillini v Tomasovich*, 213 AD3d 943, 944 [2023], quoting *Quinn v Quinn*, 134 AD3d 688, 689 [2015]). “In determining whether a proposed move is in a child’s best interests, courts are ‘free to consider and give appropriate weight to all of the factors that may be relevant to the determination’” (*id.*, quoting *Matter of Tropea v Tropea*, 87 NY2d 727, 740 [1996]). “In the context of an initial custody determination, however, the strict application of the factors relevant to a relocation petition is not required” (*id.* at 945; see *Joseph P.A. v Martha A.*, 237 AD3d 1146, 1147 [2025]).

Contrary to the mother’s contention, the Family Court’s determination that an award of sole physical custody of the child to the father was in the child’s best interests has a sound and substantial basis in the record. The record established, inter alia, that since his birth the eight-year-old child lived with the father and the paternal grandmother in a stable home where the child’s special needs had been met and that the father facilitated regular contact between the child and the mother since the mother relocated to Maryland (see *Matter of Martinez v Toole*, 239 AD3d 855, 857 [2025]; *Matter of Paisley v Moon-sammy*, 213 AD3d 941, 942 [2023]).

Accordingly, the Family Court properly granted that branch of the father’s petition which was for sole physical custody of the child and denied those branches of the mother’s petition which were for sole physical custody of the child and for permission to relocate with the child to Maryland. Dillon, J.P., Chambers, Wan and Love, JJ., concur.

14 In the Matter of Ashana R. Orange County Department of Social Services, Respondent; Paul R., Appellant. [251 NYS3d 273]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Failure to Comply with Terms of Suspended Judgment

In a proceeding pursuant to Social Services Law § 384-b, the father appeals from an order of the Family Court, Orange County (Christine P. Krahulik, J.), dated December 12, 2024. The order, after a hearing, found that the father violated the terms and conditions of a suspended judgment contained in an order of the same court dated November 21, 2023, lifted the suspended judgment, terminated the father’s parental rights, and transferred custody and guardianship of the subject child to the Orange County Department of Social Services for the purpose of adoption.

Ordered that the order dated December 12, 2024, is affirmed, without costs or disbursements.

The Orange County Department of Social Services (hereinafter DSS) commenced this proceeding pursuant to Social Services Law § 384-b to terminate the father's parental rights to the subject child on the ground of permanent neglect. In an order dated November 21, 2023, the Family Court found that the father permanently neglected the child and terminated the father's parental rights, but imposed a suspended judgment with certain terms and conditions. Thereafter, DSS moved to find the father to be in violation of the terms and conditions of the suspended judgment, to lift the suspended judgment, and to terminate the father's parental rights. After a hearing, in an order dated December 12, 2024, the court found that the father violated the terms and conditions of the suspended judgment, lifted the suspended judgment, terminated the father's parental rights, and transferred custody and guardianship of the child to DSS for the purpose of adoption. The father appeals.

The Family Court may lift a suspended judgment after a hearing if it finds, by a preponderance of the evidence, that the parent failed to comply with one or more of the conditions of the suspended judgment (*see Matter of Marish G. [Maria E.G.]*, 215 AD3d 966, 966 [2023]; *Matter of Derrick D.A. [Shavonna L.L.D.]*, 134 AD3d 928, 929 [2015]). The court's credibility findings should be accorded great deference, as it had direct access to the parties and was in the best position to evaluate their testimony, character, and sincerity (*see Matter of Derrick D.A. [Shavonna L.L.D.]*, 134 AD3d at 929; *Matter of Christyn Ann D.*, 26 AD3d 491, 492 [2006]). Here, the court properly found, by a preponderance of the evidence, that the father failed to comply with several of the terms and conditions of the suspended judgment (*see Matter of Hailey B. [Melissa B.]*, 152 AD3d 677, 678 [2017]; *Matter of Derrick D.A. [Shavonna L.L.D.]*, 134 AD3d at 929).

Further, the evidence adduced at the hearing supported the Family Court's determination that it was in the child's best interests to terminate the father's parental rights and free the child for adoption (*see Matter of William U.L. [Rachel D.H.]*, 139 AD3d 732, 733 [2016]; *Matter of Derrick D.A. [Shavonna L.L.D.]*, 134 AD3d at 929).

The father's remaining contention is without merit. Duffy, J.P., Christopher, Warhit and Goldberg Velazquez, JJ., concur.

15 In the Matter of Christine M. Schneider, Appellant, v Board of Education of the City School District of the City of New York et al., Respondents. [251 NYS3d 258]—

In a proceeding pursuant to CPLR article 75 to vacate an arbitration award dated September 10, 2021, and pursuant to CPLR article 78 to review a determination of the New York City Department of Education dated October 2, 2021, placing the petitioner on leave without pay, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Queens County (Timothy J. Dufficy, J.), dated May 19, 2022. The order and judgment, insofar as appealed from, granted the respondents' cross-motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition, denied the petition, and, in effect, dismissed the proceeding.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs.

The petitioner is a tenured teacher for the New York City Department of Education (hereinafter the DOE). In August 2021, the Commissioner of the New York City Department of Health and Mental Hygiene issued an order (hereinafter the vaccine mandate), requiring, among others, employees of the DOE to be vaccinated against COVID-19 and provide proof of such vaccination. In September 2021, following arbitration between the DOE and the United Federation of Teachers (hereinafter UFT), the union representing a majority of teachers in New York City public schools, an arbitrator issued an award (hereinafter the Impact Award), which established a process for the implementation of the vaccine mandate. The Impact Award provided, among other things, that "[a]ny unvaccinated employee who has not requested an exemption . . . , or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay," that "[e]mployees who become vaccinated while on such leave without pay and provide appropriate documentation . . . prior to November 30, 2021, shall have a right of return to the same school," and that "[b]eginning December 1, 2021, the DOE shall seek to unilaterally separate" such employees who remained on leave without pay.

On October 2, 2021, the petitioner was placed on leave without pay by the DOE after failing to submit proof of vaccination by the deadline. The petitioner then commenced this proceeding pursuant to CPLR article 75 to vacate the Impact Award and pursuant to CPLR article 78, to review the DOE's determination dated October 2, 2021, placing her on leave without pay, alleging, inter alia, that the DOE violated Education Law §§ 3020 and 3020-a by doing so without providing hearings under those statutes. The respondents cross-moved pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition.

In an order and judgment dated May 19, 2022, the Supreme Court, among other things, granted the respondents' cross-motion, denied the petition, and, in effect, dismissed the proceeding. The petitioner appeals.

Initially, under the circumstances of this case, the petitioner waived her objections to the timeliness of the respondents' cross-motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition by accepting it without any objection (*see Oparaji v Duran*, 18 AD3d 725, 725-726 [2005]; *Ligotti v Wilson*, 287 AD2d 550, 551 [2001]).

Since the petitioner was not a party to the arbitration between the DOE and the UFT, she does not have standing to seek review of the Impact Award (*see* CPLR 7511; *Matter of O'Reilly v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 42 NY3d 986, 990-991 [2024]; *Matter of Soto [Goldman]*, 7 NY2d 397, 399 [1960]; *Matter of Baksh v New York Racing Assn., Inc.*, 225 AD3d 689, 690 [2024]).

Moreover, contrary to the petitioner's contention, she was not entitled to the hearing procedures outlined in Education Law §§ 3020 and 3020-a before being placed on leave without pay for failure to comply with the vaccine mandate because the mandate is a condition of employment (*see Matter of O'Reilly v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 42 NY3d at 991).

The petitioner's remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court properly granted the respondents' cross-motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition, denied the petition, and, in effect, dismissed the proceeding. Genovesi, J.P., Ford, Love and Golia, JJ., concur.

16 In the Matter of Nicole Serra-Gonzalez, Appellant, v Board of Education of the City School District of the City of New York et al., Respondents. [247 NYS3d 750]—

Schools—Teachers—Placement of Unvaccinated Teachers on Leave with Pay

In a proceeding pursuant to CPLR article 75 to vacate an arbitration award dated September 10, 2021, and pursuant to CPLR article 78 to review a determination of the New York City Department of Education dated October 2, 2021, placing the petitioner on leave without pay, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Kings County (Carl J. Landicino, J.), dated October 6, 2022. The order and judgment, insofar as appealed from, granted the

respondents' cross-motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition, denied the petition, and dismissed the proceeding.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs.

The petitioner is a tenured teacher for the New York City Department of Education (hereinafter the DOE). In August 2021, the Commissioner of the New York City Department of Health and Mental Hygiene issued an order (hereinafter the vaccine mandate), requiring, among others, employees of the DOE to be vaccinated against COVID-19 and provide proof of such vaccination. In September 2021, following arbitration between the DOE and the United Federation of Teachers (hereinafter UFT), the union representing a majority of teachers in New York City public schools, an arbitrator issued an award (hereinafter the Impact Award), which established a process for the implementation of the vaccine mandate. The Impact Award provided, among other things, that "[a]ny unvaccinated employee who has not requested an exemption . . . , or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay," that "[e]mployees who become vaccinated while on such leave without pay and provide appropriate documentation . . . prior to November 30, 2021, shall have a right of return to the same school," and that "[b]eginning December 1, 2021, the DOE shall seek to unilaterally separate" such employees who remained on leave without pay.

On October 2, 2021, the petitioner was placed on leave without pay by the DOE after failing to submit proof of vaccination by the deadline. The petitioner then commenced this proceeding pursuant to CPLR article 75 to vacate the Impact Award and pursuant to CPLR article 78 to review the DOE's determination dated October 2, 2021, placing her on leave without pay, alleging, inter alia, that the DOE violated Education Law §§ 3020 and 3020-a by doing so without providing hearings under those statutes. The respondents cross-moved pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition. In an order and judgment dated October 6, 2022, the Supreme Court granted the respondents' cross-motion, denied the petition, and dismissed the proceeding. The petitioner appeals.

Since the petitioner was not a party to the arbitration between the DOE and the UFT, she does not have standing to seek review of the Impact Award (*see id.* § 7511; *Matter of O'Reilly v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 42 NY3d 986, 990-991 [2024]; *Matter of Soto [Goldman]*,

7 NY2d 397, 399 [1960]; *Matter of Baksh v New York Racing Assn., Inc.*, 225 AD3d 689, 690 [2024]).

Moreover, contrary to the petitioner's contention, she was not entitled to the hearing procedures outlined in Education Law §§ 3020 and 3020-a before being placed on leave without pay for failure to comply with the vaccine mandate because the mandate is a condition of employment (see *Matter of O'Reilly v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 42 NY3d at 991).

The petitioner's remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court properly granted the respondents' cross-motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition, denied the petition, and dismissed the proceeding. Genovesi, J.P., Ford, Love and Golia, JJ., concur.

17 In the Matter of Maria Fabia Simonetti, Appellant, v Gerard Anthony Simonetti, Respondent. [248 NYS3d 321]—

Parent, Child and Family—Custody—Subject Matter Jurisdiction—New York Not Child's Home State

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Kings County (Sandra M. Munoz, J.), dated April 3, 2024. The order dismissed the mother's petition for custody of the parties' child with prejudice for lack of subject matter jurisdiction.

Ordered that the order is affirmed, with costs.

The parties' child was born in Brazil in 2011. In 2024, the mother commenced a custody proceeding in the Family Court, Kings County.

Contrary to the mother's contentions, the Family Court properly dismissed her petition for custody of the child with prejudice for lack of subject matter jurisdiction. The record before the court confirmed that the child had not resided in New York "for at least six consecutive months immediately before the commencement of [this] proceeding" and that New York was therefore not the child's home state (*Matter of Louis-Charles v White*, 209 AD3d 1030, 1030 [2022]; see Domestic Relations Law §§ 75-a [7]; 76 [1] [a]; *Matter of Gathiaka v Mubea*, 202 AD3d 678, 678 [2022]). Indeed, the child has never lived in the United States. The child was born in Brazil, has lived there her entire life, has not traveled to the United States, and the issue of custody was previously determined by a Brazilian court.

Accordingly, the Family Court properly dismissed the

mother's custody petition with prejudice for lack of subject matter jurisdiction.

The parties' remaining contentions either are not properly before this Court, are without merit, or need not be reached in light of our determination. Barros, J.P., Voutsinas, Golia and Hom, JJ., concur.

18 In the Matter of Shirley Singh, Respondent, v Brooke Harry, Appellant. [252 NYS3d 156]—

Parent, Child and Family—Support—Doctrine of Law of Case—Previously Resolved on Merits

In a proceeding pursuant to Family Court Act article 5-B, Brooke Harry appeals from an order of the Family Court, Queens County (Connie Gonzalez, J.), dated June 28, 2024. The order denied his objections to an amended order of the same court (Jameelah Hayes, S.M.) dated April 26, 2024, which, after a hearing, denied his motion to vacate the registration of a foreign child support order.

Ordered that the order dated June 28, 2024, is affirmed, without costs or disbursements.

Brooke Harry (hereinafter the appellant) commenced a child custody proceeding in Canada in the Ontario Court of Justice (hereinafter the Ontario court). In that proceeding, the Ontario court issued a temporary order dated August 15, 2006, which, inter alia, awarded custody of the appellant's children to the children's maternal grandparents and directed the appellant to pay a specified amount of child support (hereinafter the Ontario temporary support order). The Ontario temporary support order was registered in the Family Court, Queens County, pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B) on or about June 2, 2017. The appellant subsequently commenced a proceeding (hereinafter the prior proceeding) to vacate the registration of the Ontario temporary support order. The prior proceeding ultimately was dismissed in an order by a Support Magistrate upon a finding that the appellant failed to establish any defense that would contest the validity or registration of the Ontario temporary support order. The appellant filed objections to the Support Magistrate's order, including that the Ontario court lacked personal jurisdiction over him. His objections were denied, and this Court, in a decision and order dated March 31, 2021, affirmed the denial of those objections (*see Matter of Harry v Singh*, 192 AD3d 1106 [2021]).

Meanwhile, the Ontario court issued an amended final order, dated July 3, 2007, among other things, directing the appellant

to pay the specified amount of child support (hereinafter the Ontario final support order). The Ontario final support order was registered in the Family Court, Queens County, on or about August 22, 2022. The maternal grandmother commenced this proceeding to enforce the Ontario final order of support, and the appellant moved to vacate the registration of the Ontario final order of support. In an amended order dated April 26, 2024, the Support Magistrate denied the appellant's motion. The appellant filed objections to the Support Magistrate's order, and, in an order dated June 28, 2024, the Family Court denied the objections. This appeal ensued.

A party seeking to vacate the registration of a registered foreign support order has the burden of proving one or more of certain enumerated defenses (*see* Family Ct Act § 580-607 [a]). If the contesting party does not establish one of the enumerated defenses, the court is required by statute to confirm the registered foreign support order (*see id.* § 580-607 [c]).

Here, the appellant's contention that the Ontario court lacked personal jurisdiction over him was raised in the prior proceeding in his objections to the order denying his petition to vacate the registration of the Ontario temporary order of support. Since this Court previously resolved that issue on the merits and against the appellant, the doctrine of the law of the case forecloses re-examination of that issue (*see Matter of Norton v Town of Islip*, 167 AD3d 624, 626 [2018]; *Matter of Chung Li*, 165 AD3d 1105, 1106 [2018]). The appellant failed to establish any of the other enumerated defenses to the registration of the Ontario final order of support. Accordingly, the Family Court properly denied the appellant's objections to the Support Magistrate's order (*see Matter of Harry v Singh*, 192 AD3d at 1107; *Matter of Barclay v Hutchinson*, 129 AD3d 953 [2015]). Dillon, J.P., Brathwaite Nelson, Landicino and Quirk, JJ., concur.

19 Nationstar Mortgage, LLC, Appellant, v Donato Balsamo, Respondent, et al., Defendant. [251 NYS3d 706]—

Process—Service of Process—Extension of Time—Good Cause

Process—Service of Process—Extension of Time—Prejudice to Opposing Party

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Nassau County (David P. Sullivan, J.), dated November 14, 2023. The order, insofar as appealed from, in effect, upon reargument, adhered to a determination in an order of the same court entered May 31, 2023, denying the plaintiff's application pursuant to CPLR 306-b to

extend the time to serve the summons and complaint upon the defendant Donato Balsamo.

Ordered that the order dated November 14, 2023, is affirmed insofar as appealed from, with costs.

This action to foreclose a mortgage was commenced in 2009. The defendant Donato Balsamo (hereinafter the defendant) failed to answer the complaint. In May 2018, the plaintiff moved for a judgment of foreclosure and sale. The defendant opposed the motion and cross-moved, inter alia, pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction. In an order entered October 24, 2018, the Supreme Court, among other things, granted the plaintiff's motion and denied that branch of the defendant's cross-motion. A judgment of foreclosure and sale was entered, inter alia, directing the sale of the property. In a decision and order dated October 7, 2020, this Court, among other things, reversed the judgment of foreclosure and sale, determining that although the plaintiff demonstrated, prima facie, that the defendant had been properly served, the defendant rebutted that prima facie showing (*see Nationstar Mtge., LLC v Balsamo*, 187 AD3d 769, 769 [2020]). The matter was remitted to the Supreme Court, Nassau County, inter alia, for a hearing to determine the validity of service of process upon the defendant (*id.* at 770).

The hearing took place on May 9, 2023, at which the plaintiff produced no witnesses and the Supreme Court determined that the plaintiff failed to demonstrate that the defendant was properly served. At the hearing, the plaintiff made an application pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant. In an order entered May 31, 2023, the court, among other things, denied the application. Thereafter, the plaintiff moved, inter alia, for leave to reargue its application pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant. In an order dated November 14, 2023, the court, among other things, in effect, granted reargument and, upon reargument, adhered to the determination denying the plaintiff's application pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant. The plaintiff appeals.

"Service of the summons and complaint . . . shall be made within one hundred twenty days after the commencement of the action or proceeding" (*id.*). "If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to

that defendant, or upon good cause shown or in the interest of justice, extend the time for service” (*id.*). “‘Good cause’ and ‘interest of justice’ are two separate and independent statutory standards” (*Wells Fargo Bank, NA v Barrella*, 166 AD3d 711, 713 [2018] [internal quotation marks omitted]). “To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service” (*id.* [internal quotation marks omitted]). Good cause may be absent where a plaintiff did not make an attempt to serve a defendant within the 120-day period after the complaint was filed (*see BAC Home Loans Servicing, L.P. v Rogener*, 171 AD3d 996, 998 [2019]). “[A]n attempt at service that later proves defective cannot be the basis for a ‘good cause’ extension of time to serve process pursuant to CPLR 306-b” (*Estate of Fernandez v Wyckoff Hgts. Med. Ctr.*, 162 AD3d 742, 743 [2018]; *see Hobbins v North Star Orthopedics, PLLC*, 148 AD3d 784, 787-788 [2017]).

Here, the plaintiff failed to demonstrate that it had previously made a valid attempt to serve the defendant within the 120-day period after the complaint was filed. This Court previously determined that the defendant rebutted the plaintiff’s prima facie showing of valid service (*see Nationstar Mtge., LLC v Balsamo*, 187 AD3d at 769). The plaintiff did not produce any further evidence in support of its contention that service was valid. Therefore, the plaintiff did not demonstrate good cause for an extension (*see Estate of Fernandez v Wyckoff Hgts. Med. Ctr.*, 162 AD3d at 743).

“[T]he more flexible ‘interest of justice’ standard accommodates late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant” (*HSBC Bank, USA v Gibatov*, 183 AD3d 555, 556 [2020] [internal quotation marks omitted]). “‘[T]he court may consider diligence, or lack thereof, along with any other relevant factor . . . , including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant’ ” (*State of New York Mtge. Agency v Braun*, 182 AD3d 63, 66-67 [2020], quoting *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]). “Where the plaintiff’s delay in serving a defendant is protracted, and the defendant has no notice of the action for a protracted period of time, an inference of substantial prejudice arises” (*Wells Fargo Bank, NA v Barrella*, 166 AD3d at 714). “The determination of whether to grant the extension in the interest of justice is within the discretion of the motion court” (*Rosenzweig v 600 N. St., LLC*, 35 AD3d 705, 706 [2006]).

Here, although the plaintiff demonstrated a potentially meritorious cause of action, other factors weighed against granting an extension of time to serve the complaint in the interest of justice. After this Court remitted the matter to the Supreme Court, Nassau County, for a hearing to determine the validity of service of process upon the defendant (*see Nationstar Mtge., LLC v Balsamo*, 187 AD3d at 769), the plaintiff failed to promptly request an extension of time. The plaintiff also failed to rebut the inference of substantial prejudice that arose from its protracted delay in serving the defendant, as, contrary to the plaintiff's contention, there is no indication in the record that the defendant had notice of this action until nearly nine years after the action was commenced (*see Wells Fargo Bank, NA v Barrella*, 166 AD3d at 714). Under these circumstances, the plaintiff failed to establish its entitlement to an extension of time to serve the defendant under the interest of justice standard (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 107; *Wells Fargo Bank, NA v Barrella*, 166 AD3d at 714).

Accordingly, the Supreme Court providently exercised its discretion by, in effect, upon reargument, adhering to the determination denying the plaintiff's application pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendant. Connolly, J.P., Chambers, Voutsinas and Landicino, JJ., concur.

20 Marcus Nedd, Plaintiff, v Bernadette Nedd, Defendant. Maryam Jahedi-Perez, Nonparty Appellant. [251 NYS3d 698]—

Attorney and Client—Frivolous Conduct—Withdrawal as Counsel—Not Required to Move by Order to Show Cause

In an action for a divorce and ancillary relief, nonparty Maryam Jahedi-Perez, former counsel for the defendant, appeals, by permission, from (1) an order of the Supreme Court, Kings County (Esther M. Morgenstern, J.), dated July 20, 2022, and (2) an order of the same court dated July 26, 2022. The order dated July 20, 2022, sua sponte, imposed a sanction pursuant to 22 NYCRR 130-1.1 against nonparty Maryam Jahedi-Perez. The order dated July 26, 2022, directed nonparty Maryam Jahedi-Perez to pay costs in the form of reimbursement of attorneys' fees in the sum of \$1,375 to the plaintiff's counsel.

Ordered that the orders are reversed, on the law, without costs or disbursements.

The parties in this action for a divorce and ancillary relief were scheduled to appear in court on July 20, 2022, for a continued trial. Two days prior to this scheduled court appear-

ance, at the defendant's request, Maryam Jahedi-Perez (hereinafter the appellant), then counsel for the defendant, executed a consent to change attorney form. The fully executed consent to change attorney form, which was signed by the appellant, the defendant, and the defendant's new counsel, was filed on the New York State Courts Electronic Filing System on the same date that it was executed and was received by the plaintiff's counsel. On the date of the scheduled continued trial, in an order dated July 20, 2022, the Supreme Court, sua sponte, imposed a sanction pursuant to 22 NYCRR 130-1.1 against the appellant. Thereafter, in an order dated July 26, 2022, the court directed the appellant to pay costs in the form of reimbursement of attorneys' fees in the sum of \$1,375 to the plaintiff's counsel for the July 20, 2022 court appearance. These appeals ensued.

The Supreme Court erred in imposing a sanction pursuant to 22 NYCRR 130-1.1 against the appellant and directing the appellant to pay costs in the form of reimbursement of attorneys' fees in the sum of \$1,375 to the plaintiff's counsel for the July 20, 2022 court appearance. "A court does not have the authority to impose a penalty or sanction absent enabling legislation or court rule authorizing the penalty or sanction" (*Matter of Fernandez v Nigro*, 178 AD3d 703, 704 [2019]). "The court, in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1 [a]). Conduct is frivolous if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (*id.* § 130-1.1 [c] [1], [2]; *see Astrada v Archer*, 71 AD3d 803, 807 [2010]). The court may order the payment of such costs "upon the court's own initiative, after a reasonable opportunity to be heard" (22 NYCRR 130-1.1 [d]; *see U.S. Bank N.A. v Tait*, 234 AD3d 889, 892 [2025]).

Here, the record does not reflect that the appellant engaged in frivolous conduct. Contrary to the Supreme Court's determination, the appellant was not required to move by order to show cause to be relieved as counsel, as the appellant properly followed the requirements of CPLR 321 (b) (1) in executing a consent to change attorney form (*see Matter of Cassini*, 182 AD3d 13, 40-41 [2020]). Moreover, the court did not give the appellant a reasonable opportunity to be heard before directing

the payment of costs (*see Matter of Fernandez v Nigro*, 178 AD3d at 705; *Oppedisano v Oppedisano*, 138 AD3d 1080, 1081 [2016]).

In light of the foregoing, we need not reach the appellant's remaining contention. Chambers, J.P., Wooten, Dowling and Landicino, JJ., concur.

21 Marcus Nedd, Respondent, v Bernadette Nedd, Appellant. [250 NYS3d 629]—

Husband and Wife and Other Domestic Relationships—Marital Residence—Determination as Marital Property—Executed Subsequent Deed during Marriage

Husband and Wife and Other Domestic Relationships—Equitable Distribution—Award of 50% Interest in Marital Residence

In an action for a divorce and ancillary relief, the defendant appeals from a judgment of divorce of the Supreme Court, Kings County (Esther M. Morgenstern, J.), dated August 1, 2023. The judgment of divorce, insofar as appealed from, upon a decision of the same court dated March 29, 2023, made after a nonjury trial, awarded the plaintiff a 50% interest in the marital residence.

Ordered that the judgment of divorce is affirmed insofar as appealed from, with costs.

The parties were married on August 26, 1995. The plaintiff commenced this action for a divorce and ancillary relief on December 23, 2020. Following a nonjury trial, the Supreme Court issued a decision, among other things, equitably distributing the marital residence. Thereafter, the court issued a judgment of divorce dated August 1, 2023, *inter alia*, awarding the plaintiff a 50% interest in the marital residence. The defendant appeals.

Marital property is “all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held” (Domestic Relations Law § 236 [B] [1] [c]). Separate property includes, among other things, “property acquired before marriage” (*id.* § 236 [B] [1] [d] [1]). Separate property “can be transmuted into marital property when the actions of the titled spouse demonstrate his [or her] intent to transform the character of the property from separate to marital” (*Spera v Spera*, 71 AD3d 661, 664 [2010]; *see Spencer-Forrest v Forrest*, 159 AD3d 762, 765 [2018]; *Diacio v Diacio*, 278 AD2d 358, 359 [2000]). Moreover, “any appreciation in value of separate property due to the contributions or efforts of the nontitled spouse will be consid-

ered marital property” (*Shvalb v Rubinshtein*, 204 AD3d 1059, 1061-1062 [2022]).

Here, contrary to the defendant’s contention, the Supreme Court did not err in its determination that the marital residence was marital property and not the defendant’s separate property. While the deed executed at the time of the initial purchase of the property, prior to the marriage, indicated that the defendant held a 99% interest in the marital residence and the plaintiff held a 1% interest in the marital residence, the parties executed a subsequent deed during the marriage transferring the marital residence to themselves (*see Spencer-Forrest v Forrest*, 159 AD3d at 765; *Diacio v Diaco*, 278 AD2d at 359). Moreover, the evidence adduced at trial reflected that both parties contributed to the down payment for the marital residence and equally shared household expenses until the plaintiff moved out of the marital residence in 2020 and that mortgage agreements with respect to the marital residence indicated that both parties were liable for the entire amount owed.

“The equitable distribution of marital assets must be based on the circumstances of the particular case and the consideration of a number of statutory factors” (*Culen v Culen*, 157 AD3d 926, 929 [2018]; *see* Domestic Relations Law § 236 [B] [5] [d]). “Those factors include: the income and property of each party at the time of marriage and at the time of commencement of the divorce action; the duration of the marriage; the age and health of the parties; the loss of inheritance and pension rights; any award of maintenance; any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of marital property by the party not having title; and any other factor which the court shall expressly find to be just and proper” (*Taylor v Taylor*, 140 AD3d 944, 945-946 [2016]).

“A trial court is vested with broad discretion in making an equitable distribution of marital property, and unless it can be shown that the court improvidently exercised that discretion, its determination should not be disturbed” (*Albano v Albano*, 230 AD3d 723, 725 [2024]; *see Osuagwu v Osuagwu*, 229 AD3d 802, 802-803 [2024]). “However, this Court has discretion to determine issues of equitable distribution that is as broad as that of the trial court” (*D’Ambra v D’Ambra*, 225 AD3d 662, 666 [2024]; *see Sufia v Khalique*, 189 AD3d 1499, 1501 [2020]). “Moreover, where the determination as to equitable distribution has been made after a nonjury trial, the trial court’s assessment of the credibility of witnesses is afforded great weight

on appeal' ” (*Taylor v Taylor*, 140 AD3d at 946, quoting *Aloi v Simoni*, 82 AD3d 683, 685 [2011]).

Here, upon consideration of all of the relevant factors (*see* Domestic Relations Law § 236 [B] [5] [d]), the Supreme Court did not improvidently exercise its discretion in awarding the plaintiff a 50% interest in the marital residence (*see D'Ambra v D'Ambra*, 225 AD3d at 666; *Silvers v Silvers*, 197 AD3d 1195, 1198 [2021]).

Accordingly, we affirm the judgment of divorce insofar as appealed from. Chambers, J.P., Wooten, Dowling and Landicino, JJ., concur.

22 Jamal Parchment, Respondent, v Molly Crawford et al., Defendants, and Town of North Hempstead, Appellant. [251 NYS3d 260]—

Municipal Corporations—Sidewalks—Prior Written Notice—Lack of Record of Defect at Location of Accident

In an action to recover damages for personal injuries, the defendant Town of North Hempstead appeals from an order of the Supreme Court, Nassau County (Eileen C. Daly-Sapraicone, J.), dated September 20, 2024. The order, insofar as appealed from, denied that defendant's motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the motion of the defendant Town of North Hempstead for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it is granted.

The plaintiff commenced this action against, among others, the defendant Town of North Hempstead to recover damages for personal injuries he allegedly sustained when he tripped and fell due to a defect on a sidewalk located within the Town. The Town moved for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it, contending, *inter alia*, that it did not have prior written notice of the defect pursuant to Code of Town of North Hempstead (hereinafter Town Code) § 26-1. The plaintiff opposed the motion, contending that there were triable issues of fact as to whether the Town had prior written notice of the defect and whether the Town affirmatively created the defect through an act of negligence. In an order dated September 20, 2024, the Supreme Court, among other things, denied the Town's motion. The Town appeals.

“When a municipality has adopted a prior written notice law,

the municipality cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies” (*Reynolds v City of Poughkeepsie*, 230 AD3d 1260, 1260-1261 [2024] [internal quotation marks omitted]; see *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). Where the municipality makes a prima facie showing that it lacked prior written notice of the alleged defect, “the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (*Smith v City of New York*, 210 AD3d 53, 62 [2022], quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; see *Groninger v Village of Mamaroneck*, 17 NY3d 125, 129-130 [2011]). Pursuant to Town Code § 26-1, written notices must be “manually subscribed by the complainant” and “actually given to the Town Superintendent of Highways or the Town Clerk.”

Here, the Town established, prima facie, that it did not receive prior written notice of the alleged defect by submitting, inter alia, affidavits from the First Deputy Town Clerk of the Town and the Town’s Superintendent of Highways, who averred that a records search failed to reveal any prior written notice of a defective condition at the location of the plaintiff’s accident (see *Callaghan v County of Nassau*, 236 AD3d 725, 727 [2025]; *Parthesius v Town of Huntington*, 210 AD3d 789, 790 [2022]; *Belluck v Town of N. Hempstead*, 193 AD3d 669, 670 [2021]). In opposition, the plaintiff failed to raise a triable issue of fact as to whether the Town had prior written notice of the alleged defect or whether the Town affirmatively created the alleged defect (see *Callaghan v County of Nassau*, 236 AD3d at 727).

Accordingly, the Supreme Court should have granted the Town’s motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it. Barros, J.P., Warhit, Voutsinas and Wan, JJ., concur.

23 The People of the State of New York, Respondent, v Dayvon Battle, Appellant. [247 NYS3d 758]—

Crimes—Appeal—Preservation of Issue for Review

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Michael J. Yavinsky, J.), rendered May 10, 2023, convicting him of criminal contempt in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention regarding the duration of the orders of protection issued at the time of sentencing is unpreserved for appellate review, as the defendant failed to object to the duration of the orders of protection at sentencing (see CPL 470.05 [2]; *People v Nieves*, 2 NY3d 310, 316-318 [2004]; *People v Almonds*, 238 AD3d 893 [2025]). Under the circumstances, we decline to reach this contention in the exercise of our interest of justice jurisdiction (see *People v Demilio*, 227 AD3d 1098, 1100-1101 [2024]; *People v Mensah*, 221 AD3d 732, 733 [2023]). Barros, J.P., Dowling, Ventura and McCormack, JJ., concur.

24 The People of the State of New York, Respondent, v Troy Blackwell, Appellant. [247 NYS3d 762]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant from a judgment of the County Court, Dutchess County (Jessica Segal, J.), rendered August 6, 2024, convicting him of criminal possession of a controlled substance in the third degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contentions that the sentence imposed was excessive and constituted cruel and unusual punishment (see *People v Lopez*, 6 NY3d at 255-256; *People v Nesbitt*, 244 AD3d 1137 [2025]).

Although the defendant's contention that the County Court improperly delegated its authority during sentencing survives the defendant's valid waiver of the right to appeal, that contention is unpreserved for appellate review (see *People v Guin*, 229 AD3d 567, 568 [2024]). In any event, that contention is without merit.

The defendant's remaining contention, challenging the imposition of a civil forfeiture of certain currency, is unpreserved for appellate review (see *People v Coleman*, 138 AD3d 1014, 1015 [2016]) and, in any event, without merit (see *People v Latouche*, 243 AD3d 683 [2025]). Iannacci, J.P., Ford, Ventura and Quirk, JJ., concur.

25 The People of the State of New York, Respondent, v Anthony Caple, Appellant. [247 NYS3d 755]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Richmond County (Lisa Grey, J.), imposed November 21, 2023, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Bolton*, 235 AD3d 995 [2025]; *People v Young*, 225 AD3d 903 [2024]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (see *People v Lopez*, 6 NY3d 248, 256 [2006]). Barros, J.P., Chambers, Dowling, Landicino and Hom, JJ., concur.

26 The People of the State of New York, Appellant, v Dylan Hamilton, Respondent. [247 NYS3d 762]—

Crimes—Unlawful Search and Seizure—Suppression of Physical Evidence

Appeal by the People from an order of the Supreme Court, Queens County (David J. Kirschner, J.), dated May 5, 2022. The order, insofar as appealed from, after a hearing, granted that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the order is affirmed insofar as appealed from.

The underlying facts of this appeal are set forth in this Court's decision and order in *People v Creary* (236 AD3d 672, 673 [2025]), determining the codefendant's appeal from the same order now before this Court. For the same reasons we held in *People v Creary* in favor of the codefendant, here, the Supreme Court properly granted that branch of the defendant's omnibus motion which was to suppress physical evidence (see *id.* at 674-675; *People v Dubuissou*, 206 AD3d 757, 759 [2022]; *People v Pearson*, 59 AD3d 743, 744 [2009]). Iannacci, J.P., Brathwaite Nelson, Wooten and Taylor, JJ., concur.

27 The People of the State of New York, Respondent, v Timia Hodges, Appellant. [247 NYS3d 764]—Appeal by the defendant, as limited by her motion, from a sentence of the Supreme Court, Queens County (Michael B. Aloise, J.), imposed March 21, 2023, upon her plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]). Dillon, J.P., Wooten, Wan and Golia, JJ., concur.

28 The People of the State of New York, Respondent, v Yamen Jackson, Appellant. [247 NYS3d 756]—

Crimes—Possession of Weapon—Constitutional Challenge to Firearm Licensing Scheme

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Heidi C. Cesare, J.), rendered September 20, 2022, convicting him of criminal possession of a firearm, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that New York's firearm licensing scheme is unconstitutional in light of the decision of the United States Supreme Court in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) is unpreserved for appellate review, since he failed to raise a constitutional challenge before the Supreme Court (see *People v Cabrera*, 41 NY3d 35, 42-51 [2023]; *People v Wilson*, 222 AD3d 1006, 1009 [2023]). In any event, the defendant's contention is without merit (see *People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *2 [2025]; *People v Emmanuel D.*, 238 AD3d 1068, 1070 [2025]; *People v Cooper*, 237 AD3d 844, 846 [2025]). Iannacci, J.P., Brathwaite Nelson, Wooten and Taylor, JJ., concur.

29 The People of the State of New York, Respondent, v Carlos Mejia, Appellant. [249 NYS3d 228]—

Crimes—Appeal—Valid Waiver of Right to Appeal—Aware of Waiver Prior to Guilty Plea

Crimes—Appeal—Valid Waiver of Right to Appeal—Adequate Explanation
Crimes—Appeal—Preservation of Issue for Review—Status as Second Felony Offender

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Jerry M. Iannece, J.), rendered June 13, 2023, convicting him of assault in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

Under the totality of the circumstances, the record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). Although it would have been better practice for the Supreme Court to discuss with the defendant the waiver of his appellate rights before obtaining an admission of guilt (see *People v Callejo*, 237 AD3d 1218, 1218 [2025]; *People v White*, 234 AD3d 884, 884 [2025]), the record reflects that the defendant was made aware of the People's demand for an appeal waiver before he agreed to plead guilty, as, among other things, he acknowledged that he had discussed the appeal waiver with his attorney and executed a written waiver of his right to appeal prior to the plea

proceeding. Thus, it cannot be said that the defendant “received no material benefit from his appeal waiver” or that the appeal waiver “was a gratuitous, after-the-fact additional demand asserted after the bargain had already been struck” (*People v White*, 234 AD3d at 884-885 [internal quotation marks omitted]).

Moreover, contrary to the defendant’s contention, the Supreme Court adequately explained, and the defendant acknowledged that he understood, that an appeal waiver is separate and distinct from those rights automatically forfeited upon a plea of guilty (see *People v Bradshaw*, 18 NY3d 257, 264 [2011]; *People v Batista*, 167 AD3d 69, 73 [2018]). The court also adequately explained, and the defendant acknowledged that he understood, the nature of the right to appeal and the consequences of waiving that right, and the court did not mischaracterize the nature or scope of the waiver (see *People v Morao*, 238 AD3d 1175, 1175 [2025]; *People v Sobers*, 235 AD3d 908, 909 [2025]). Under the circumstances presented, including, inter alia, the exemplary explanation of the right to appeal provided to the defendant, the court’s delay in explaining the appeal waiver until after the defendant’s factual allocation of the crime did not render the appeal waiver invalid (see *People v Callejo*, 237 AD3d at 1218-1219).

The defendant’s valid waiver of his right to appeal precludes appellate review of his contention that his adjudication as a second felony offender was unconstitutional in light of *Erlinger v United States* (602 US 821 [2024]) and *Apprendi v New Jersey* (530 US 466 [2000]), “since such a challenge implicates the Supreme Court’s compliance with procedures to determine the defendant’s predicate felony status, rather than the legality of the sentence itself” (*People v Simpson*, 244 AD3d 762, 762 [2025]).

The defendant’s contention that his sentence was illegal due to the People’s failure to establish the requisite tolling period to bring the defendant’s prior felony conviction within the applicable 10-year look back period is not preserved for appellate review because he failed to contest or controvert his status as a second felony offender before or at his sentencing (see *People v Lashley*, 37 NY3d 1140, 1141 [2021]; *People v Spencer*, 165 AD3d 706, 707 [2018]). Furthermore, this contention is “not reviewable under the narrow illegal sentence exception to the preservation requirement because it was not readily discernible from the trial record that the sentence[] the court imposed [was] not within the permissible range” (*People v Cofield*, 215 AD3d 882, 883 [2023] [internal quotation marks omitted]; see

People v Lashley, 37 NY3d at 1141). We decline to reach the contention in the exercise of our interest of justice jurisdiction.

To the extent that the defendant contends that New York's predicate felony offender statutes are facially unconstitutional, that contention is not precluded by the appeal waiver (see *People v Smith*, 244 AD3d 1144 [2025]). However, that contention is also unpreserved for appellate review (see CPL 470.05 [2]; *People v Hernandez*, 43 NY3d 591, 597 [2025]; *People v Smith*, 244 AD3d 1144 [2025]), and we decline to reach it in the exercise of our interest in justice jurisdiction. LaSalle, P.J., Voutsinas, Love and Hom, JJ., concur.

30 The People of the State of New York, Respondent, v Johnny Perez, Appellant. (Action Nos. 1, 2, 3.) The People of the State of New York, Respondent, v John Perez, Also Known as Johnny Perez, Appellant. (Action No. 4.) [248 NYS3d 322]—

Crimes—Appeal—Valid Waiver of Right to Appeal—Adequate Explanation

Appeals by the defendant from four judgments of the Supreme Court, Kings County (William Harrington, J.), each rendered May 31, 2022, convicting him of burglary in the third degree under indictment No. 4615/19, burglary in the third degree under indictment No. 7226/19, burglary in the third degree under indictment No. 798/20, and burglary in the third degree under indictment No. 74006/21, upon his pleas of guilty, and imposing sentences.

Ordered that the judgments are affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (see *People v Lopez*, 6 NY3d 248, 257 [2006]; *People v Esson*, 225 AD3d 786 [2024]). Contrary to the defendant's contention, the Supreme Court adequately explained, and the defendant acknowledged that he understood, the separate and distinct nature of the waiver of the right to appeal (see *People v Esson*, 225 AD3d at 787; *People v Headley*, 197 AD3d 1329, 1330 [2021]). The defendant's valid waiver of his right to appeal precludes appellate review of his challenge to the procedure used to adjudicate him as a second felony offender (see *People v Simpson*, 244 AD3d 762 [2025]; *People v Leon*, 200 AD3d 717, 717 [2021]; *People v Meyers*, 172 AD3d 1236, 1237 [2019]; *People v Rodriguez*, 82 AD3d 794, 795 [2011]).

To the extent the defendant contends that New York's predicate felony offender statutes are facially unconstitutional, that contention is not precluded by the appeal waiver (see *People v Johnson*, — NY3d —, 2025 NY Slip Op 06528 [2025]). However, that contention is unpreserved for appellate review (see CPL

470.05 [2]; *People v Hernandez*, 43 NY3d 591, 597 [2025]; *People v Munoz*, 237 AD3d 1110, 1111 [2025]), and we decline to reach it in the exercise of our interest of justice jurisdiction (see *People v Munoz*, 237 AD3d at 1111). Dillon, J.P., Chambers, Wan and Love, JJ., concur.

31 The People of the State of New York, Respondent, v Joseph Petty, Appellant. [251 NYS3d 266]—

Crimes—Fitness to Proceed to Trial—Incapacitation

Crimes—Verdict—Sufficiency of Evidence

Crimes—Right to Counsel—Valid Waiver—Searching Inquiry

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Gia L. Morris, J.), rendered February 11, 2020, convicting him of course of sexual conduct against a child in the first degree, upon a jury verdict, and imposing sentence. By decision and order dated March 26, 2025, this Court remitted the matter to the Supreme Court, Queens County, to conduct a reconstruction hearing to determine whether the defendant was competent to stand trial in light of the evidence available on or before February 7, 2019, and thereafter report to this Court as to its determination, and the appeal was held in abeyance in the interim (see *People v Petty*, 236 AD3d 1065 [2025]). The Supreme Court (Ira H. Margulis, J.) has now filed its report.

Ordered that the judgment is affirmed.

The defendant was convicted, after a jury trial, of course of sexual conduct against a child in the first degree. The defendant appeals. In a decision and order dated March 26, 2025, this Court remitted the matter to the Supreme Court, Queens County, to conduct a reconstruction hearing to determine whether the defendant was competent to stand trial in light of the evidence available on or before February 7, 2019, and thereafter report to this Court as to its determination, and the appeal was held in abeyance in the interim (see *People v Petty*, 236 AD3d 1065 [2025]). In a report dated July 17, 2025, the Supreme Court determined that the defendant was competent to stand trial.

A defendant is incapacitated where he or she, “as a result of mental disease or defect[,] lacks capacity to understand the proceedings against him [or her] or to assist in his [or her] own defense” (CPL 730.10 [1]; see *People v Mendez*, 1 NY3d 15, 19 [2003]). “The burden of proof is on the prosecution to establish a defendant’s competence, and the burden requires that fitness to stand trial be established by a preponderance of the evidence” (*People v Rodriquez*, 194 AD3d 1078, 1078 [2021]). Here,

the Supreme Court concluded, after a hearing, that the People established by a preponderance of the evidence that the defendant was competent to stand trial, and we perceive no basis upon which to disturb the court's determination (*see People v Mendez*, 1 NY3d at 20; *People v Rodriguez*, 194 AD3d at 1078). Contrary to the defendant's contention, the court providently exercised its discretion in denying his application to call the judge who had formerly presided over the case as a witness (*see People v Bryant*, 211 AD3d 848, 849 [2022]).

The defendant contends that his conviction was against the weight of the evidence. "There is no preservation requirement for weight-of-the-evidence appellate review" (*People v Rose*, 191 AD3d 697, 698 [2021]). Although the defendant's contention that his conviction was not supported by legally sufficient evidence was not properly preserved for appellate review, "we necessarily determine whether each element of the crime was proven beyond a reasonable doubt in assessing the claim that the conviction is against the weight of the evidence" (*People v Rivera*, 180 AD3d 939, 940 [2020]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

Contrary to the defendant's contention, he validly waived his right to counsel. "A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself" (*People v Hall*, 244 AD3d 753, 754 [2025]; *see People v Crampe*, 17 NY3d 469, 481 [2011]). To make that evaluation, the court "'must undertake a searching inquiry designed to insur[e] that a defendant [is] aware of the dangers and disadvantages of proceeding without counsel'" (*People v Hall*, 244 AD3d at 755 [internal quotation marks omitted], quoting *People v Crampe*, 17 NY3d at 481). "The court's inquiry 'must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication'" (*People v Hall*, 244 AD3d at 755, quoting *People v Smith*, 92 NY2d 516, 520 [1998]). Here, the record reflects that the Supreme Court engaged in a "searching inquiry" to clarify that the defendant understood the ramifications of proceeding pro se before accepting the defendant's waiver (*People v Coad*, 216 AD3d 1110, 1110 [2023] [internal quotation marks omitted]). The defendant also had the benefit of standby counsel throughout the proceedings and "proceeded at his own peril, fully aware of the consequences of his chosen course" (*People v Webb*, 172 AD3d 920, 922 [2019]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contention is without merit.

Accordingly, we affirm the judgment. LaSalle, P.J., Ford, Voutsinas and Landicino, JJ., concur.

32 The People of the State of New York, Respondent, v Nelson Gonzalez Portalatin, Appellant. [247 NYS3d 759]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Michael D. Kitsis, J.), imposed June 20, 2023, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *see also People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 255). Iannacci, J.P., Christopher, Voutsinas, Love and Goldberg Velazquez, JJ., concur.

33 The People of the State of New York, Respondent, v Joel Thompson, Appellant. [251 NYS3d 262]—

Crimes—Right to Counsel—Effective Representation—Court's Failure to Conduct Hearing on Motion to Vacate

Crimes—Right to Counsel—Effective Representation—Declining to Request Lesser Included Charge

Appeal by the defendant, by permission, from an order of the County Court, Westchester County (George E. Fufidio, Jr., J.), dated November 6, 2024, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of the same court rendered March 12, 2021, convicting him of murder in the second degree and attempted murder in the second degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the order is reversed, on the law, and the matter is remitted to the County Court, Westchester County, for a hearing in accordance herewith and a new determination thereafter of the defendant's motion pursuant to CPL 440.10 to vacate the judgment.

The defendant was convicted, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and two counts

of attempted murder in the second degree (*id.* §§ 110.00, 125.25 [1]). The evidence at trial demonstrated that the defendant drove his car into a group of three people, killing one of them. The defendant testified that he blacked out after sustaining a head injury, regained consciousness long enough to start his car and perform a U-turn in a parking lot, and blacked out a second time before striking one of the victims.

During the trial, the defendant's counsel informed the County Court that she intended to request that the jury be charged on manslaughter in the first degree as a lesser included offense of murder in the second degree. At the charge conference, the defendant's counsel did not request that the jury be charged on manslaughter in the first degree as a lesser included offense despite stating on the record that she had advised the defendant that the request should be made.

On the defendant's direct appeal from the judgment of conviction, he argued, *inter alia*, that trial counsel was ineffective by deferring to the defendant's wishes in declining to seek a jury charge on the lesser included offense of manslaughter in the first degree. In affirming the judgment, this Court declined to reach the defendant's ineffective assistance of counsel claim, finding that the claim relied in part upon matter dehors the record and that a motion pursuant to CPL 440.10 was the appropriate forum for reviewing the claim (*see People v Thompson*, 204 AD3d 942, 942 [2022]). The Court of Appeals denied the defendant's application for leave to appeal (*see People v Thompson*, 38 NY3d 1136 [2022]).

Thereafter, the defendant moved pursuant to CPL 440.10 to vacate the judgment on the ground that trial counsel was ineffective by deferring to the defendant's wishes in declining to request a jury charge of manslaughter in the first degree as a lesser included offense of murder in the second degree. In an order dated November 6, 2024, the County Court denied the motion without a hearing. The defendant appeals, by permission, from the order dated November 6, 2024.

"To establish ineffective assistance of counsel under the federal standard, a defendant is required to demonstrate that counsel[s] performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense" (*People v Montgomery*, 235 AD3d 1004, 1005 [2025]; *see Strickland v Washington*, 466 US 668, 693 [1984]; *People v Nicholson*, 26 NY3d 813, 830 [2016]). "The first prong of the *Strickland* test is essentially a restatement of attorney competence, which requires a showing that counsel's representation fell below an objective standard of reasonableness' "

(*People v Banyai*, 230 AD3d 701, 702 [2024], quoting *People v McDonald*, 1 NY3d 109, 113 [2003]). “The second prong, also known as the prejudice prong, focuses on whether there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (*People v Robinson*, 200 AD3d 908, 911 [2021], quoting *People v Pagan*, 155 AD3d 779, 781 [2017]).

“In contrast, New York’s constitutional requirement of effective assistance of counsel is met when the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation” (*People v Lewis*, 215 AD3d 982, 983 [2023], quoting *People v Robinson*, 200 AD3d at 911). “[A] single error may [constitute] ineffective assistance [if] the error is sufficiently egregious and prejudicial as to compromise [the] defendant’s right to a fair trial” (*People v Gomez*, 223 AD3d 843, 844 [2024], quoting *People v Caban*, 5 NY3d 143, 152 [2005]).

Here, the County Court should not have denied the defendant’s motion pursuant to CPL 440.10 to vacate the judgment without conducting a hearing, as an affirmation of the defendant’s trial counsel that was submitted in support of the motion tended to substantiate the defendant’s ineffective assistance claim (see CPL 440.30 [4] [b]). While “a defendant unquestionably has the right to chart his [or her] own defense” (*People v DeGina*, 72 NY2d 768, 776 [1988]), “[m]atters of strategy and tactics, such as whether to request the submission of lesser-included offenses for the jury’s consideration, . . . generally fall within the purview of counsel” (*People v Clark*, 129 AD3d 1, 11 [2015] [citations omitted], *affd* 28 NY3d 556 [2016]; see *People v Colville*, 20 NY3d 20, 32 [2012]). Under the circumstances of this case, trial counsel’s representations that she advised the defendant that a jury charge of manslaughter in the first degree as a lesser included offense should be requested, informed the court that she would defer to the defendant’s decision, and did not request that charge tended to substantiate the defendant’s claim that trial counsel deprived the defendant of the expert judgment of counsel to which he was constitutionally entitled (see *People v Colville*, 20 NY3d at 32; *People v Minckler*, 149 AD3d 1526, 1527 [2017]).

However, the essential facts of the defendant’s ineffective assistance claim are neither “conceded by the [P]eople to be true” nor “conclusively substantiated by unquestionable documentary proof” (CPL 440.30 [3] [c]), as trial counsel’s statements to the County Court, as amplified by the qualified language of her af-

firmation, are still “ambiguous as to her ultimate reasoning for declining to request the charge” (*People v Thompson*, 204 AD3d at 942).

Accordingly, the matter must be remitted to the County Court, Westchester County, for a hearing and a new determination thereafter of the defendant’s motion pursuant to CPL 440.10 to vacate the judgment (*see id.* § 440.30 [5]). Duffy, J.P., Christopher, Warhit and Goldberg Velazquez, JJ., concur.

34 The People of the State of New York, Respondent, v Eric F. Vergara, Appellant. [247 NYS3d 759]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Crimes—Order of Protection—Exceeded Maximum Period Permissible

Appeal by the defendant from a judgment of the Supreme Court, Richmond County (Lisa Grey, J.), rendered May 23, 2023, convicting him of assault in the first degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review an order of protection issued at the time of sentencing.

Ordered that upon the appeal from the judgment, the order of protection is modified, on the law, by deleting the provision thereof directing that it shall remain in effect until and including May 22, 2041, and substituting therefor a provision directing that it shall remain in effect until and including June 22, 2040; and it is further,

Ordered that the judgment is affirmed.

The record demonstrates that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant’s valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Sayles*, 242 AD3d 1126, 1126 [2025]; *People v Alijaj*, 217 AD3d 881, 882 [2023]).

As the People correctly concede, the duration of the order of protection exceeded the maximum period permissible under CPL 530.13 (4) (A) (ii). The defendant requests, and the People concede, that the order of protection should be modified accordingly. Therefore, we modify the order of protection by providing that it shall remain in effect until and including June 22, 2040 (*see People v Jackson*, 242 AD3d 903, 903 [2025]; *People v Williams*, 235 AD3d 1017, 1017 [2025]). Genovesi, J.P., Christopher, Taylor and Golia, JJ., concur. **[Prior Case History: 79 Misc 3d 245.]**

35 The People of the State of New York, Respondent, v Jose Victor, Appellant. [247 NYS3d 763]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Raymond L. Rodriguez, J.), rendered March 20, 2024, convicting him of criminal possession of a firearm, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, the record demonstrates that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Thomas*, 34 NY3d 545 [2019]; *People v Lopez*, 6 NY3d 248 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his challenge to the Supreme Court's denial of those branches of his omnibus motion which were to suppress physical evidence and his statements to law enforcement officials (*see People v Cheristin*, 239 AD3d 670, 671 [2025]; *People v Hightower-Castro*, 219 AD3d 504, 505 [2023]) and his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 256). Genovesi, J.P., Ford, Landicino and Quirk, JJ., concur.

36 The People of the State of New York, Respondent, v Donte K. Whittingham, Appellant. [251 NYS3d 281]—

Crimes—Sentence—Concurrent and Consecutive Terms—Failure to Establish Convictions Separate and Distinct

Appeal by the defendant from three judgments of the Supreme Court, Kings County (Rhonda Z. Tomlinson, J.), all rendered July 5, 2023, convicting him of robbery in the third degree under indictment No. 2706/19, attempted assault in the second degree and criminal possession of a firearm under indictment No. 75019/22, and disorderly conduct under Superior Court information No. 76668/22, upon his pleas of guilty, and sentencing him, as a second felony offender, to an indeterminate term of imprisonment of 3½ to 7 years on his conviction of robbery in the third degree under indictment No. 2706/19, indeterminate terms of imprisonment of 2 to 4 years on his convictions of attempted assault in the second degree and criminal possession of a firearm under indictment No. 75019/22, to run consecutively to each other and the sentence imposed on the conviction of robbery in the third degree under indictment No. 2706/19, and a definite term of imprisonment of 15 days on the conviction of disorderly conduct under Superior Court information No. 76668/22, to run concurrently with all other sentences.

Ordered that the judgment under indictment No. 75019/22 is modified, on the law, by providing that the sentences imposed

on the convictions of attempted assault in the second degree and criminal possession of a firearm shall run concurrently with each other; as so modified, the judgment is affirmed; and it is further,

Ordered that the judgments under indictment No. 2706/19 and Superior Court information No. 76668/22 are affirmed.

“The Penal Law provides that concurrent sentences must be imposed ‘for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other’ ” (*People v Laureano*, 87 NY2d 640, 643 [1996], quoting Penal Law § 70.25 [2]). “Thus, sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other” (*id.*). “Conversely, consecutive sentences may be imposed when, among other things, ‘the facts demonstrate that the defendant’s acts underlying the crimes are separate and distinct’ ” (*People v Bailey*, 167 AD3d 924, 925 [2018], quoting *People v Ramirez*, 89 NY2d 444, 451 [1996]). “The People bear the burden of establishing the legality of consecutive sentencing” (*id.*).

Here, based upon the facts adduced during the plea colloquy, the People failed to establish that the convictions of attempted assault in the second degree and criminal possession of a firearm under indictment No. 75019/22 were separate and distinct (*see People v Williams*, 243 AD3d 818, 820 [2025]; *People v Bailey*, 167 AD3d at 925). Accordingly, as conceded by the People, the Supreme Court should have directed the sentences imposed upon those convictions to run concurrently with each other (*see People v Laureano*, 87 NY2d at 643).

The aggregate sentence imposed, as modified, was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Iannacci, J.P., Ford, Ventura and Quirk, JJ., concur.

37 The People of the State of New York, Respondent, v Dequann Wilson, Appellant. [248 NYS3d 323]—

Crimes—Appeal—Valid Waiver of Right to Appeal—Defendant Informed That Some Issues Survive Waiver

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Suffolk County (Richard I. Horowitz, J.), imposed June 3, 2025, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

Contrary to the defendant’s contention, the record demon-

strates that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 254 [2006]). The Supreme Court properly advised the defendant, among other things, that the waiver of the right to appeal did not preclude him from taking an appeal and that “most claims of error” would not be reviewable (*see People v Thomas*, 34 NY3d 545, 558, 567 [2019]). Thus, the defendant was aware that some issues would survive his appeal waiver and “it was not necessary for the [court] to specifically delineate the various issues that survive a valid appeal waiver” (*People v Stevens*, 203 AD3d 958, 959 [2022]; *see People v Feliz*, 231 AD3d 1061, 1061 [2024]).

The defendant’s valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d at 255-256).

The defendant’s remaining contention is without merit. Dillon, J.P., Wooten, Wan and Golia, JJ., concur.

38 The People of the State of New York, Respondent, v Shen Yang, Appellant. [251 NYS3d 289]—

Crimes—Verdict—Sufficiency of Evidence—Grand Larceny

Crimes—Proof of Other Crimes—Balance between Probative Value and Prejudice

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Michael Gary, J.), rendered November 16, 2016, convicting him of burglary in the second degree and grand larceny in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant’s contention that his conviction of grand larceny in the third degree is not supported by legally sufficient evidence is unpreserved for appellate review, as his motion to dismiss made at the close of evidence was not sufficiently specific (*see People v Jhagroo*, 186 AD3d 741, 743 [2020]; *People v James*, 35 AD3d 762, 762 [2006]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we find that the evidence was legally sufficient to establish the defendant’s guilt of grand larceny in the third degree beyond a reasonable doubt (*see People v Robinson*, 60 NY2d 982, 983 [1983]; *People v Olivo*, 52 NY2d 309, 318 [1981]). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see CPL 470.15 [5]; People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury’s opportunity to view the witnesses, hear the testimony,

and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon viewing the record here, we are satisfied that the verdict of guilt on the count of grand larceny in the third degree was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

The defendant failed to raise any constitutional objections to the Supreme Court's *Sandoval* ruling (*see People v Sandoval*, 34 NY2d 371 [1974]), and, therefore, to the extent that the defendant now raises constitutional claims, they are unpreserved for appellate review (*see People v Grant*, 7 NY3d 421, 424 [2006]; *People v Noble*, 211 AD3d 970, 973 [2022]). In any event, the defendant's contentions regarding the court's *Sandoval* ruling are without merit, as the ruling reflected a proper balance between the "probative value" of the defendant's prior convictions on the issue of his credibility and the danger of "impermissible prejudice" to the defendant (*People v Sandoval*, 34 NY2d at 375, 377; *see People v Skinner*, 195 AD3d 952, 952-953 [2021]).

The defendant's contention that the sentence imposed was excessive has been rendered academic (*see People v Nicholson*, 31 AD3d 468, 469 [2006]), since the maximum expiration date of his post-release supervision has passed (*see People v Jackson*, 231 AD3d 966, 966 [2024]; *People v Reyes-Lopez*, 189 AD3d 1269, 1269 [2020]). Barros, J.P., Voutsinas, Golia and Hom, JJ., concur.

39 The People of the State of New York, Respondent, v Gary Hall, Appellant. [251 NYS3d 710]—

Crimes—Right to Counsel—Assignment of New Counsel—Failure to Correct Mistake Regarding Sex Offender Risk Assessment

Appeal by the defendant from an order of the County Court, Suffolk County (Karen M. Wilutis, J.), dated October 17, 2024, which, after a hearing, designated him a level three sex offender pursuant to Correction Law article 6-C.

Ordered that on the Court's own motion, Salvatore C. Adamo, 1345 Avenue of the Americas, 2nd Fl., New York, NY 10105, is relieved as counsel for the appellant, and he is directed to turn over all papers in his possession related to the appeal from the order to new counsel assigned herein; and it is further,

Ordered that Richard L. Herzfeld, 112 Madison Avenue, 8th Floor, New York, NY 10016, is assigned as counsel to perfect the appeal from the order; and it is further,

Ordered that the respondent is directed to furnish a copy of the certified transcript of the proceedings to the new assigned counsel; and it is further,

Ordered that new counsel shall serve and file a brief on behalf of the appellant within 90 days of this decision and order on motion, and the respondent shall serve and file its brief within 30 days after the brief on behalf of the appellant is served and filed. By prior decision and order on motion of this Court dated May 16, 2025, pursuant to CPL 380.55 (2), this Court directed that the appeal be heard on the original papers (including a certified transcript of the proceedings, if any) and on the briefs of the parties. The parties are directed to upload, through the digital portal on this Court's website, digital copies of their respective briefs, with proof of service of one hard copy on each other (*see* 22 NYCRR 1250.9 [a]).

The defendant was convicted, upon his plea of guilty, of course of sexual conduct against a child in the first degree and three counts of criminal sexual act in the first degree. After a hearing pursuant to the Sex Offender Registration Act (Correction Law art 6-C), the County Court assessed the defendant 155 points on the risk assessment instrument and designated him a level three sex offender. The defendant appeals.

On appeal, the defendant's assigned counsel's sole contention is that the County Court improperly assessed 10 points under risk factor 12. This contention is based on a misconception of the record, as the court did not assess any points under that risk factor. Even after this was pointed out in the respondent's brief, and after this Court directed assigned counsel to appear for oral argument, assigned counsel was still under this misconception at the time of oral argument. Assigned counsel also took no action to correct his mistake. It is apparent that the defendant did not receive effective assistance of counsel on the appeal, and under the unique circumstances of this case, assigned counsel is relieved and new appellate counsel is assigned to represent the defendant (*see People v Cortez-Moreno*, 194 AD3d 953, 954 [2021]; *People v Edwards*, 281 AD2d 640 [2001]). LaSalle, P.J., Voutsinas, Love and Hom, JJ., concur.

40 Patrick Purcell, Respondent, v Archdiocese of New York et al., Defendants, and Iona Preparatory School, Appellant. [251 NYS3d 283]—

Negligence—Duty—Child Victims Act—School's Control over Teacher's Actions

In an action, inter alia, to recover damages for negligence, the defendant Iona Preparatory School appeals from an order of the Supreme Court, Westchester County (Doris M. Gonzalez, J.), dated April 14, 2025. The order, insofar as appealed from, denied those branches of that defendant's motion which were

for summary judgment dismissing the causes of action to recover damages for negligence insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the motion of the defendant Iona Preparatory School which were for summary judgment dismissing the causes of action to recover damages for negligence insofar as asserted against it are granted.

The plaintiff commenced this action pursuant to the Child Victims Act (*see* CPLR 214-g) against, among others, the defendant Iona Preparatory School (hereinafter Iona). The plaintiff sought, *inter alia*, to recover damages for negligence, alleging that, in 1964, he was sexually abused by a teacher employed by Cardinal Farley Military Academy while he was a student there. The teacher had previously taught at Iona, an institution that the plaintiff did not attend.

Iona moved for summary judgment dismissing the amended complaint insofar as asserted against it. The plaintiff opposed the motion. In an order dated April 14, 2025, the Supreme Court, among other things, denied those branches of Iona's motion which were for summary judgment dismissing the causes of action to recover damages for negligence insofar as asserted against it. Iona appeals.

A plaintiff asserting a negligence cause of action must allege “a duty owed to the plaintiff by the defendant, a breach of that duty, and injury proximately resulting therefrom” (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 157 [2023]; *see Nellenback v Madison County*, 44 NY3d 329, 334 [2025]; *Davila v Orange County*, 229 AD3d 500, 501 [2024]). “‘Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party’” (*Morrison v New York Archdiocese*, 227 AD3d 703, 704 [2024], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]).

As a general matter, “such a duty may arise only ‘where there is a relationship either between defendant and a third-person tortfeasor that encompasses defendant’s actual control of the third person’s actions, or between defendant and plaintiff that requires defendant to protect plaintiff from the conduct of others’” (*Matter of New York City Asbestos Litig.*, 5 NY3d 486, 493-494 [2005], quoting *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]; *see Morrison v New York Archdiocese*, 227 AD3d at 704; *Hansen v New York Archdiocese*, 227 AD3d 683, 684 [2024]).

“Schools are under a duty to adequately supervise the

students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision” (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]). “[T]he duty [schools] owe to their students derives from their physical custody and control over the students” (*Boyle v Brewster Cent. Sch. Dist.*, 209 AD3d 619, 620 [2022]). “‘Generally, a school cannot be held liable for injuries that occur off school property and beyond the orbit of its authority’” (*id.* at 621, quoting *Donofrio v Rockville Ctr. Union Free Sch. Dist.*, 149 AD3d 805, 806 [2017]).

Here, Iona established, *prima facie*, that it did not owe the plaintiff a duty at the time he was allegedly sexually abused (see *Matter of New York City Asbestos Litig.*, 5 NY3d at 493-494; *Morrison v New York Archdiocese*, 227 AD3d at 704). The evidence submitted in support of Iona’s motion demonstrated, *prima facie*, that Iona maintained no control over the teacher’s alleged actions. At the time of the alleged sexual abuse, the teacher had not taught at Iona for approximately one year. In opposition, the plaintiff failed to raise a triable issue of fact.

The parties’ remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court should have granted those branches of Iona’s motion which were for summary judgment dismissing the causes of action to recover damages for negligence insofar as asserted against it. Dillon, J.P., Chambers, Wan and Love, JJ., concur.

41 Tony Romano, Respondent, v Welsbach Electric Corp., Appellant. [248 NYS3d 324]—

Disclosure—Discovery and Inspection—Relevant Evidence—Whether Party Caused Pothole

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Patria Frias-Colón, J.), dated January 25, 2023. The order denied the defendant’s motion for summary judgment dismissing the complaint with leave to renew upon the completion of discovery.

Ordered that the order is affirmed, with costs.

In June 2018, the plaintiff commenced an action in the Supreme Court, Kings County, under index No. 512209/18, against the City of New York to recover damages for personal injuries (hereinafter the first action). The plaintiff alleged that in April 2017, he attempted to cross 10th Avenue at its intersection with 63rd Street in Brooklyn in a designated crosswalk, when he tripped and injured his ankle by stepping into a

pothole. Thereafter, the City joined issue in the first action. On or about March 20, 2020, the plaintiff commenced this action in the Supreme Court, Kings County, under index No. 507069/20, against the defendant, Welsbach Electric Corp. (hereinafter Welsbach), a municipal electrical contractor that had entered into a contract with the City to install new traffic equipment, including underground conduits, in the subject intersection. The plaintiff sought to recover damages for personal injuries arising out of the same accident. The plaintiff alleged that Welsbach was negligent in causing, creating, allowing, and/or permitting the pothole to exist. Thereafter, Welsbach joined issue in this action.

In an order dated June 29, 2021, the Supreme Court granted Welsbach's motion to consolidate the first action and this action to the extent that the actions were joined for the purposes of trial and discovery, but each action was to retain its own index number, and each action would have, inter alia, separate notes of issue and separate judgments.

Prior to the completion of discovery, Welsbach moved for summary judgment dismissing the complaint. By order dated January 25, 2023, the Supreme Court denied Welsbach's motion with leave to renew upon the completion of discovery on the ground, among others, that it was premature. Welsbach appeals.

While “[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment” (*Brea v Salvatore*, 130 AD3d 956, 956 [2015]; see *Bernstein v New York City Tr. Auth.*, 153 AD3d 897, 897-898 [2017]), a party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts necessary to oppose the motion are exclusively within the knowledge and control of the movant (see CPLR 3212 [f]; *Min Gyo Cho v Marcario*, 238 AD3d 703, 703 [2025]; *Knowles v 21-43 27th St., LLC*, 224 AD3d 737, 738 [2024]). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2013] [internal quotation marks omitted]; see *Min Gyo Cho v Marcario*, 238 AD3d at 703-704; *Tone v Studin*, 148 AD3d 1205, 1206 [2017]; *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2006]).

Here, the plaintiff demonstrated that further discovery, including, among other things, deposition testimony of employees for the City, may result in the disclosure of evidence rele-

vant to the issues of whether Welsbach caused or created the pothole or exacerbated its defective nature (*see Knowles v 21-43 27th St., LLC*, 224 AD3d at 737; *Rodriguez v County of Westchester*, 120 AD3d 1331, 1331 [2014]). Accordingly, the Supreme Court properly denied Welsbach's motion for summary judgment dismissing the complaint with leave to renew upon the completion of discovery on the ground that it was premature.

In light of our determination, we need not address Welsbach's remaining contentions. Dillon, J.P., Christopher, Wan and Hom, JJ., concur.

42 Ernest Saint Cloud, Appellant, v Steven Koehler, M.D., et al., Respondents, et al., Defendants. [252 NYS3d 166]—

Disclosure—Penalty for Failure to Disclose—Striking of Pleading—Delay in Scheduling of Depositions

Physicians and Surgeons—Malpractice—Deviation from Accepted Standards of Care—Failure to Present Expert Evidence

In an action, inter alia, to recover damages for medical malpractice, the plaintiff appeals from an order of the Supreme Court, Kings County (Consuelo Mallafre Melendez, J.), dated April 4, 2023. The order denied the plaintiff's motion, in effect, for summary judgment on the issue of liability and to strike the defendants' answers.

Ordered that the order is affirmed, with one bill of costs to the respondents appearing separately and filing separate briefs.

In July 2019, the plaintiff commenced this action, inter alia, to recover damages for medical malpractice. By order dated August 2, 2022, the Supreme Court, among other things, directed that the defendants appear for examinations before trial on or before October 18, 2022, and stated that “[f]ailure to comply with this order will result in the non-complying party being precluded from offering evidence, testifying at trial, or submitting an affidavit in response to any dispositive motion, upon further motion for same, pursuant to CPLR 3126 (2).” However, on or about October 3, 2022, the deposition of the defendant Steven Koehler was scheduled for November 8, 2022, which was beyond the October 18, 2022 deadline.

On November 4, 2022, the plaintiff moved, in effect, for summary judgment on the issue of liability and to strike the defendants' answers. By order dated April 4, 2023, the Supreme Court denied the plaintiff's motion in its entirety. The plaintiff appeals.

“Resolution of discovery disputes and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 are mat-

ters within the sound discretion of the motion court’ ” (*Farrell v Keldiyarov*, 234 AD3d 933, 934 [2025], quoting *Madonna Mgt. Servs., Inc. v R.S. Naghavi, M.D., PLLC*, 172 AD3d 845, 847 [2019]). Contrary to the plaintiff’s contention, the order dated August 2, 2022, was not a self-executing order of preclusion but, instead, expressly required an additional motion pursuant to CPLR 3126 (2) (see *Degachi v Faridi*, 230 AD3d 634, 635 [2024]). Moreover, “[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious’ ” (*Wanliss v Retina Assoc. of N.Y., P.C.*, 230 AD3d 1270, 1271 [2024] [internal quotation marks omitted], quoting *Household Fin. Realty Corp. of N.Y. v Cioppa*, 153 AD3d 908, 910 [2017]; see *Zavala v Rennew Holding Corp.*, 219 AD3d 787, 789 [2023]). Here, the plaintiff failed to establish that the delay in the scheduling of depositions was the result of willful and contumacious conduct on the part of the defendants (see *Wanliss v Retina Assoc. of N.Y., P.C.*, 230 AD3d at 1271; *Sokolnik v Voronova*, 221 AD3d 1036, 1038 [2023]).

Turning to the question of whether the plaintiff was entitled to summary judgment on the issue of liability on the merits, in order to establish prima facie entitlement to judgment as a matter of law in a medical malpractice action, the plaintiff was required to present expert evidence of a deviation from accepted standards of medical care which was a proximate cause of the plaintiff’s injuries (see *Hudler v Reddy*, 226 AD3d 654, 656 [2024]; *Navarro v Ortiz*, 203 AD3d 834, 836 [2022]; *Pieter v Polin*, 148 AD3d 1193, 1194 [2017]). Here, the plaintiff failed to present such evidence. Accordingly, the plaintiff failed to establish his prima facie entitlement to judgment as a matter of law on the issue of liability on the merits, without regard to the sufficiency of the opposing papers (see *Buzeska v Crystal Run Healthcare Physicians, LLP*, 234 AD3d 656, 659 [2025]; *Woehrle v Buono*, 232 AD3d 820, 821 [2024]).

In view of the foregoing, the Supreme Court properly denied the plaintiff’s motion, in effect, for summary judgment on the issue of liability and to strike the defendants’ answers. Barros, J.P., Christopher, Wan and Taylor, JJ., concur.

43 Ruth Viana, as Administrator of the Estate of Luis Vian, Deceased, Appellant, v All Island Recycle and Rubbish Removal et al., Defendants, and Belco Enterprises, Inc., Respondent. [247 NYS3d 760]—

Labor—Safe Place to Work—Dangerous Condition—Constructive Notice

In an action, inter alia, to recover damages for wrongful death, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Linda J. Kevins, J.), dated March 28, 2024. The order, insofar as appealed from, granted that branch of the motion of the defendant Bellco Enterprises, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs.

In 2016, the plaintiff's decedent was killed in an accident while working on premises owned by the defendant Bellco Enterprises, Inc. (hereinafter Bellco), when he allegedly was struck by a payload. The plaintiff commenced this action against, among others, Bellco, alleging that Bellco was negligent and seeking, inter alia, to recover damages for wrongful death.

Bellco moved, among other things, for summary judgment dismissing the complaint insofar as asserted against it. In an order dated March 28, 2024, the Supreme Court, inter alia, granted that branch of Bellco's motion. The plaintiff appeals.

"Liability on common-law negligence . . . causes of action generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site" (*Nusio v Legend Autorama, Ltd.*, 219 AD3d 842, 843 [2023] [internal quotation marks omitted]). Where "a claim arises out of the means and methods of the work, a defendant may be held liable for common-law negligence . . . only if he or she had the authority to supervise or control the performance of the work" (*Roblero v Bais Ruchel High Sch., Inc.*, 175 AD3d 1446, 1448 [2019] [internal quotation marks omitted]; see *Walsh v Kenny*, 219 AD3d 1555, 1557 [2023]). "A defendant has the authority to supervise or control the work . . . when that defendant bears the responsibility for the manner in which the work is performed" (*Abelleira v City of New York*, 201 AD3d 679, 680 [2022] [internal quotation marks omitted]).

Here, to the extent that the plaintiff's claims are based on the manner in which the work was performed, Bellco established, prima facie, that it did not have the authority to supervise or control the means and method of that work (see *Hamm v Review Assoc., LLC*, 202 AD3d 934, 939 [2022]). Bellco's submissions established that the decedent was an independent contractor who was working with one of Bellco's

tenants on Belco's premises and that Belco had no oversight or control over the work.

Further, to the extent that the plaintiff's claims are based on an alleged dangerous condition on the premises, Belco established, *prima facie*, that there was no dangerous condition on the premises and that, in any event, "it did not create the allegedly dangerous condition or have actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied it" (*Verderosa v County of Suffolk*, 226 AD3d 845, 847 [2024] [internal quotation marks omitted]; see *Hamm v Review Assoc., LLC*, 202 AD3d at 939). In opposition, the plaintiff failed to raise a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Seizeme v Levy*, 208 AD3d 809, 811 [2022]).

Accordingly, the Supreme Court properly granted that branch of Belco's motion which was for summary judgment dismissing the complaint insofar as asserted against it. Brathwaite Nelson, J.P., Taylor, Ventura and McCormack, JJ., concur.

44 *Wilmington Savings Fund Society, FSB, Appellant, v Luz Duran et al., Respondents, et al., Defendants.* [251 NYS3d 269]—

Mortgages—Foreclosure—Standing—Discrepancy between Two Versions of Note

Mortgages—Foreclosure—Compliance with RPAPL 1304 Notice Requirement—Mail Return Receipts Neither Signed Nor Postmarked

Mortgages—Foreclosure—Compliance with Federal Regulations—Conditions Precedent to Commencement of Action

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Maurice E. Muir, J.), entered October 25, 2023. The order, insofar as appealed from, denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Luz Duran and Jovini Sanchez and to strike those defendants' amended answer and granted those defendants' cross-motion for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is modified, on the law, by deleting the provision thereof granting the cross-motion of the defendants Luz Duran and Jovini Sanchez for summary judgment dismissing the complaint insofar as asserted against them, and substituting therefor a provision denying the cross-motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The defendants Luz Duran and Jovini Sanchez (hereinafter together the defendants) executed a note secured by a mortgage on real property located in Queens. Subsequently, the plaintiff

commenced this action to foreclose the mortgage against the defendants, among others. The defendants interposed an answer and an amended answer, in which they asserted affirmative defenses alleging, inter alia, lack of standing, failure to comply with RPAPL 1304, and failure to comply with 12 CFR 1024.39 (a) and (b) (1), 24 CFR 203.602, 203.604, 203.605, and 203.606. The plaintiff moved, among other things, for summary judgment on the complaint insofar as asserted against the defendants and to strike the defendants' amended answer. The defendants opposed the motion and cross-moved for summary judgment dismissing the complaint insofar as asserted against them based on the plaintiff's failure to comply with the foregoing federal regulations. In an order entered October 25, 2023, the Supreme Court, inter alia, denied those branches of the plaintiff's motion and granted the defendants' cross-motion. The plaintiff appeals.

"To establish a prima facie case in an action to foreclose a mortgage, a plaintiff must produce the mortgage, the unpaid note, and evidence of default" (*Bank of Am., N.A. v Bloom*, 202 AD3d 736, 736 [2022]; see *Christiana Trust v Rashid*, 228 AD3d 822, 824 [2024]). "Additionally, where, as here, a plaintiff's standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief" (*Bank of Am., N.A. v Bloom*, 202 AD3d at 736; see *Wells Fargo Bank, N.A. v Carrington*, 221 AD3d 746, 748 [2023]). "A plaintiff establishes its standing to foreclose a mortgage by demonstrating that, when the action was commenced, it was either the holder of, or the assignee of, the underlying note" (*Wells Fargo Bank, N.A. v Carrington*, 221 AD3d at 748 [internal quotation marks omitted]; see *HSBC Bank USA, N.A. v Sene*, 219 AD3d 1499, 1500 [2023]).

The Supreme Court properly denied those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants and to strike the defendants' amended answer. As an initial matter, the plaintiff failed to establish its standing. The plaintiff provided, inter alia, the affidavits of Mario Selva, an assistant secretary employed by the plaintiff's prior loan servicer, Rushmore Loan Services, LLP (hereinafter Rushmore), and Dawn Horne, a document execution specialist for the plaintiff's current loan servicer, Selene Finance, L.P. However, the plaintiff's submissions in support of its motion included two different versions of the note—one submitted with Selva's and Horne's affidavits and the other annexed to the complaint. Selva and Horne both averred that the version of the note at-

tached to their respective affidavits was the true and accurate copy of the note. However, the plaintiff made no attempt to provide any explanation for the discrepancy between the two versions of the note (*see Partners for Payment Relief DE IV, LLC v Ramadan*, 190 AD3d 757 [2021]). Accordingly, the plaintiff failed to establish that it was the holder or assignee of the note at the time the action was commenced and, therefore, failed to establish its standing (*see HSBC Bank USA, N.A. v Sene*, 219 AD3d at 1500; *Partners for Payment Relief DE IV, LLC v Ramadan*, 190 AD3d 757 [2021]).

Additionally, the plaintiff failed to establish its compliance with RPAPL 1304. “Pursuant to RPAPL 1304 (1), ‘at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, or borrowers at the property address and any other address of record, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.’ The RPAPL 1304 notice must be sent ‘by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage’ ” (*NS194, LLC v Gregg*, 231 AD3d 1162, 1162 [2024], quoting RPAPL 1304 [2]). “Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action” (*U.S. Bank N.A. v Adams*, 202 AD3d 867, 868 [2022] [internal quotation marks omitted]; *see Citibank, N.A. v Conti-Scheurer*, 172 AD3d 17, 21 [2019]). “A plaintiff demonstrates compliance with RPAPL 1304 ‘through evidence of actual mailing (e.g., an affidavit of mailing or service) or . . . by proof of a sender’s routine business practice with respect to the creation, addressing, and mailing of documents of that nature’ ” (*U.S. Bank N.A. v Romano*, 231 AD3d 1079, 1080 [2024] [emphasis omitted], quoting *CIT Bank N.A. v Schiffman*, 36 NY3d 550, 556 [2021]; *see U.S. Bank N.A. v Pickering-Robinson*, 197 AD3d 757, 759 [2021]).

Here, Selva stated that a review of Rushmore’s business records confirmed that a 90-day notice was sent via certified and first-class mail on May 7, 2015. However, the plaintiff submitted no evidence that the notice was sent by first-class mail, and the certified mail return receipts submitted were neither signed nor postmarked (*see NS194, LLC v Gregg*, 231 AD3d at 1163; *Wells Fargo Bank, N.A. v Shields*, 201 AD3d 1007, 1010 [2022]). Moreover, Selva, in his affidavit, failed to specifically describe the procedures in place designed to ensure that RPAPL notices were properly addressed and mailed both by first-class mail and by registered or certified mail (*see Wilmington Trust, N.A. v Meyerhoeffer*, 219 AD3d 549, 552 [2023]).

However, the Supreme Court improperly granted the defendants' cross-motion for summary judgment dismissing the complaint insofar as asserted against them. Where a defendant alleges that the plaintiff failed to comply with conditions precedent set forth in the loan documents to foreclose on a mortgage, such as violations of certain federal regulations applicable to a mortgage insured by the Federal Housing Administration (hereinafter FHA), as part of its prima facie showing, the plaintiff must establish compliance with such conditions precedent or that it was exempt from complying with them (*see Green Planet Servicing, LLC v Martin*, 141 AD3d 892, 893 [2016]). Here, the defendants demonstrated their prima facie entitlement to judgment as a matter of law, as they established that the instant action involved an FHA-insured loan, which was subject to certain federal regulations that were conditions precedent to the commencement of an action, which conditions were not satisfied. However, the plaintiff raised triable issues of fact as to whether it was exempt from complying with such regulations (*see id.*; *Washington v United States Dept. of Hous. & Urban Dev.*, 2019 WL 5694102, *2, 2019 US Dist LEXIS 127027, *2-3 [ED NY, July, 29, 2019, No. 16-CV-3948 (ENV) (SMG)]).

In light of our determination, we need not reach the defendants' remaining contention. Genovesi, J.P., Chambers, Taylor and Hom, JJ., concur.

45 Michelle Worob, Appellant, v Brian Campbell et al., Respondents, et al., Defendant. (And a Third-Party Action.) [252 NYS3d 158]—

Pleading—Sufficiency of Pleading—Libel and Slander

Pleading—Sufficiency of Pleading—Negligent Infliction of Emotional Distress—Failure to Allege Fear for Safety

Libel and Slander—Public Figure—Achievement of Fame or in Public Controversy—Requirement to Plead Actual Malice

In an action to recover damages for defamation, defamation per se, intentional infliction of emotional distress, and negligent infliction of emotional distress, the plaintiff appeals from (1) an order of the Supreme Court, Rockland County (Paul I. Marx, J.), dated October 8, 2021, and (2) an undated order of the same court. The order dated October 8, 2021, insofar as appealed from, granted the motion of the defendant Lisa Williams pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against her and denied the plaintiff's cross-motion pursuant to CPLR 3025 (b) for leave to amend the complaint. The undated order granted the motion of the defendants Brian Campbell and Matt Worgul pursuant to CPLR

3211 (a) (7) to dismiss the complaint insofar as asserted against them.

Ordered that the order dated October 8, 2021, is modified, on the law, (1) by deleting the provisions thereof granting those branches of the motion of the defendant Lisa Williams which were pursuant to CPLR 3211 (a) (7) to dismiss the causes of action to recover damages for defamation and defamation per se insofar as asserted against her, and substituting therefor provisions denying those branches of the motion, and (2) by deleting the provision thereof denying the plaintiff's cross-motion pursuant to CPLR 3025 (b) for leave to amend the complaint, and substituting therefor a provision granting the cross-motion; as so modified, the order dated October 8, 2021, is affirmed insofar as appealed from; and it is further,

Ordered that the undated order is modified, on the law, by deleting the provisions thereof granting those branches of the motion of the defendants Brian Campbell and Matt Worgul which were pursuant to CPLR 3211 (a) (7) to dismiss the causes of action to recover damages for defamation and defamation per se insofar as asserted against them, and substituting therefor provisions denying those branches of the motion; as so modified, the undated order is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

In February 2021, the plaintiff commenced this action against the defendants to recover damages for defamation, defamation per se, intentional infliction of emotional distress, and negligent infliction of emotional distress. The plaintiff alleged, among other things, that the defendants made various statements to a local online newspaper and individual members of the community falsely accusing her of misappropriating monies from the Pearl River Chamber of Commerce while she was acting as its treasurer.

The defendant Lisa Williams moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against her for failure to state a cause of action. The plaintiff cross-moved pursuant to CPLR 3025 (b) for leave to amend the complaint. In an order dated October 8, 2021, the Supreme Court, *inter alia*, granted Williams's motion and denied the plaintiff's cross-motion. The plaintiff appeals.

Thereafter, the defendants Brian Campbell and Matt Worgul moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against them for failure to state a cause of action. The plaintiff cross-moved pursuant to CPLR 3025 (b) for leave to amend the complaint. In an undated order, the Supreme Court, without referencing the plaintiff's second

cross-motion for leave to amend the complaint, granted the motion of Campbell and Worgul. The plaintiff appeals.

Generally, “[l]eave to amend a pleading shall be freely given absent prejudice or surprise resulting directly from the delay unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Spina v Browning Hotel Props., LLC*, 230 AD3d 613, 613 [2024] [internal quotation marks omitted], quoting *Ruland v Leibowitz*, 209 AD3d 1051, 1052 [2022]; see *Kyung Hee Moon v Owadayah*, 223 AD3d 793, 794 [2024]). Here, the Supreme Court improvidently exercised its discretion in denying the plaintiff’s cross-motion for leave to amend the complaint, made in response to Williams’s motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against her, as the proposed amendments were not palpably insufficient or patently devoid of merit (see *Tenenbaum v Ziv*, 231 AD3d 1181, 1182 [2024]; *Spina v Browning Hotel Props., LLC*, 230 AD3d at 613-614).

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Tsamasiros v Jones*, 232 AD3d 816, 817 [2024]; see *Whelan v Cuomo*, 220 AD3d 979, 980 [2023]).

“The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se” (*Greenberg v Spitzer*, 155 AD3d 27, 41 [2017]; see *Tsamasiros v Jones*, 232 AD3d at 817). In addition, where the plaintiff is a public figure, the plaintiff is required to prove, by clear and convincing evidence, that the defamatory statements were published with actual malice (see *Udell v NYP Holdings, Inc.*, 169 AD3d 954, 956 [2019]; *Greenberg v Spitzer*, 155 AD3d at 41). “In an action for libel or slander, the particular words complained of shall be set forth in the complaint” (CPLR 3016 [a]; see *Tsamasiros v Jones*, 232 AD3d at 817; *Nofal v Yousef*, 228 AD3d 772, 774 [2024]), and the complaint “must also allege the time, place, and manner of the false statement and specify to whom it was made” (*Tsatskin v Kordonsky*, 189 AD3d 1296, 1299 [2020]; see *Dillon v City of New York*, 261 AD2d 34, 38 [1999]).

Here, accepting the allegations in the proposed amended

complaint as true and according the plaintiff every possible favorable inference, the proposed amended complaint sufficiently pleaded causes of action against Williams to recover damages for defamation and defamation per se (see *Jesberger v CVS Health Solutions, LLC*, 222 AD3d 849, 850 [2023]; *Crime Victims Ctr., Inc. v Logue*, 181 AD3d 556, 557 [2020]). Accordingly, the Supreme Court should have denied those branches of Williams's motion which were pursuant to CPLR 3211 (a) (7) to dismiss the causes of action to recover damages for defamation and defamation per se insofar as asserted against her (see *Jesberger v CVS Health Solutions, LLC*, 222 AD3d at 850).

“The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress” (*Oluwo v Mills*, 228 AD3d 879, 881 [2024], quoting *Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710 [2012]). “In order to state a cause of action to recover damages for intentional infliction of emotional distress, the pleading must allege ‘conduct [that] has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community’” (*Ratto v Oliva*, 195 AD3d 870, 873 [2021], quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]; see *Oluwo v Mills*, 228 AD3d at 881). Here, accepting as true the allegations in the proposed amended complaint, the alleged conduct did not satisfy that standard (see *Oluwo v Mills*, 228 AD3d at 881; *Klein v Metropolitan Child Servs., Inc.*, 100 AD3d at 711). Moreover, the cause of action to recover damages for intentional infliction of emotional distress is duplicative of the causes of action to recover damages for defamation and defamation per se (see *Segall v Sanders*, 129 AD3d 819, 821 [2015]; *Akpinar v Moran*, 83 AD3d 458, 459 [2011]). Accordingly, the Supreme Court properly granted that branch of Williams's motion which was pursuant to CPLR 3211 (a) (7) to dismiss the cause of action to recover damages for intentional infliction of emotional distress insofar as asserted against her (see *Davydov v Youssefi*, 205 AD3d 881, 883 [2022]; *Mees v Buiter*, 186 AD3d 1670, 1672 [2020]).

“A cause of action to recover damages for negligent infliction of emotional distress ‘generally must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety’” (*Lea v McNulty*, 227

AD3d 971, 973 [2024], quoting *Santana v Leith*, 117 AD3d 711, 712 [2014]). Here, the plaintiff failed to allege, inter alia, either that she feared for her own safety or that any of Williams's acts endangered her physical safety (see *DiMauro v Advance Publs., Inc.*, 190 AD3d 942, 945-946 [2021]; *Ross v State Univ. of N.Y.*, 166 AD3d 1034, 1035 [2018]). Accordingly, the Supreme Court properly granted that branch of Williams's motion which was pursuant to CPLR 3211 (a) (7) to dismiss the cause of action to recover damages for negligent infliction of emotional distress insofar as asserted against her (see *DiMauro v Advance Publs., Inc.*, 190 AD3d at 945-946).

As the causes of action against Campbell and Worgul to recover damages for defamation and defamation per se were sufficiently pleaded, the Supreme Court should have denied those branches of their motion which were pursuant to CPLR 3211 (a) (7) to dismiss those causes of action insofar as asserted against them (see *Jesberger v CVS Health Solutions, LLC*, 222 AD3d at 849; *Crime Victims Ctr., Inc. v Logue*, 181 AD3d at 557). However, the court properly granted those branches of their motion which were pursuant to CPLR 3211 (a) (7) to dismiss the causes of action to recover damages for intentional infliction of emotional distress and negligent infliction of emotional distress insofar as asserted against them, for the reasons discussed above (see *Oluwo v Mills*, 228 AD3d at 881; *DiMauro v Advance Publs., Inc.*, 190 AD3d at 945-946).

Moreover, contrary to the defendants' contentions, the plaintiff is not a public figure or a limited-purpose public figure. "Certain individuals may be considered public figures for all purposes while others 'may invite publicity only with respect to a narrow area of interest' and may fairly be considered public figures only where the alleged defamation relates to the publicity they sought" (*Gottwald v Sebert*, 40 NY3d 240, 251 [2023], quoting *James v Gannett Co.*, 40 NY2d 415, 423 [1976]). Limited-purpose public figures "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (*Huggins v Moore*, 94 NY2d 296, 302 [1999], quoting *Gertz v Robert Welch, Inc.*, 418 US 323, 345 [1974]). Here, the plaintiff did not "achieve such pervasive fame or notoriety that [she became] a public figure for all purposes" (*Gertz v Robert Welch, Inc.*, 418 US at 351), nor did she inject herself into a particular public controversy, and, thus, the plaintiff was not required to plead actual malice (see *Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880, 883 [2011]).

The plaintiff's cross-motion for leave to amend the complaint

made in response to the motion of Campbell and Worgul pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against them was not addressed in the undated order appealed from and, thus, remains pending and undecided (*see Katz v Katz*, 68 AD2d 536, 542-543 [1979]). Chambers, J.P., Christopher, Ford and Golia, JJ., concur.

(February 18, 2026)

1 Dwayne Belfield, Respondent, v Xaianara Y. Marte et al., Appellants, and Tushaine D. Phillpotts-Johnson et al., Respondents. [251 NYS3d 714]—

Motor Vehicles—Emergency Vehicles—Reckless Disregard—Activated Lights and Sirens and Slowed before Entering Intersection

In an action to recover damages for personal injuries, the defendants Xaianara Y. Marte and Lifeline Ambulance Service, Inc., appeal from an order of the Supreme Court, Kings County (Debra Silber, J.), dated October 6, 2023. The order denied that branch of those defendants' motion which was for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them.

Ordered that the order is reversed, on the law, with one bill of costs, and that branch of the motion of the defendants Xaianara Y. Marte and Lifeline Ambulance Service, Inc., which was for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them is granted.

On December 15, 2018, an ambulance owned by the defendant Lifeline Ambulance Service, Inc., and operated by the defendant Xaianara Y. Marte (hereinafter together the ambulance defendants), and a vehicle operated by the defendant Tushaine D. Phillpotts-Johnson (hereinafter the Nicholas vehicle) and owned by the defendant Trevor F. Nicholas (hereinafter together the Nicholas defendants) came into contact at the intersection of Kings Highway and Snyder Avenue in Brooklyn. The plaintiff was a passenger in the Nicholas vehicle. Immediately prior to the accident, the Nicholas vehicle was driving eastbound on Snyder Avenue and entered the intersection with a green traffic signal. Marte was driving northbound on Kings Highway and entered the intersection with a red traffic signal.

The plaintiff commenced this action to recover damages for personal injuries. The ambulance defendants moved, inter alia, for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them, contending that

Marte's actions were governed by the reckless disregard standard of care pursuant to Vehicle and Traffic Law § 1104, that Marte did not act with reckless disregard for the safety of others, and that Phillpotts-Johnson's actions were the sole proximate cause of the accident. In an order dated October 6, 2023, the Supreme Court denied that branch of the ambulance defendants' motion. The ambulance defendants appeal.

"Vehicle and Traffic Law § 1104 provides a qualified exemption to drivers of authorized emergency vehicles from certain traffic laws when they are involved in an emergency operation" (*Robinson v County of Suffolk*, 219 AD3d 1542, 1543 [2023] [internal quotation marks omitted]; see *McGough v City of Long Beach*, 174 AD3d 698, 699 [2019]; *Torres v Saint Vincent's Catholic Med. Ctrs. of N.Y.*, 117 AD3d 717, 717-718 [2014]). Those traffic laws include, among other things, proceeding past a steady red signal or exceeding the speed limit (see Vehicle and Traffic Law § 1104 [a], [b] [2], [3]). Pursuant to Vehicle and Traffic Law § 1104 (e), however, "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his [or her] reckless disregard for the safety of others" (*Fuchs v City of New York*, 186 AD3d 459, 460 [2020]). "Thus, the manner in which a driver of an authorized emergency vehicle operates the vehicle in an emergency situation may not form the basis for civil liability to an injured third party unless that authorized emergency driver acted in reckless disregard for the safety of others" (*id.*; see Vehicle and Traffic Law § 1104; *Shalom v East Midwood Volunteer Ambulance Corp.*, 138 AD3d 724, 725 [2016]). "This [reckless disregard] standard requires proof that the driver intentionally committed an act of an unreasonable character while disregarding a known or obvious risk that was so great as to make it highly probable that harm would follow" (*Shalom v East Midwood Volunteer Ambulance Corp.*, 138 AD3d at 725-726; see *Woodard v Thomas*, 77 AD3d 738, 739 [2010]). Pursuant to Vehicle and Traffic Law § 1104 (c), generally "the exemptions apply only when the authorized emergency vehicle sounded audible signals such as a siren and displayed at least one red light" (*Wynter v City of New York*, 173 AD3d 1122, 1124 [2019]; see *Bonafede v Bonito*, 145 AD3d 842, 843 [2016]; *Bryan v City of Long Beach*, 138 AD3d 774, 775 [2016]).

Here, in support of their motion, the ambulance defendants submitted, among other things, transcripts of the deposition testimony of Marte, the plaintiff, Phillpotts-Johnson, and

nonparty Conrad Glasgow, an eyewitness to the accident. At her deposition, Marte testified that at the time of the accident, she and her partner were responding to a level one priority call, that the emergency lights and siren on the ambulance were activated the entire time, and that when she arrived at the intersection of Kings Highway and Snyder Avenue, the traffic light was turning red for her direction of travel, so she brought the ambulance to a stop. Marte testified that she stopped for approximately two seconds before proceeding into the intersection, then began to “creep[] out” by slowly “hit[ting] . . . the gas,” and continued creeping out until the accident occurred. Marte testified that she did not see the Nicholas vehicle while she was stopped at the red light. According to Marte, prior to reaching the intersection at Snyder Avenue, her highest rate of speed on Kings Highway had been 25 miles per hour and her rate of speed at the moment of impact was approximately 4 miles per hour. Glasgow testified during his deposition that the emergency lights and siren were activated on the ambulance as it traveled on Kings Highway until the accident occurred and that he could not understand why the Nicholas vehicle was not slowing down since the siren was blaring. Glasgow testified that he did not notice if the ambulance slowed down at any point before entering the intersection and that he did not see if the ambulance had stopped before it proceeded through the intersection since “at that time [he] was running for [his] life.” Glasgow testified that he estimated that the ambulance was traveling at a rate of speed of 45 to 50 miles per hour on Kings Highway since the ambulance had its siren on, because he assumed that usually when an ambulance had its siren on, the “ambulance is probably doing about 45, 50 miles an hour.” The plaintiff testified during his deposition that he heard the siren prior to the accident but did not see the ambulance before the accident. Phillpotts-Johnson testified during his deposition that he saw the ambulance’s emergency lights from the corner of his eye when the ambulance was 5 to 10 feet from the Nicholas vehicle. Phillpotts-Johnson initially testified that he did not hear a siren but later testified that he could not recall if he had heard an ambulance siren at any point prior to the accident. Phillpotts-Johnson testified that he estimated the ambulance’s rate of speed to be 45 to 50 miles per hour.

The ambulance defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that, at the time of the accident, Marte was operating an emergency vehicle while involved in an emergency operation (*see* Vehicle and Traffic Law §§ 101, 114-b; *Alonso v Crest Transp.*

Serv., Inc., 226 AD3d 634, 635 [2024]; *Torres v Saint Vincent's Catholic Med. Ctrs. of N.Y.*, 117 AD3d at 718) and that Marte's conduct did not rise to the level of reckless disregard for the safety of others (see *Alonso v Crest Transp. Serv., Inc.*, 226 AD3d at 635; *Jobson v SM Livery, Inc.*, 175 AD3d 1510, 1512 [2019]). The ambulance defendants' submissions demonstrated that the ambulance's emergency lights and sirens were activated (see Vehicle and Traffic Law § 1104 [c]; *Alonso v Crest Transp. Serv., Inc.*, 226 AD3d at 635) and that Marte either stopped or slowed sufficiently before entering the intersection (see *Jobson v SM Livery, Inc.*, 175 AD3d at 1512; *Woodard v Thomas*, 77 AD3d at 739). Contrary to the plaintiff's contentions, the deposition testimony of Glasgow and Phillpotts-Johnson did not raise triable issues of fact regarding whether Marte stopped or slowed down prior to entering the intersection (cf. *Robinson v County of Suffolk*, 219 AD3d 1542, 1544 [2023]; *Sanicola v Wantagh Fire Dist., Inc.*, 187 AD3d 1232, 1232-1233 [2020]) or whether the rate of speed at which Marte was driving was reckless, given that Glasgow's estimation of the ambulance's rate of speed was based on an assumption and Phillpotts-Johnson admitted that he first saw the ambulance from the corner of his eye when the ambulance was a few feet from the Nicholas vehicle (see *Frezzell v City of New York*, 24 NY3d 213, 218 [2014]). In opposition, the plaintiff and the Nicholas defendants failed to raise a triable issue of fact.

Accordingly, the Supreme Court should have granted that branch of the ambulance defendants' motion which was for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them.

In light of our determination, we need not reach the ambulance defendants' remaining contention. Chambers, J.P., Christopher, Landicino and McCormack, JJ., concur.

2 David E. Bharath, Appellant, v Virendra Sitaram, Respondent. [252 NYS3d 174]—

Courts—Jurisdiction—Participation in Lawsuit on Merits—Appearance for Examination under Oath

In an action for a renewal judgment pursuant to CPLR 5014, which was commenced by motion for summary judgment in lieu of complaint pursuant to CPLR 3213, the plaintiff appeals from an order of the Supreme Court, Queens County (Carmen R. Velasquez, J.), entered June 27, 2023. The order granted the defendant's motion (1) pursuant to CPLR 5015 (a) (4) to vacate a renewal judgment of the same court entered March 18, 2021, which, upon an order of the same court entered March 2, 2021,

granting the plaintiff's unopposed motion for summary judgment in lieu of complaint, is in favor of the plaintiff and against the defendant in the principal sum of \$207,490, and (2) pursuant to CPLR 3211 (a) (8) to dismiss the action.

Ordered that the order entered June 27, 2023, is reversed, on the law, with costs, and the defendant's motion pursuant to CPLR 5015 (a) (4) to vacate the renewal judgment and pursuant to CPLR 3211 (a) (8) to dismiss the action is denied.

On April 1, 2011, the plaintiff obtained a judgment against the defendant in a personal injury action. The judgment was docketed in the Queens County Clerk's Office on April 1, 2011, thus creating a 10-year lien on the defendant's property (*see* CPLR 5203 [a]).

On October 8, 2020, prior to the expiration of the judgment lien, the plaintiff commenced the instant action for a renewal judgment pursuant to CPLR 5014 by electronically filing a motion for summary judgment in lieu of complaint pursuant to CPLR 3213. On October 16, 2020, the defendant was served by substitute service of the summons, notice of motion for summary judgment in lieu of complaint, and supporting documents upon a person of suitable age and discretion at the defendant's home address pursuant to CPLR 308 (2). On October 19, 2020, the defendant was served those same documents by first-class mail to his home address. On October 23, 2020, an affidavit of service was filed.

The motion for summary judgment in lieu of complaint was made returnable on November 20, 2020. Prior to the return date, the Supreme Court administratively adjourned the motion until November 30, 2020. The defendant made no appearance and submitted no papers on or prior to November 30, 2020. In an order entered March 2, 2021, the court granted the plaintiff's unopposed motion for summary judgment. On March 18, 2021, a renewal judgment was entered.

On November 12, 2021, the defendant participated in an examination under oath in connection with the enforcement of the renewal judgment. On September 23, 2022, the defendant moved pursuant to CPLR 5015 (a) (4) to vacate the renewal judgment and pursuant to CPLR 3211 (a) (8) to dismiss the action. On June 27, 2023, the Supreme Court granted the defendant's motion. The plaintiff appeals.

Pursuant to CPLR 5015 (a) (4), the "court that rendered a judgment or order may relieve a party from it upon such terms as may be just" (*Beneficial Homeowner Serv. Corp. v Francis*, 209 AD3d 957, 958 [2022]), including "upon the ground of . . . lack of jurisdiction to render the judgment or order" (*Sams*

Distribs., LLC v Friedman, 235 AD3d 1021, 1022 [2025] [internal quotation marks omitted]).

“‘[I]mproper service of a motion provides a complete excuse for default on a motion and deprives the court of jurisdiction to entertain the motion’” (*Blue Lagoon, LLC v Reisman*, 214 AD3d 938, 940 [2023], quoting *Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 124-125 [2015]), and “‘the failure to provide a defendant with proper notice of a motion renders the resulting order and judgment entered upon that order nullities, warranting vacatur pursuant to CPLR 5015 (a) (4)’” (*id.*, quoting *Paulus v Christopher Vacirca, Inc.*, 128 AD3d at 125).

However, “‘[w]hen a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court’s jurisdiction over the action, and by appearing informally in this manner, the defendant confers in personam jurisdiction on the court’” (*Deutsche Bank Natl. Trust Co. v Medford*, 234 AD3d 669, 671 [2025], quoting *JPMorgan Chase Bank, N.A. v Lee*, 186 AD3d 685, 686 [2020]; see *HSBC Bank USA, N.A. v Whitelock*, 214 AD3d 855, 856-857 [2023]; *Bayview Loan Servicing, LLC v Zelyakovsky*, 202 AD3d 738, 741 [2022]).

Here, the defendant made an informal appearance in the action by appearing for the examination under oath in connection with the enforcement of the renewal judgment, which went to the merits of this action. He did so without preserving his jurisdictional defense in a submission to the Supreme Court. Indeed, the defendant did not seek to vacate his default until 10 months after his appearance. Under these circumstances, the defendant waived his jurisdictional objection through his informal appearance (see generally *Travelon, Inc. v Maekitan*, 215 AD3d 710, 713 [2023]; *Taveras v City of New York*, 108 AD3d 614, 617 [2013]).

Accordingly, the Supreme Court should have denied the defendant’s motion pursuant to CPLR 5015 (a) (4) to vacate the renewal judgment and pursuant to CPLR 3211 (a) (8) to dismiss the action.

In light of the foregoing, the parties’ remaining contentions need not be reached. Connolly, J.P., Chambers, Voutsinas and Landicino, JJ., concur.

3 Esther Castillo, Appellant, v Logan Bus Co., Inc., et al., Respondents. [251 NYS3d 291]—

Motions and Orders—Reargument or Renewal—Misapprehension of Terms of Order

Motor Vehicles—Collision—Triable Issue—Which Vehicle Had Right-of-Way

In an action to recover damages for personal injuries, the

plaintiff appeals from an order of the Supreme Court, Kings County (Carolyn E. Wade, J.), dated July 20, 2023. The order, insofar as appealed from, granted that branch of the defendants' motion which was for leave to reargue their opposition to that branch of the plaintiff's prior motion which was for summary judgment on the issue of liability, which had been granted in an order of the same court dated February 16, 2023, and, upon reargument, in effect, vacated so much of the order dated February 16, 2023, as granted that branch of the plaintiff's prior motion, and thereupon, denied that branch of the prior motion.

Ordered that the order dated July 20, 2023, is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action to recover damages for personal injuries that she allegedly sustained in a motor vehicle accident. The accident occurred when a school bus owned by the defendant Logan Bus Co., Inc., and operated by the defendant Jean Claude Picard, collided with the plaintiff's vehicle in the intersection of Woodhaven Boulevard and Jamaica Avenue in Queens. In an order dated March 2, 2022 (hereinafter the March 2022 order), the Supreme Court, *inter alia*, directed Picard to appear for a deposition by a date certain and ordered that, if Picard failed to appear for a deposition by this date, he would be precluded, among other things, from offering evidence in opposition to a dispositive motion. Picard thereafter failed to appear for a deposition, and the plaintiff moved, *inter alia*, for summary judgment on the issue of liability. In an order dated February 16, 2023 (hereinafter the February 2023 order), the court, among other things, granted that branch of the motion.

The defendants thereafter moved, *inter alia*, for leave to renew and reargue their opposition to that branch of the plaintiff's prior motion which was for summary judgment on the issue of liability. To the extent the defendants sought leave to renew, they contended, among other things, that a change in decisional law prior to the February 2023 order meant the Supreme Court had misapplied the March 2022 order to bar both defendants from offering evidence in opposition to that branch of the plaintiff's prior motion which was for summary judgment on the issue of liability. In seeking leave to reargue, the defendants contended that the court had overlooked an affidavit of Lidia Pineda, a nonparty witness, which raised triable issues of fact as to whether the defendants were free from fault in the happening of the accident.

In an order dated July 20, 2023, the Supreme Court, *inter*

alia, denied that branch of the defendants' motion which was for leave to renew, granted that branch of their motion which was for leave to reargue, and, upon reargument, in effect, vacated so much of the February 2023 order as granted that branch of the plaintiff's prior motion which was for summary judgment on the issue of liability, and thereupon, denied that branch of the prior motion. The plaintiff appeals.

"A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (*Milennium Dev. & Constr., LLC v Pick*, 235 AD3d 737, 739 [2025] [internal quotation marks omitted]). "[T]he determination to grant leave to reargue lies within the sound discretion of the court" (*D'Amico Constr., Inc. v Cow Bay Sprinkler Corp.*, 233 AD3d 1024, 1025 [2024] [internal quotation marks omitted]). Here, contrary to the plaintiff's contention, the Supreme Court providently exercised its discretion in granting leave to reargue, as the court (1) misapprehended the terms of the March 2022 order and (2) overlooked an affidavit submitted by the defendants in opposition to the plaintiff's prior motion (see CPLR 2221 [d]; *Christopulos v Christopulos*, 209 AD3d 968, 969 [2022]).

Insofar as the Supreme Court concluded it had misapprehended the terms of the March 2022 order, the court correctly determined, in the order on appeal, that, in fact, only Picard was precluded from offering testimony or an affidavit.

The Supreme Court also properly, upon reargument, denied that branch of the plaintiff's prior motion which was for summary judgment on the issue of liability. "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Farooq v Uber USA, LLC*, 235 AD3d 846, 846-847 [2025] [internal quotation marks omitted]).

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability. However, in opposition, the defendants raised triable issues of fact through the submission of Pineda's affidavit. Pineda averred that Picard was facing a green turn arrow permitting a left turn at the intersection of Woodhaven Boulevard and Jamaica Avenue before the collision, raising a triable issue of fact as to whether Picard had the right of way and was free from fault in the happening of the accident. Contrary to the plaintiff's

contention, this issue of fact is more than simply about the apportionment of fault between the plaintiff and the defendants, since the trier of fact could find that the defendants were free from fault in the happening of the accident.

The parties' remaining contentions either are without merit or need not be reached in light of our determination. Dillon, J.P., Brathwaite Nelson, Voutsinas and Hom, JJ., concur.

4 Vanik Chiloyan, Appellant, v Eduard Chiloyan, Respondent. [252 NYS3d 574]—

Motor Vehicles—Injuries to Passengers—Maintenance of Seatbelt—Possible to Conclude Negligence Not Substantial Factor

Trial—Verdict—Setting Verdict Aside—Culpable Conduct Not Same as Proximate Cause

Evidence—Photographic Evidence—Harmless Error in Preclusion of Photograph—Substantial Influence on Result

In an action to recover damages for personal injuries, the plaintiff appeals from (1) a judgment of the Supreme Court, Richmond County (Orlando Marrazzo, Jr., J.), dated December 29, 2022, and (2) an order of the same court dated March 13, 2023. The judgment, upon a jury verdict in favor of the defendant on the issue of liability, is in favor of the defendant and against the plaintiff dismissing the complaint. The order denied the plaintiff's motion pursuant to CPLR 4404 (a) to set aside a jury verdict on the issue of liability and for judgment as a matter of law or, in the alternative, to set aside the jury verdict as contrary to the weight of the evidence and for a new trial.

Ordered that the judgment is affirmed; and it is further,

Ordered that the order is affirmed; and it is further,

Ordered that one bill of costs is awarded to the defendant.

The plaintiff was operating a van transporting passengers to the airport when he was involved in a collision with another vehicle at an intersection in Manhattan. The plaintiff alleges that as a result of the impact, he was ejected from the van, which then rolled on top of him. The van was owned and maintained at the time by the defendant. The plaintiff commenced this action against the defendant to recover damages for personal injuries, alleging that he was caused to be ejected from the van due to the defendant's failure to equip the vehicle with a functional operator's seat belt. Following the liability portion of a bifurcated trial, the jury found that the defendant was negligent, but that his negligence was not a substantial factor in causing the plaintiff to be ejected from the van. On December 29, 2022, the Supreme Court issued a judgment in favor of the defendant and against the plaintiff dismissing the

complaint. In an order dated March 13, 2023, the court denied the plaintiff's motion pursuant to CPLR 4404 (a) to set aside the jury verdict on the issue of liability and for judgment as a matter of law or, in the alternative, to set aside the jury verdict as contrary to the weight of the evidence and for a new trial. The plaintiff appeals.

"A motion pursuant to CPLR 4401 or 4404 for judgment as a matter of law may be granted only 'where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party'" (*Caliendo v Ellington*, 104 AD3d 635, 636 [2013], quoting *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; see *Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Chicoine v Mendola*, 233 AD3d 841, 843 [2024]). "In considering such a motion, 'the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant'" (*Hamilton v Rouse*, 46 AD3d 514, 516 [2007], quoting *Szczerbiak v Pilat*, 90 NY2d at 556).

Here, viewing the evidence in the light most favorable to the defendant, and according him every favorable inference which may properly be drawn from the facts presented, there is a valid line of reasoning and permissible inferences which could lead rational individuals to the jury's conclusion that the defendant was negligent in failing to maintain, repair, or replace the seat belt, but that his negligence was not a substantial factor in causing the plaintiff to be ejected from the van (see *Cohen v Hallmark Cards*, 45 NY2d at 499). Although the jury concluded that the defendant was negligent, the jury could have rationally concluded, based upon the testimony and other evidence adduced at trial, that the defendant's negligence was not a substantial factor in causing the plaintiff to be ejected from the van because the plaintiff was not wearing the seat belt at the time of the accident.

Further, a jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]; *Nicastro v Park*, 113 AD2d 129, 134 [1985]). "A jury's finding that there was negligence, but that such negligence was not a proximate cause of the injury is inconsistent and, therefore, contrary to the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Sela v Katz*, 165 AD3d 1191, 1193 [2018] [internal quotation marks

omitted]; see *Archer v City of New York*, 204 AD3d 872, 873 [2022]). “Thus, where there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view” (*Bonomo v City of New York*, 78 AD3d 1094, 1095 [2010]).

Contrary to the plaintiff’s contention, a finding of proximate cause did not inevitably flow from a finding of culpable conduct (see *Cona v Dwyer*, 292 AD2d 562, 563 [2002]). Thus, the jury could have reasonably concluded, based upon the testimony and other evidence adduced at trial, that the defendant was negligent in maintaining the seat belt, but that the plaintiff did not use the seat belt, and, accordingly, the defendant’s negligence was not a substantial factor in causing the plaintiff to be ejected from the van (see *Arroyo v Derfner Mgt., Inc.*, 191 AD3d 747, 749 [2021]). Although the plaintiff testified that he was wearing his seat belt at the time of the accident, “[i]t is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses” (*Harewood v Holmes*, 163 AD3d 638, 638-639 [2018]; see *Bacchus v Restaurant Depot, LLC*, 234 AD3d 903, 904 [2025]). The record provides no basis for disturbing the jury’s credibility determination, and the jury’s determination with respect to the defendant’s liability was supported by a fair interpretation of the evidence (see *Lolik v Big V Supermarkets*, 86 NY2d at 746). Accordingly, the jury’s determination that the defendant’s negligence was not a substantial factor in causing the plaintiff to be ejected from the van was not contrary to the weight of the evidence (see *Arroyo v Derfner Mgt., Inc.*, 191 AD3d at 749; *Moffett-Knox v Anthony’s Windows on the Lake, Inc.*, 126 AD3d 768, 769 [2015]).

Contrary to the plaintiff’s contention, the jury was properly charged on causation since the “charge as a whole conveyed the correct legal principles” (*Manna v Don Diego*, 261 AD2d 590, 591 [1999]) and the record fails to establish the existence of substantial juror confusion occasioned by the Supreme Court’s instructions that would warrant a new trial (see *Young Mee Oh v Koon*, 140 AD3d 861, 862 [2016]; *Casella v City of New York*, 69 AD3d 549, 550 [2010]; *Mattei v Figueroa*, 262 AD2d 459 [1999]).

The Supreme Court properly permitted the testimony of two police witnesses, who testified about the police investigation of the accident. Since both witnesses were fact witnesses and not

expert witnesses, the disclosure requirement of CPLR 3101 (d) (1) was inapplicable (see *O’Neil v Klass*, 36 AD3d 677, 678 [2007]; *Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 35 [2001]).

“[T]rial courts are accorded wide discretion in making evidentiary rulings and those rulings should not be disturbed on appeal absent an improvident exercise of discretion or a showing of prejudice to a substantial right pursuant to CPLR 2002” (*Dyszkiewicz v City of New York*, 218 AD3d 546, 550 [2023] [citation and internal quotation marks omitted]; see *Traca v Catapano Engg. & Architecture, P.C.*, 237 AD3d 1134, 1135 [2025]; *6 Harbor Park Dr., LLC v Town of N. Hempstead*, 230 AD3d 721, 723 [2024]). Contrary to the plaintiff’s contention, the Supreme Court did not improvidently exercise its discretion in refusing to permit the plaintiff to introduce a certain photograph into evidence on the plaintiff’s case-in-chief. In any event, any error in precluding the plaintiff from introducing the photograph on his case-in-chief was harmless under the circumstances, as there is no indication that the evidence would have had a substantial influence on the result of the trial (see CPLR 2002; *Dyszkiewicz v City of New York*, 218 AD3d at 550-551; *Division Seven, Inc. v HP Bldrs. Corp.*, 58 AD3d 796, 797 [2009]).

The plaintiff’s contention that the Supreme Court erred in denying his motion in limine for a unified trial is without merit. Judges are encouraged to direct a bifurcated trial on the issues of liability and damages in any action to recover damages for personal injuries “where it appears that bifurcation may assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action” (22 NYCRR 202.42 [a]; see *Marisova v Collins-Brewster*, 223 AD3d 891, 892 [2024]; *Castro v Malia Realty, LLC*, 177 AD3d 58, 63 [2019]). “Although bifurcation is encouraged in appropriate settings, bifurcation is not an absolute given and it is the responsibility of the trial judge to exercise discretion in determining whether bifurcation is appropriate in light of all relevant facts and circumstances presented by the individual cases” (*Castro v Malia Realty, LLC*, 177 AD3d at 66; see *Rueda v Elmhurst Woodside, LLC*, 187 AD3d 955, 956 [2020]). A unified trial is appropriate where the nature of the plaintiff’s injuries has “an important bearing on the issue of liability” (*Matthew H. v County of Nassau*, 131 AD3d 135, 148 [2015]; see *Castro v Malia Realty, LLC*, 177 AD3d at 63-64). “The decision whether to conduct a bifurcated trial rests within the discretion of the trial court, and should not be disturbed absent an improvident exercise of discretion”

(*Wright v New York City Tr. Auth.*, 142 AD3d 1163, 1163 [2016] [internal quotation marks omitted]; see *Rueda v Elmhurst Woodside, LLC*, 187 AD3d at 956; *Castro v Malia Realty, LLC*, 177 AD3d at 63).

Here, the plaintiff failed to demonstrate that evidence regarding the nature and extent of his injuries was probative of the issue of liability (see *Wright v New York City Tr. Auth.*, 142 AD3d at 1164; *Parris v New York City Tr. Auth.*, 140 AD3d 938, 939 [2016]; *Patino v County of Nassau*, 124 AD3d 738, 740 [2015]). Under the circumstances, we decline to disturb the Supreme Court's determination to deny the plaintiff's motion in limine for a unified trial (see *Rueda v Elmhurst Woodside, LLC*, 187 AD3d at 956).

The plaintiff's remaining contentions are without merit. Genovesi, J.P., Ford, Wan and Love, JJ., concur.

5 Cui Lan Mai, Respondent, v Jets Towing, Inc., et al., Appellants. [249 NYS3d 231]—

**Motor Vehicles—Injuries to Pedestrians—Hit by Car while in Crosswalk—Affidavit, Police Accident Report, and Video of Accident
Motions and Orders—Premature Motion—Summary Judgment—Evidentiary Basis That Discovery Might Lead to Relevant Evidence**

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Caroline Piela Cohen, J.), dated February 22, 2024. The order, insofar as appealed from, granted that branch of the plaintiff's motion which was for summary judgment on the issue of liability.

Ordered that the order is affirmed insofar as appealed from, with costs.

On February 23, 2023, the plaintiff allegedly was injured while crossing Atlantic Avenue near its intersection with Brooklyn Avenue, when she was struck by a vehicle operated by the defendant Jeffery Joseph Munoz (hereinafter the defendant driver) on behalf of his employer, the defendant Jets Towing, Inc. Immediately prior to the accident, the defendants' vehicle was stopped on a pedestrian crosswalk near the intersection. The plaintiff walked in front of the defendants' vehicle, which started to accelerate and struck the plaintiff.

In March 2023, the plaintiff commenced this action to recover damages for personal injuries against the defendants. Thereafter, the plaintiff moved, inter alia, for summary judgment on the issue of liability. In an order dated February 22, 2024, the Supreme Court, among other things, granted that branch of the plaintiff's motion. The defendants appeal.

“A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant’s negligence was a proximate cause of the alleged injuries” (*Wei Ping Zheng v Sun & Son, Inc.*, 233 AD3d 733, 734 [2024] [internal quotation marks omitted]; see *Shanyou Liu v Joerg*, 223 AD3d 762, 763 [2024]). “To be entitled to summary judgment on the issue of a defendant’s liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence” (*Xiuying Cui v Hus-sain*, 207 AD3d 788, 789 [2022]; see *Rodriguez v City of New York*, 31 NY3d 312, 317-325 [2018]).

“‘A driver is bound to see what is there to be seen with the proper use of his or her senses’” (*Crist v Rosenberger*, 219 AD3d 569, 571 [2023], quoting *Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 790 [2019]). “‘A driver also has a statutory duty’ pursuant to Vehicle and Traffic Law § 1146 ‘to use due care to avoid colliding with pedestrians on the roadway, as well as a common-law duty to see that which he or she should have seen through the proper use of his or her senses’” (*Farooq v Uber USA, LLC*, 235 AD3d 846, 847 [2025], quoting *Lieb v Jacobson*, 202 AD3d 1072, 1073 [2022]). “‘A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se’” (*Farooq v Uber USA, LLC*, 235 AD3d at 847, quoting *Ali v Alam*, 223 AD3d 642, 644 [2024]).

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting, inter alia, her affidavit, a certified police accident report, and video from a surveillance camera, which demonstrated, prima facie, that the defendant driver negligently failed to see what there was to be seen and to exercise due care to avoid striking the plaintiff while she crossed the street (see Vehicle and Traffic Law § 1146; *Frankel v Jaroslawicz*, 225 AD3d 742, 743-744 [2024]; *Crist v Rosenberger*, 219 AD3d at 571). The defendants’ contention that the plaintiff’s affidavit was inadmissible because it was not in compliance with CPLR 2101 (b) is improperly raised for the first time on appeal and, thus, is not properly before this Court (see *Pyke v Bachan*, 123 AD3d 994, 995 [2014]). In opposition to the plaintiff’s prima facie showing, the defendants failed to raise a triable issue of fact.

Contrary to the defendants’ contention, that branch of the plaintiff’s motion which was for summary judgment on the issue of liability was not premature. “A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the

facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2013]; see CPLR 3212 [f]; *Quintanilla v Mark*, 210 AD3d 713, 714 [2022]). Here, the defendants failed to offer any evidentiary basis to suggest that discovery might lead to relevant evidence or that facts essential to opposing that branch of the plaintiff’s motion which was for summary judgment on the issue of liability were exclusively within the knowledge and control of the plaintiff (see CPLR 3212 [f]; *Edwards v Cheezwhse Com, Inc.*, 210 AD3d 952, 953 [2022]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 737 [2007]).

Accordingly, the Supreme Court properly granted that branch of the plaintiff’s motion which was for summary judgment on the issue of liability. Genovesi, J.P., Wooten, Ventura and Golia, JJ., concur.

6 Dairy King, Inc., Doing Business as Barone Provisions, et al., Respondents-Appellants, v Boar’s Head Provisions Co., Inc., et al., Appellants-Respondents. [252 NYS3d 585]—

Release—Scope of Release—General Release—Obtained under Circumstances That Indicated Unfairness

Contracts—Breach or Performance of Contract—Covenant of Good Faith and Fair Dealing—Confiscating Account and Termination of Distribution Agreement

Duress—Economic Duress—Immediate Possession of Needful Goods Threatened—Threat to Take All Stores Away

In an action, inter alia, to recover damages for breach of contract, the defendants appeal, and the plaintiffs cross-appeal, from an order of the Supreme Court, Kings County (Reginald A. Boddie, J.), dated March 8, 2021. The order, insofar as appealed from, denied those branches of the defendants’ separate motions which were pursuant to CPLR 3211 (a) to dismiss the fifth and sixth causes of action insofar as asserted against each of them. The order, insofar as cross-appealed from, granted those branches of the motion of the defendant Frank Brunckhorst Co., LLC, which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, fourth, seventh, eighth, ninth, and tenth causes of action and the demand for punitive damages insofar as asserted against it and, in effect, granted those branches of the motion of the defendant Boar’s Head Provisions Co., Inc., which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, fourth, seventh, eighth, ninth, and tenth causes of action and the demand for punitive damages insofar as asserted against it.

Ordered that the order is modified, on the law, (1) by delet-

ing the provision thereof granting those branches of the motion of the defendant Frank Brunckhorst Co., LLC, which were pursuant to CPLR 3211 (a) to dismiss the second, fourth, seventh, eighth, ninth, and tenth causes of action insofar as asserted it, and substituting therefor a provision denying those branches of the motion, (2) by deleting the provision thereof, in effect, granting those branches of the motion of the defendant Boar's Head Provisions Co., Inc., which were pursuant to CPLR 3211 (a) to dismiss the second, fourth, seventh, eighth, ninth, and tenth causes of action insofar as asserted it, and substituting therefor a provision denying those branches of the motion, and (3) by deleting the provision thereof denying those branches of the defendants' separate motions which were pursuant to CPLR 3211 (a) to dismiss the fifth and sixth causes of action insofar as asserted against each of them, and substituting therefor a provision granting those branches of the motions; as so modified, the order is affirmed insofar as cross-appealed from, without costs or disbursements.

The plaintiffs, Frank Barone and his company, Dairy King, Inc. (hereinafter Dairy King), commenced this action in 2020 against the defendants, Boar's Head Provisions Co., Inc. (hereinafter Boar's Head), and Frank Brunckhorst Co., LLC (hereinafter Brunckhorst). The complaint alleged the following. Boar's Head produced "delicatessen edibles," which were distributed through Brunckhorst. Brunckhorst distributed the products to authorized distributors, who, in turn, distributed the products to stores through the acquisition of distribution routes. Boar's Head exercised a large degree of control over the authorized distributors and, among other things, required its approval of the sale of a distribution route from one authorized distributor to another and prohibited authorized distributors from engaging in any other food-related business. In 1999, Dairy King became an authorized distributor and purchased a distribution route. In August 2019, the defendants informed the plaintiffs that they would no longer provide Boar's Head products to Dairy King and that Dairy King would no longer be considered an authorized distributor.

The complaint asserted 10 causes of action, alleging tortious interference with contract (first cause of action), breach of contract (second cause of action), fraudulent inducement (third cause of action), economic duress (fourth cause of action), violations of the Franchise Sales Act (General Business Law § 680 *et seq.*) (fifth and sixth causes of action), and violations of the Labor Law (seventh through tenth causes of action). The complaint also included a demand for punitive damages.

The defendants separately moved pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against each of them. In an order dated March 8, 2021, the Supreme Court, among other things, granted those branches of Brunckhorst's motion which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, fourth, seventh, eighth, ninth, and tenth causes of action and the demand for punitive damages insofar as asserted against it, and, in effect, granted those branches of Boar's Head's motion which were pursuant to CPLR 3211 (a) to dismiss those causes of action and the demand for punitive damages insofar as asserted against it. The court denied those branches of the defendants' separate motions which were pursuant to CPLR 3211 (a) to dismiss the fifth and sixth causes of action insofar as asserted against each of them. The defendants appeal, and the plaintiffs cross-appeal.

On a motion to dismiss pursuant to CPLR 3211 (a), the complaint must be liberally construed (*see id.* § 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d at 87). In assessing a motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action, the court must "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88; *see Langley v Melville Fire Dist.*, 213 AD3d 748, 750 [2023]). Under CPLR 3211 (a) (1), dismissal is warranted "only where the documentary evidence utterly refutes [the] factual allegations [in the complaint], conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Leon v Martinez*, 84 NY2d at 88).

Pursuant to CPLR 3211 (a) (5), a party may move to dismiss a cause of action on the ground that it may not be maintained because of a release. "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release shifts the burden of going forward to the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [alterations and internal quotation marks omitted]; *see Cames v Craig*, 181 AD3d 851, 852 [2020]). Here, while a general release executed by the plaintiffs, by its terms, released the defendants from all known and unknown causes of action that accrued on or before October 29, 2019, the allegation in the complaint that the defendants threatened to deny

approval of the plaintiffs' sale of the distribution route was sufficient to support a possible finding that the general release was obtained under circumstances that indicated unfairness (see *Farber v Breslin*, 47 AD3d 873, 877 [2008]; see also *China Dev. Indus. Bank v Morgan Stanley & Co. Inc.*, 86 AD3d 435, 437 [2011]; *Pashtrik Realty Corp. v Gjonlekaj*, 234 AD2d 54, 54 [1996]). The defendants' contention that the plaintiffs ratified the general release is not properly before this Court, because it relies on matter dehors the record (see *Yakubov v Gaft*, 231 AD3d 1099, 1101 [2024]). Accordingly, the Supreme Court properly denied dismissal of the complaint on the ground that the causes of action were barred by the general release.

Contrary to the plaintiffs' contention, the complaint failed to state a cause of action to recover damages for tortious interference with contract, as it failed to allege a breach of a valid contract between the plaintiffs and a third party and failed to allege the defendants' intentional procurement of the third party's breach of such a contract (see *Delanerolle v St Catherine of Sienna Med. Ctr.*, 231 AD3d 1013, 1014-1015 [2024]; *Influx Capital, LLC v Pershin*, 186 AD3d 1622, 1624 [2020]). Accordingly, the Supreme Court properly granted that branch of Brunckhorst's motion which was to dismiss the first cause of action insofar as asserted against it and properly, in effect, granted that branch of Boar's Head's motion which was to dismiss that cause of action insofar as asserted against it.

However, the Supreme Court should have denied those branches of the defendants' separate motions which were to dismiss the second cause of action, alleging breach of contract, insofar as asserted against each of them. "Even if a party is not in breach of its express contractual obligations, it may be in breach of the implied covenant of good faith and fair dealing when it exercises a contractual right as part of a scheme to deprive the other party of the benefit of its bargain" (*JLO Dev. Corp. v Amalgamated Bank*, 232 AD3d 705, 706-707 [2024]; see *Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 770 [2017]). Here, the complaint adequately alleged that the defendants breached the implied covenant of good faith and fair dealing by confiscating one of the plaintiffs' accounts and terminating the parties' alleged distribution agreement without justification or good cause (see *JLO Dev. Corp. v Amalgamated Bank*, 232 AD3d at 706-707; *Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d at 770-771). Contrary to the defendants' contention, an excerpt of the defendants' sales policy and the plaintiffs' acknowledgment thereof did not utterly

refute the plaintiffs' allegations (*see Array BioPharma, Inc. v AstraZeneca AB*, 184 AD3d 463, 464 [2020]; *Braddock v Braddock*, 60 AD3d 84, 91-92 [2009]).

Affording the complaint a liberal construction and accepting the facts as alleged therein as true, the complaint failed to state a cause of action to recover damages for fraudulent inducement, inasmuch as it failed to allege reasonable reliance by the plaintiffs upon the defendants' alleged misrepresentations (*see* CPLR 3016 [b]; *Riggs v Brooklyn Hosp. Ctr.*, 207 AD3d 405, 406-407 [2022]; *Avery v WJM Dev. Corp.*, 197 AD3d 1141, 1144 [2021]). Thus, contrary to the plaintiffs' contention, the Supreme Court properly granted that branch of Brunckhorst's motion which was to dismiss the third cause of action insofar as asserted against it and properly, in effect, granted that branch of Boar's Head's motion which was to dismiss that cause of action insofar as asserted against it.

The fourth cause of action sought to recover damages for economic duress. Economic duress "permits a complaining party to void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will" (*805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]). "The existence of economic duress or business compulsion is demonstrated by proof that immediate possession of needful goods is threatened or . . . by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand" (*Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971] [citation and internal quotation marks omitted]). Here, the complaint alleged that the defendants threatened, inter alia, to "take all [of the plaintiffs'] stores away," which was adequate to allege economic duress (*see id.* at 130-131). Accordingly, the Supreme Court should have denied those branches of the defendants' separate motions which were to dismiss the fourth cause of action insofar as asserted against each of them.

The Supreme Court should have granted those branches of the defendants' separate motions which were to dismiss the fifth and sixth causes of action, alleging violations of the Franchise Sales Act, insofar as asserted against each of them. Pursuant to General Business Law § 691 (1), a person who offers or sells a franchise in violation of specified sections of the Franchise Sales Act "is liable to the person purchasing the franchise for damages" (*see Tyszka v Make & Take Holding, LLC*, 72 AD3d 1620, 1621 [2010]). However, an action for such

damages must be commenced within three years after the act or transaction constituting the violation (*see* General Business Law § 691 [4]). Here, since the complaint alleged that the plaintiffs purchased the distribution routes in 1999 and 2001, the causes of action alleging violations of the Franchise Sales Act were time-barred.

The Supreme Court erred in granting dismissal of the seventh through tenth causes of action on the ground that Barone was not an employee of the defendants. “[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results” (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). “Where the record shows more than incidental control, . . . an issue of fact arises as to whether there is an employer-employee relationship” (*Velasquez v Sunstone Red Oak, LLC*, 213 AD3d 883, 884 [2023]). Here, the complaint alleged that the defendants exerted more than incidental control over the results produced and the means employed to achieve those results, including setting rules for work hours, setting prices, dictating marketing campaigns, and enforcing cosmetic standards (*see Matter of Jani-King of N.Y., Inc. [Commissioner of Labor]*, 214 AD3d 1088, 1090-1091 [2023]). Accordingly, the Supreme Court should have denied those branches of the defendants’ separate motions which were to dismiss the seventh through tenth causes of action insofar as asserted against each of them.

Contrary to the plaintiffs’ contention, the complaint failed to allege an independent tort sufficient to warrant punitive damages (*see Michael Davis Constr., Inc. v 129 Parsonage Lane, LLC*, 194 AD3d 805, 808 [2021]). Brathwaite Nelson, J.P., Christopher, Wan and Golia, JJ., concur.

7 Barbara Del Rosso, as Executor of the Estate of Joseph Del Rosso, Deceased, Plaintiff, v Staten Island University Hospital et al., Defendants. Krentsel Guzman Herbert, LLP, Nonparty Appellant; Harris, Keenan, & Goldfarb, Nonparty Respondent. [252 NYS3d 592]—

Attorney and Client—Division of Fees—Current and Discharged Attorneys—Award of 25% of Net Contingency Fee

In an action, inter alia, to recover damages for personal injuries, etc., nonparty Krentsel Guzman Herbert, LLP, appeals from an order of the Supreme Court, Richmond County (Peter Geis, Ct. Atty. Ref.), dated August 14, 2023. The order, insofar as appealed from, after a hearing, in effect, granted

that branch of the motion of nonparty Krentsel Guzman Herbert, LLP, which was, in effect, for a determination of the allocation of a net contingency fee to the extent of awarding it only 25% of the net contingency fee and awarding 75% of the net contingency fee to nonparty Harris, Keenan, & Goldfarb.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action, inter alia, to recover damages for personal injuries that Joseph Del Rosso allegedly sustained while being treated at a hospital and a rehabilitation center. The plaintiff initially retained the predecessor firm to nonparty law firm Harris, Keenan, & Goldfarb (hereinafter Harris) to represent them in the action, on a contingency fee basis. In 2014, Harris commenced this action on the plaintiff's behalf against 10 defendants. Over the next approximately eight years, Harris's attorneys, among other things, conducted extensive discovery including 13 depositions, engaged in motion practice, attended dozens of conferences, and filed the note of issue. In July 2021, the plaintiff discharged Harris and retained nonparty Krentsel Guzman & Herbert, LLP (hereinafter Krentsel), to represent her. In December 2022, on the eve of jury selection, the action was settled for \$1,724,000.

Thereafter, Krentsel moved, inter alia, in effect, for a determination of the allocation of a net contingency fee. In an order dated June 21, 2023, the Supreme Court referred the matter to a court attorney referee to hear and determine the fee issue.

In an order dated August 14, 2023, after a hearing, the court attorney referee, in effect, granted that branch of Krentsel's motion which was for a determination of the allocation of the net contingency fee to the extent of awarding it 25% of the net contingency fee and awarding 75% of the net contingency fee to Harris. Krentsel appeals.

“ ‘When there is a fee dispute between the current and discharged attorneys for the plaintiff in an action to which a contingent fee retainer agreement applies, [t]he discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based on his or her proportionate share of the work performed on the whole case’ ” (*Tirado-Sottosanyti v Crowley*, 220 AD3d 820, 822 [2023], quoting *Lamanna v Compitiello*, 213 AD3d 833, 834 [2023]; see *Matter of Cohen v Grainger, Tesoriero & Bell*, 81 NY2d 655, 658 [1993]). “ ‘The issue of apportionment of an attorney's fee is controlled by the circumstances and equities of each particular case, and the trial court is in the best position to assess such factors’ ” (*Tirado-Sottosanyti v Crowley*, 220

AD3d at 822, quoting *Lamanna v Compitiello*, 213 AD3d at 834; see *Oz v GCPKOP, LLC*, 210 AD3d 689, 690 [2022]). “‘An award of . . . reasonable attorney’s fee[s] is within the sound discretion of the Supreme Court based upon such factors as the time and labor required, the difficulty of the issues involved, the skill required to handle the matter, and the effectiveness of the legal work performed’” (*Tirado-Sottosanyti v Crowley*, 220 AD3d at 822, quoting *Lamanna v Compitiello*, 213 AD3d at 834).

Here, based upon the record in this case, it cannot be said that the award of 25% of the net contingency fee to Krentsel constituted an improvident exercise of discretion (see *Tirado-Sottosanyti v Crowley*, 220 AD3d at 822-823; *Stephen v City of New York*, 216 AD3d 1029, 1030 [2023]; *Berkowitz v Helms Bros., Inc.*, 193 AD3d 671, 672 [2021]). Brathwaite Nelson, J.P., Ford, Voutsinas and Love, JJ., concur.

8 Deutsche Bank National Trust Company, Respondent, v Dennis Szal, Also Known as Dennis A. Szal, Appellant, et al., Defendants. [252 NYS3d 179]—

Mortgages—Foreclosure—Standing

In an action to foreclose a mortgage, the defendant Dennis Szal appeals from an order of the Supreme Court, Nassau County (Timothy S. Driscoll, J.), entered April 18, 2024. The order, insofar as appealed from, denied that branch of that defendant’s cross-motion which was for summary judgment dismissing the complaint insofar as asserted against him.

Ordered that the order is affirmed insofar as appealed from, with costs.

On March 9, 2012, the plaintiff commenced this action against the defendant Dennis Szal (hereinafter the defendant), among others, to foreclose a mortgage encumbering certain real property located in Massapequa Park. The defendant interposed an answer, asserting various affirmative defenses, including lack of standing.

The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant, to strike his answer, and for an order of reference. In an order entered August 10, 2016, the Supreme Court, among other things, granted those branches of the plaintiff’s motion. The plaintiff moved for a judgment of foreclosure and sale, and the defendant cross-moved, inter alia, for leave to reargue his opposition to those branches of the plaintiff’s prior motion which were for summary judgment on the complaint insofar as asserted against him, to strike his answer, and for an order of reference.

In an order entered May 25, 2017, the court granted leave to reargue, and, upon reargument, adhered to the original determination in the order entered August 10, 2016. The court also granted the plaintiff's motion for a judgment of foreclosure and sale, determining that the plaintiff had established standing. The defendant appealed, and in a decision and order dated April 14, 2021, this Court modified the order entered May 25, 2017, so as to deny the plaintiff's motion for a judgment of foreclosure and sale, and, upon reargument, to vacate the determination in the order entered August 10, 2016, and thereupon, to deny those branches of the plaintiff's prior motion which were for summary judgment on the complaint insofar as asserted against the defendant, to strike his answer, and for an order of reference, determining that the plaintiff failed to establish standing (*see Deutsche Bank Natl. Trust Co. v Szal*, 193 AD3d 816 [2021]).

The defendant subsequently cross-moved, among other things, for summary judgment dismissing the complaint insofar as asserted against him, contending that dismissal was required "in view of [this Court's] holding that the plaintiff did not establish standing to commence this action in 2012." In an order entered April 18, 2024, the Supreme Court, *inter alia*, denied that branch of the defendant's cross-motion. The defendant appeals.

The Supreme Court properly denied that branch of the defendant's cross-motion which was for summary judgment dismissing the complaint insofar as asserted against him. On a motion to dismiss for lack of standing, "the burden is on the moving defendant to establish, *prima facie*, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied" (*Wells Fargo Bank, N.A. v Taylor*, 212 AD3d 685, 687 [2023] [internal quotation marks omitted]). A plaintiff has standing to maintain a mortgage foreclosure action where it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]; *U.S. Bank N.A. v Hadar*, 206 AD3d 688, 689 [2022]). Here, in our prior decision and order, this Court held that the plaintiff failed to establish standing since its evidence was insufficient to demonstrate that it had possession of the note prior to commencing this action (*see Deutsche Bank Natl. Trust Co. v Szal*, 193 AD3d 816 [2021]). However, the plaintiff's failure to establish, *prima facie*, that it had standing to enforce the mortgage does not satisfy the defendant's burden to establish the plaintiff's lack of standing, and, in support of his cross-

motion, the defendant failed to submit any evidence to establish, *prima facie*, that the plaintiff lacked standing to enforce the mortgage (*see Deutsche Bank Natl. Trust Co. v PJK Holdings, LLC*, 232 AD3d 765, 767 [2024]; *BAC Home Loans Servicing, LP v Rychik*, 161 AD3d 924, 925-926 [2018]).

Accordingly, the Supreme Court properly denied that branch of the defendant's cross-motion which was for summary judgment dismissing the complaint insofar as asserted against him, without regard to the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Brathwaite Nelson, J.P., Christopher, Taylor and McCormack, JJ., concur.

9 Donato Guzzetta, Appellant, v Joseph C. Messina, Respondent. [252 NYS3d 177]—

Judgments—Res Judicata—Same Set of Facts or Transactions—Prior Action Concerned Real Property Not at Issue

In an action to recover on promissory notes, the plaintiff appeals from an order of the Supreme Court, Westchester County (Alexandra D. Murphy, J.), dated March 21, 2023. The order, insofar as appealed from, granted that branch of the defendant's motion which was for summary judgment dismissing the complaint and denied, as academic, the plaintiff's cross-motion for summary judgment on the issue of liability and dismissing the defense alleging usury.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, the defendant's motion for summary judgment dismissing the complaint is denied, and the matter is remitted to the Supreme Court, Westchester County, for a determination on the merits of the plaintiff's cross-motion for summary judgment on the issue of liability and dismissing the defense alleging usury.

The plaintiff seeks, in this action, to recover on 14 promissory notes executed by the defendant, in the plaintiff's favor, on which the defendant allegedly defaulted. After this action was commenced, the plaintiff commenced a separate action (hereinafter the Debtor and Creditor Law action) against the defendant and his wife pursuant to Debtor and Creditor Law § 276 to void a transfer of real property from the defendant to his wife, to enjoin further transfer of that property, and to appoint a receiver for the property. After the Supreme Court denied the plaintiff's motion in the Debtor and Creditor Law action to preliminarily enjoin the sale of the real property, and the property was sold to a third party, that action was discontinued with prejudice by stipulation of the parties.

Following discovery in the present action, the defendant moved, *inter alia*, for summary judgment dismissing the complaint on the ground that the action was barred by the doctrine of *res judicata*, due to the discontinuance with prejudice of the Debtor and Creditor Law action. The plaintiff cross-moved for summary judgment on the issue of liability and dismissing the defense alleging usury. By order dated March 21, 2023, the Supreme Court, among other things, granted that branch of the defendant's motion and denied the plaintiff's cross-motion as academic. The plaintiff appeals.

"Under the doctrine of *res judicata*, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" (*Cullen v Moschetta*, 207 AD3d 699, 700 [2022] [internal quotation marks omitted]; see *Vehifax Corp. v Georgilis*, 205 AD3d 973, 976 [2022]). "The primary purposes of *res judicata* are grounded in public policy concerns and are intended to ensure finality, prevent vexatious litigation and promote judicial economy" (*Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005]). "However, unfairness may result if the doctrine is applied too harshly; thus [i]n properly seeking to deny a litigant two days in court, courts must be careful not to deprive [the litigant] of one" (*id.* [internal quotation marks omitted]; see *Simmons v Trans Express Inc.*, 37 NY3d 107, 112 [2021]).

Here, the causes of action asserted in the present action to recover on promissory notes and those asserted in the subsequently-commenced Debtor and Creditor Law action, which solely concerned a parcel of real property not at issue in the present action and required proof of a different set of facts, do not arise out of the same transaction or series of transactions for purposes of applying the bar of *res judicata* (see *Cullen v Moschetta*, 207 AD3d at 700; *Kudla v Kudla*, 173 AD3d 1149, 1151 [2019]; *Specialized Realty Servs., LLC v Maikisch*, 123 AD3d 801, 802-803 [2014]). Accordingly, the Supreme Court should have denied that branch of the defendant's motion which was for summary judgment dismissing the complaint.

In light of our determination, the plaintiff's cross-motion for summary judgment on the issue of liability and dismissing the defense alleging usury is no longer academic. Under the circumstances, we remit the matter to the Supreme Court, Westchester County, for a determination on the merits of the plaintiff's cross-motion. Iannacci, J.P., Christopher, Wan and McCormack, JJ., concur.

10 Donato Guzzetta, Appellant, v Donna M. Messina et al., Respondents. [248 NYS3d 676]—

Stipulations—Discontinuance—Fraudulent Misrepresentation—Mutual or Unilateral Mistake

In an action to modify a stipulation of discontinuance, the plaintiff appeals from an order of the Supreme Court, Westchester County (Alexandra D. Murphy, J.), dated March 21, 2023. The order, insofar as appealed from, granted the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action seeking to modify a stipulation of discontinuance entered into by the parties discontinuing with prejudice a prior action the plaintiff had commenced against the defendants, so as to include language reserving certain rights. After joinder of issue, the defendants moved for summary judgment dismissing the complaint. By order dated March 21, 2023, the Supreme Court, inter alia, granted the defendants' motion. The plaintiff appeals.

“Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation” (*Mooney v Manhattan Occupational, Physical & Speech Therapies, PLLC*, 166 AD3d 957, 960 [2018] [internal quotation marks omitted]). “A party seeking reformation of a contract by reason of a mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake or a unilateral mistake induced by the other party's fraudulent misrepresentation” (*id.* [internal quotation marks omitted]).

Here, in opposition to the defendants' prima facie showing of entitlement to judgment as a matter of law dismissing the complaint, the plaintiff failed to demonstrate the existence of any triable issues of fact as to whether the stipulation of discontinuance was executed under mutual mistake or a unilateral mistake induced by the defendants' fraudulent misrepresentation (*see id.*; *Matter of Sheng v State of N.Y. Div. of Human Rights*, 93 AD3d 851, 852 [2012]).

The plaintiff's remaining contention is without merit.

Accordingly, the Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint. Iannacci, J.P., Christopher, Wan and McCormack, JJ., concur.

11 JPMorgan Chase Bank, National Association, Respondent, v Toju Realty Corporation et al., Defendants, and 1495-99

East 46th Street Corp., Appellant. Francisca Gbenebitse, Nonparty Appellant. [252 NYS3d 578]—

Actions—Stay—Appointment of Personal Representative—Backlog and Scheduling Issues in Court

Judgments—Default Judgment—Vacatur—Reasonable Excuse

In an action, inter alia, to foreclose a mortgage, the defendant 1495-99 East 46th Street Corp. and nonparty Francisca Gbenebitse appeal from (1) an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated October 11, 2023, and (2) an order of the same court dated February 9, 2024. The order dated October 11, 2023, insofar as appealed from, granted that branch of the motion of the defendant 1495-99 East 46th Street Corp. and nonparty Francisca Gbenebitse which was pursuant to CPLR 2201 to stay the action until the Surrogate's Court, Nassau County, appointed a personal representative to act on behalf of the estate of the deceased principal of the defendant Toju Realty Corporation only to the extent of staying the action until December 31, 2023, and, in effect, denied those branches of the motion which were to deem served the proposed answer of the defendant Toju Realty Corporation once a personal representative is appointed to act on behalf of the estate of the deceased principal of the defendant Toju Realty Corporation, and to compel the plaintiff to accept the untimely answer of the defendant 1495-99 East 46th Street Corp. The order dated February 9, 2024, insofar as appealed from, upon renewal, and upon, in effect, vacating so much of the order dated October 11, 2023, as granted that branch of the motion of the defendant 1495-99 East 46th Street Corp. and nonparty Francisca Gbenebitse which was pursuant to CPLR 2201 to stay the action until the Surrogate's Court, Nassau County, appointed a personal representative to act on behalf of the estate of the deceased principal of the defendant Toju Realty Corporation only to the extent of staying the action until December 31, 2023, granted that branch of the prior motion only to the extent of staying the action for 60 days after entry of the order.

Ordered that the appeal from so much of the order dated October 11, 2023, as granted that branch of the motion of the defendant 1495-99 East 46th Street Corp. and nonparty Francisca Gbenebitse which was pursuant to CPLR 2201 to stay the action until the Surrogate's Court, Nassau County, appointed a personal representative to act on behalf of the estate of the deceased principal of the defendant Toju Realty Corporation only to the extent of staying the action until December 31, 2023, is dismissed as academic, as that portion of the order was, in effect, vacated by the order dated February 9, 2024, made upon renewal; and it is further,

Ordered that the order dated October 11, 2023, is modified, on the law and in the exercise of discretion, by deleting the provision thereof, in effect, denying that branch of the motion of the defendant 1495-99 East 46th Street Corp. and nonparty Francisca Gbenebitse which was to deem served the proposed answer of the defendant Toju Realty Corporation once a personal representative is appointed to act on behalf of the estate of the deceased principal of the defendant Toju Realty Corporation, and substituting therefor a provision granting that branch of the motion; as so modified, the order dated October 11, 2023, is affirmed insofar as reviewed; and it is further,

Ordered that the order dated February 9, 2024, is reversed insofar as appealed from, on the law and in the exercise of discretion, and the matter is remitted to the Supreme Court, Kings County, for further proceedings consistent herewith; and it is further,

Ordered that the plaintiff is awarded one bill of costs payable by the defendant 1495-99 East 46th Street Corp.

In 2000, the defendant 1495-99 East 46th Street Corp. (hereinafter East 46th Street Corp.) conveyed certain real property to the defendant Toju Realty Corporation (hereinafter Toju). Toju executed a mortgage consolidation, modification, and extension agreement to secure a consolidated note in the sum of \$1,217,000. In 2020, Toju allegedly conveyed the property back to East 46th Street Corp. and defaulted on the consolidated note in November 2020. Toju's principal (hereinafter the decedent) died on February 2, 2021. The decedent's wife, nonparty Francisca Gbenebitse, filed a petition for letters of administration in March 2022.

In December 2022, the plaintiff commenced this action against, among others, Toju and East 46th Street Corp., inter alia, for reformation of certain loan documents and foreclosure of the mortgage. In August 2023, East 46th Street Corp submitted an answer, which the plaintiff rejected as untimely. In September 2023, East 46th Street Corp. and Gbenebitse (hereinafter together the appellants) moved pursuant to CPLR 2201 to stay the action until the Surrogate's Court, Nassau County, appointed a personal representative to act on behalf of the decedent's estate, to deem served Toju's proposed answer, which was annexed to the motion papers, once a personal representative was appointed to act on behalf of the decedent's estate, and to compel the plaintiff to accept East 46th Corp.'s untimely answer. In an order dated October 11, 2023, the Supreme Court granted that branch of the motion which was pursuant to CPLR

2201 to stay the action until the Surrogate's Court appointed a personal representative to act on behalf of the decedent's estate to the extent that the action was stayed until December 31, 2023, and, in effect, denied the remaining branches of the motion.

In January 2024, Gbenebitse moved for leave to renew those branches of the prior motion which were pursuant to CPLR 2201 to stay the action until the Surrogate's Court appointed a personal representative to act on behalf of the decedent's estate and to deem served Toju's proposed answer once a personal representative was appointed to act on behalf of the decedent's estate. Gbenebitse argued that the deadline of December 31, 2023, for the Surrogate's Court to appoint a personal representative to act on behalf of the decedent's estate was impossible to meet because the Surrogate's Court had a backlog and the Surrogate "would not be sitting on the bench during the last week or two of December 2023." In an order dated February 9, 2024, the Supreme Court, among other things, upon renewal, granted that branch of the appellants' prior motion which was pursuant to CPLR 2201 to stay the action until the Surrogate's Court appointed a personal representative to act on behalf of the decedent's estate only to the extent of staying the action for 60 days after entry of the order. This appeal ensued.

"[T]he court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just" (CPLR 2201). Courts have "broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources" (*Matter of Hersh*, 198 AD3d 776, 778 [2021] [internal quotation marks omitted], quoting *Chaplin v National Grid*, 171 AD3d 691, 692 [2019]). Here, it was apparent that the appellants were ready to protect the rights of Toju once a personal representative was appointed to act on behalf of the decedent's estate, but the backlog and scheduling issues in the Surrogate's Court made appointment of a personal representative impossible in the time allotted due to circumstances beyond their control (see *Lee v Salzman*, 2023 NY Slip Op 35011[U] [Sup Ct, Queens County 2023]; see also *C.N. v West Islip Union Free Sch. Dist.*, 215 AD3d 684 [2023]). Under the circumstances, we remit the matter to the Supreme Court, Kings County, to determine if a personal representative has been appointed for the decedent and, if not, whether a further stay of the action is warranted, and for a new determination thereafter of that branch of the appellants' motion which was pursuant to CPLR

2201 to stay the action until the Surrogate's Court appointed a personal representative to act on behalf of the decedent's estate. If a personal representative has been appointed, Toju's proposed answer, which was annexed to the motion papers, should be deemed served.

"A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer must show both a reasonable excuse for the default and the existence of a potentially meritorious defense" (*U.S. Bank N.A. v Grubb*, 162 AD3d 823, 824 [2018], quoting *Citi-mortgage, Inc. v Stover*, 124 AD3d 575, 576 [2015]). The appellants failed to demonstrate a reasonable excuse for East 46th Streep Corp.'s default (see *LaSalle Bank, NA v Bernard*, 184 AD3d 816, 818 [2020]; *Aurora Loan Servs., LLC v Movtady*, 165 AD3d 1025, 1027 [2018]). Accordingly, that branch of the appellants' motion which was to compel the plaintiff to accept the untimely answer of East 46th Street Corp. was properly denied (see *U.S. Bank N.A. v Grubb*, 162 AD3d at 824). Barros, J.P., Warhit, Voutsinas and Wan, JJ., concur.

12 Bruce Kushakow, Appellant, v Law Offices of Joseph B. Rosenberg et al., Respondents. [251 NYS3d 718]—

Motions and Orders—Motion to Dismiss—Ground of Lack of Capacity—Not Specifically Requested

In an action, inter alia, to recover damages for legal malpractice, the plaintiff appeals from an order of the Supreme Court, Nassau County (Catherine Rizzo, J.), entered February 14, 2024. The order granted the defendants' motion pursuant to CPLR 3211 (a) to dismiss the amended complaint.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action against the defendant Joseph B. Rosenberg and his firm, the defendant Law Offices of Joseph B. Rosenberg, to recover damages for legal malpractice, fraud, negligent misrepresentation, breach of fiduciary duty, unjust enrichment, and violation of Judiciary Law § 487, and for a constructive trust. The plaintiff alleged that the defendants were retained as estate planning counsel by the plaintiff's parents, Stanley Kushakow (hereinafter Stanley) and Rita Kushakow (hereinafter Rita) in 2004. In 2005, the defendants prepared, among other things, wills and various trust documents for Stanley and Rita. The plaintiff alleged that in June 2007, Rita obtained a life insurance policy with a pay out in the sum of \$10,000,000, naming Stanley as the sole beneficiary. After Stanley died in August 2014, the beneficiary of the policy was not changed, such that Stanley remained the benefi-

ciary. On November 6, 2015, Rosenberg met with Rita to review various new estate planning documents, including, inter alia, her 2015 will, nominating Rosenberg as co-executor with the plaintiff, and a disclosure as to commissions and fees of attorney/fiduciary, which allowed for the attorney/fiduciary to receive a full commission. On September 8, 2020, Rita died. According to the plaintiff, it was the family's intention to leave the life insurance policy proceeds to the plaintiff. The plaintiff alleged that because no amendments were made to the life insurance policy after Stanley's death, nor were estate planning devices undertaken by the defendants, the proceeds from the life insurance policy passed through Rita's estate, causing estate taxes to be applied and depriving the plaintiff of the full proceeds, while generating the sum of approximately \$234,000 in commissions and other fees to the defendants.

The defendants moved pursuant to CPLR 3211 (a) to dismiss the amended complaint. In an order entered February 14, 2024, the Supreme Court granted the motion, concluding, among other things, that the plaintiff lacked the capacity to sue. The plaintiff appeals.

Even where a notice of motion and supporting affirmation do not formally and specifically request certain relief, “[a] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party” (*Robinson v Big City Yonkers, Inc.*, 179 AD3d 961, 963 [2020], quoting *Frankel v Stavsky*, 40 AD3d 918, 918-919 [2007]; see *Matter of Blauman-Spindler v Blauman*, 68 AD3d 1105, 1106 [2009]). There is no requirement that a movant identify a specific statute or rule in the notice of motion, only that the notice “specify . . . the relief demanded and the grounds therefor” (CPLR 2214 [a]).

“[S]tanding . . . concerns the absence or presence of a sufficiently cognizable stake in the outcome of the litigation” (*Nicke v Schwartzapfel Partners, P.C.*, 148 AD3d 1168, 1171 [2017]), whereas “[c]apacity to sue concerns a litigant’s power to appear and bring [his or her] grievance before the court” (*id.* at 1170). “Standing and capacity to sue are related, but distinguishable, legal concepts . . . [and] are both components of a party’s authority to sue” (*Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242 [2007]; see *Matter of Hamm v Board of Elections in the City of N.Y.*, 194 AD3d 73, 77 [2021]). Lack of standing and lack of capacity are both addressed within the scope of the same statutory subdivision, CPLR 3211 (a) (3) (see *Wil-*

mington Sav. Fund Socy., FSB v Matamoro, 200 AD3d 79, 89 [2021]).

A “proposed” administrator who has not obtained letters of administration lacks capacity to bring an action to recover damages on behalf of the decedent’s estate (see *Gulledge v Jefferson County*, 172 AD3d 1666, 1667 [2019]; *Muriel v New York City Health & Hosps. Corp.*, 52 AD3d 792, 792 [2008]).

Here, the relief awarded by the Supreme Court, in the form of directing dismissal of the amended complaint based on the plaintiff’s lack of capacity, was not too dramatically unlike the relief sought by the defendants and was not prejudicial to the plaintiff (see *Robinson v Big City Yonkers, Inc.*, 179 AD3d at 963; *Matter of Blauman-Spindler v Blauman*, 68 AD3d at 1106). Although in their motion pursuant to CPLR 3211 (a) to dismiss the amended complaint, the defendants did not formally and specifically request dismissal of the amended complaint on the ground of lack of capacity, they did argue for dismissal on the ground of lack of standing, based upon the plaintiff’s failure to provide letters testamentary to enable him to sue the defendants on behalf of Rita’s estate (see *Matter of Blauman-Spindler v Blauman*, 68 AD3d at 1106; see also *Matter of Hamm v Board of Elections in the City of N.Y.*, 194 AD3d at 77). While the court directed dismissal of the amended complaint for lack of capacity rather than lack of standing, the basis for the dismissal was for the same reason argued by the defendants, that is, that the plaintiff had not provided letters of administration or letters testamentary enabling him to initiate a lawsuit on behalf of Rita’s estate (see *Matter of Blauman-Spindler v Blauman*, 68 AD3d at 1106; see also *Matter of Hamm v Board of Elections in the City of N.Y.*, 194 AD3d at 77). Thus, the court properly treated the motion as one made, in effect, pursuant to CPLR 3211 (a) (3) to dismiss the amended complaint for lack of capacity (see *Matter of Blauman-Spindler v Blauman*, 68 AD3d at 1106) and properly directed dismissal of the amended complaint on that ground, as the plaintiff’s failure to provide letters of administration or letters testamentary deprived him of capacity to bring this lawsuit on behalf of Rita’s estate (see *Gulledge v Jefferson County*, 172 AD3d at 1667; *Muriel v New York City Health & Hosps. Corp.*, 52 AD3d at 792). Thus, the facts plainly appearing on the papers warranted the relief granted (see *Matter of Blauman-Spindler v Blauman*, 68 AD3d at 1106).

Accordingly, the Supreme Court properly granted the defendants’ motion pursuant to CPLR 3211 (a) to dismiss the amended complaint.

The parties' remaining contentions need not be reached in light of our determination. Iannacci, J.P., Christopher, Wan and McCormack, JJ., concur.

13 Elizabeth Larson, as Proposed Administrator of the Estate of Donald Larson, Deceased, Respondent, v Shore View Rehabilitation and Nursing Center et al., Appellants. [252 NYS3d 582]—

Parties—Capacity to Sue—Wrongful Death—Failure to Obtain Letters of Administration from Decedent's Estate

In an action, inter alia, to recover damages for negligence and wrongful death, the defendants Shore View Rehabilitation and Nursing Center and Shore View Acquisition I, LLC, the defendants Menorah Home and Hospital for the Aged and Infirm and Menorah Center for Rehabilitation and Nursing Care, and the defendants The New York Community Hospital of Brooklyn, Inc., and New York Community Hospital separately appeal from an order of the Supreme Court, Kings County (Ellen M. Spodek, J.), dated January 25, 2024. The order denied those defendants' separate motions pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against each of them with prejudice and granted the plaintiff's motion pursuant to CPLR 1015 and 1021 to amend the caption.

Ordered that the order is modified, on the law, (1) by deleting the provision thereof denying the separate motions of the defendants Shore View Rehabilitation and Nursing Center and Shore View Acquisition I, LLC, the defendants Menorah Home and Hospital for the Aged and Infirm and Menorah Center for Rehabilitation and Nursing Care, and the defendants The New York Community Hospital of Brooklyn, Inc., and New York Community Hospital pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against each of them with prejudice, and substituting therefore a provision granting those motions to the extent of dismissing the complaint insofar as asserted against each of those defendants without prejudice, and otherwise denying those motions, and (2) by deleting the provision thereof granting the plaintiff's motion pursuant to CPLR 1015 and 1021 to amend the caption, and substituting therefor a provision denying that motion as academic; as so modified, the order is affirmed, with one bill of costs to the appellants.

Prior to his death in December 2018, Donald Larson (hereinafter the decedent) was a patient at intermittent times at facilities owned or operated by the defendants Shore View Rehabilitation and Nursing Center and Shore View Acquisition I, LLC

(hereinafter together Shore View), the defendants Menorah Home and Hospital for the Aged and Infirm and Menorah Center for Rehabilitation and Nursing Care (hereinafter together Menorah), and the defendants The New York Community Hospital of Brooklyn, Inc., and New York Community Hospital (hereinafter together NYCH). The decedent allegedly suffered from bedsores which were a contributing factor in his death.

In April 2021, the plaintiff, as proposed administrator of the decedent's estate, commenced a prior action against the defendants, asserting causes of action to recover damages for violations of Public Health Law §§ 2801-d and 2803-c, medical malpractice, negligence, and wrongful death. In an order dated March 7, 2022, the Supreme Court granted the defendants' separate motions to dismiss the complaint insofar as asserted against each of them on the ground that the plaintiff lacked the capacity to bring the action because she had not yet been appointed the personal administrator of the decedent's estate.

In September 2022, the plaintiff, again as proposed administrator of the decedent's estate, commenced this action against the defendants, seeking the same relief as was sought in the prior action. The complaint alleged that the plaintiff had submitted an application to the Surrogate's Court to be appointed the decedent's administrator and that her application was still pending. Shore View, Menorah, and NYCH separately moved pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against each of them with prejudice. Thereafter, the Surrogate's Court granted the plaintiff limited letters of administration, and the plaintiff moved pursuant to CPLR 1015 and CPLR 1021 to amend the caption to reflect her appointment as the decedent's administrator. In an order dated January 25, 2024, the court denied the separate motions of Shore View, Menorah, and NYCH and granted the plaintiff's motion.

The Supreme Court should have granted the separate motions of Shore View, Menorah, and NYCH to dismiss the complaint insofar as asserted against each of them to the extent of dismissing the complaint insofar as asserted against each of those defendants without prejudice. Dismissal was warranted on the ground that the plaintiff lacked capacity to bring the action, as she had not yet obtained letters of administration to become the personal representative of the decedent's estate at the time of the commencement of this action (*see* CPLR 3211 [a] [3]; EPTL 11-3.2 [b]; 11-4.1; *Carrick v Central Gen. Hosp.*, 51 NY2d 242, 246 [1980]; *Shelley v South Shore Healthcare*,

123 AD3d 797, 798 [2014]). However, the defendants failed to establish their entitlement to dismissal of the action with prejudice, as they failed to conclusively demonstrate, under these circumstances, that any future action commenced by the plaintiff would be time-barred (*see* CPLR 205 [a]; *Tumminia v Staten Is. Univ. Hosp.*, 241 AD3d 17 [2025]; *Castillo v Suffolk Paving Corp.*, 230 AD3d 630, 632 [2024]; *Sokoloff v Schor*, 176 AD3d 120, 126 [2019]).

In light of that determination, the Supreme Court should have denied, as academic, the plaintiff's motion pursuant to CPLR 1015 and 1021 to amend the caption. Chambers, J.P., Wooten, Warhit and Landicino, JJ., concur.

14 Lercara Provisions, Inc., et al., Appellants-Respondents, v Boar's Head Provisions Co., Inc., et al., Respondents-Appellants. [252 NYS3d 182]—

Release—Scope of Release—Indication of Unfairness—Threat to Stop Selling Products

Employment Relationships—Existence of Employer-Employee Relationship—Degree of Control

Pleading—Sufficiency of Pleading—Fraud in Inducement—Reasonable Reliance

In an action, inter alia, to recover damages for breach of contract, the plaintiffs appeal, and the defendants cross-appeal, from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated May 18, 2020. The order, insofar as appealed from, granted those branches of the motion of the defendant Frank Brunckhorst Co., LLC, which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, fourth, fifth, and tenth causes of action and the demand for punitive damages insofar as asserted against it and, in effect, granted those branches of the motion of the defendant Boar's Head Provisions Co., Inc., which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, fourth, fifth, and tenth causes of action and the demand for punitive damages insofar as asserted against it. The order, insofar as cross-appealed from, denied those branches of the defendants' separate motions which were pursuant to CPLR 3211 (a) to dismiss the sixth, seventh, eighth, eleventh, and twelfth causes of action insofar as asserted against each of them.

Ordered that the order is modified, on the law, (1) by deleting the provision thereof granting those branches of the motion of the defendant Frank Brunckhorst Co., LLC, which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, and fourth causes of action insofar as asserted it, and substituting therefor a provision denying those branches of the motion, (2)

by deleting the provision thereof, in effect, granting those branches of the motion of the defendant Boar's Head Provisions Co., Inc., which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, and fourth causes of action insofar as asserted it, and substituting therefor a provision denying those branches of the motion, and (3) by deleting the provision thereof denying those branches of the defendants' separate motions which were pursuant to CPLR 3211 (a) to dismiss the eighth cause of action insofar as asserted against each of them, and substituting therefor a provision granting those branches of the motions; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The plaintiffs, Saro Anthony Lercara and his company, Lercara Provisions, Inc. (hereinafter LPI), commenced this action in 2019 against the defendants, Boar's Head Provisions Co., Inc. (hereinafter Boar's Head), and Frank Brunckhorst Co., LLC (hereinafter Brunckhorst). The amended complaint alleged the following. Boar's Head produced "delicatessen edibles," which were distributed through Brunckhorst. Brunckhorst distributed the products to authorized distributors, who, in turn, distributed the products to stores through the acquisition of distribution routes. Boar's Head exercised a large degree of control over authorized distributors and, among other things, required its approval of the sale of a distribution route from one authorized distributor to another and prohibited authorized distributors from engaging in any other food-related business. LPI was established in 2011 exclusively for the purpose of becoming an authorized distributor of Boar's Head products, and it operated as such for several years, until it was forced to sell its distribution routes after Boar's Head threatened to stop selling its products to LPI.

The amended complaint asserted 12 causes of action, alleging violations of the Labor Law (first through fourth causes of action), tortious interference with contract (fifth cause of action), breach of contract (sixth and seventh causes of action), fraudulent inducement (eighth cause of action), economic duress (ninth cause of action), unfair competition and misappropriation (tenth cause of action), and violations of the Franchise Sales Act (General Business Law § 680 *et seq.*) (eleventh and twelfth causes of action). The amended complaint also included a demand for punitive damages.

The defendants separately moved pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against each of them. In an order dated May 18, 2020, the Supreme

Court, *inter alia*, granted those branches of Brunckhorst's motion which were to dismiss the first, second, third, fourth, fifth, and tenth causes of action and the demand for punitive damages insofar as asserted against it, in effect, granted those branches of Boar's Head's motion which were to dismiss those causes of action and the demand for punitive damages insofar as asserted against it, and denied those branches of the defendants' separate motions which were to dismiss the sixth, seventh, eighth, eleventh, and twelfth causes of action insofar as asserted against each of them. The plaintiffs appeal, and the defendants cross-appeal.

On a motion to dismiss pursuant to CPLR 3211 (a), the complaint must be liberally construed (*see id.* § 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d at 87). In assessing a motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action, the court must "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88; *see Langley v Melville Fire Dist.*, 213 AD3d 748, 750 [2023]). Under CPLR 3211 (a) (1), dismissal is warranted "only where the documentary evidence utterly refutes [the] factual allegations [in the complaint], conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Leon v Martinez*, 84 NY2d at 88).

"When a defendant objects to the court's exercise of personal jurisdiction, the ultimate burden of proof rests upon the plaintiff" (*Lowy v Chalkable, LLC*, 186 AD3d 590, 591 [2020]; *see Escobar v Segunda Iglesia Pentecostal Juan 3:16 Asamblea de Dios*, 232 AD3d 719, 721 [2024]). "However, to successfully oppose a motion to dismiss for lack of personal jurisdiction, the plaintiff need only make a *prima facie* showing that the defendant was subject to the personal jurisdiction of the court" (*Clevenger v Yuzek*, 222 AD3d 931, 937 [2023] [internal quotation marks omitted]; *see Piccoli v Cerra, Inc.*, 174 AD3d 754, 755 [2019]). Here, viewing the allegations in the amended complaint in the light most favorable to the plaintiffs, the plaintiffs demonstrated, *prima facie*, that Boar's Head was subject to the jurisdiction of the Supreme Court (*see CPLR 302 [a]*; *Sacco v Reel-O-Matic, Inc.*, 183 AD3d 567, 569 [2020]; *Piccoli v Cerra, Inc.*, 174 AD3d at 756; *Paradigm Mktg. Consortium, Inc. v Yale New Haven Hosp., Inc.*, 124 AD3d 736, 737 [2015]). Accordingly, the court properly denied dismissal of the

first through eighth and tenth through twelfth causes of action insofar as asserted against Boar's Head on the ground of lack of personal jurisdiction.

Pursuant to CPLR 3211 (a) (5), a party may move to dismiss a cause of action on the ground that it may not be maintained because of a release. "Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release shifts the burden of going forward to the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the release" (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [alterations and internal quotation marks omitted]; see *Cames v Craig*, 181 AD3d 851, 852 [2020]). Here, while a general release executed by the plaintiffs, by its terms, released the defendants from all known and unknown causes of action which accrued on or before November 17, 2015, the allegations in the amended complaint that the defendants threatened to stop selling products to the plaintiffs and to deny approval of the sale of the plaintiffs' distribution routes were sufficient to support a possible finding that the general release was obtained under circumstances that indicated unfairness (see *Farber v Breslin*, 47 AD3d 873, 877 [2008]; see also *China Dev. Indus. Bank v Morgan Stanley & Co. Inc.*, 86 AD3d 435, 437 [2011]; *Pashtrik Realty Corp. v Gjonlekaj*, 234 AD2d 54, 54 [1996]). The defendants' contention that the plaintiffs ratified the general release is not properly before this Court, because it relies on matter dehors the record (see *Yakubov v Gaft*, 231 AD3d 1099, 1101 [2024]). Accordingly, the Supreme Court properly denied dismissal of the first through eighth and tenth through twelfth causes of action on the ground that those causes of action were barred by the general release.

The Supreme Court erred in granting dismissal of the first through fourth causes of action on the ground that Lercara was not an employee of the defendants. "[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results" (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). "Where the record shows more than incidental control, . . . an issue of fact arises as to whether there is an employer-employee relationship" (*Velasquez v Sunstone Red Oak, LLC*, 213 AD3d 883, 884 [2023]). Here, the amended complaint alleged that the defendants exerted more than incidental control over the results produced and the means employed to achieve those results, including setting rules for work hours, setting

prices, dictating marketing campaigns, and enforcing cosmetic standards (see *Matter of Jani-King of N.Y., Inc. [Commissioner of Labor]*, 214 AD3d 1088, 1090-1091 [2023]). Accordingly, the Supreme Court should have denied those branches of the defendants' separate motions which were to dismiss the first, second, third, and fourth causes of action insofar as asserted against each of them.

The Supreme Court properly granted that branch of Brunckhorst's motion which was to dismiss the fifth cause of action insofar as asserted against it and properly, in effect, granted that branch of Boar's Head's motion which was to dismiss that cause of action insofar as asserted against it on the ground that the amended complaint failed to state a cause of action to recover damages for tortious interference with contract. The amended complaint failed to allege a breach of a valid contract between the plaintiffs and a third party and failed to allege the defendants' intentional procurement of the third party's breach of such a contract (see *Delanerolle v St Catherine of Sienna Med. Ctr.*, 231 AD3d 1013, 1014-1015 [2024]; *Influx Capital, LLC v Pershin*, 186 AD3d 1622, 1624 [2020]).

The Supreme Court properly denied those branches of the defendants' separate motions which were to dismiss the sixth and seventh causes of action, both alleging breach of contract, insofar as asserted against each of them. The amended complaint adequately alleged that the defendants breached the implied covenant of good faith and fair dealing by terminating the parties' alleged distribution agreements without justification or good cause (see *JLO Dev. Corp. v Amalgamated Bank*, 232 AD3d 705, 706-707 [2024]; *Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 770-771 [2017]). Contrary to the defendants' contention, the plaintiffs' signed acknowledgment that a certain sales policy was not a contract or distribution agreement did not utterly refute the existence of a distribution agreement between the parties (see *CIP GP 2018, LLC v Koplewicz*, 194 AD3d 639, 640 [2021]).

To state a cause of action alleging fraudulent inducement, the complaint must allege a knowing misrepresentation of a material present fact, which was intended to deceive another party and induced that party to act on it, resulting in injury (see *Ikezi v 82nd St. Academics*, 221 AD3d 986, 988 [2023]; *Feldman v Byrne*, 210 AD3d 646, 648-649 [2022]). Further, CPLR 3016 (b) requires that when a cause of action is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." As to the element of reasonable reliance, the

plaintiff is expected to exercise ordinary diligence and may not claim to have reasonably relied upon a defendant's representation or silence where the plaintiff had means available, by the exercise of ordinary intelligence, to know the truth or the real quality of the subject of the representation (*see Feldman v Byrne*, 210 AD3d at 649). Here, affording the amended complaint a liberal construction and accepting the facts alleged therein as true, the plaintiffs failed to allege that they reasonably relied upon the defendants' alleged misrepresentations that "there was an opportunity in New York" when LPI sold its Connecticut distribution route or that the plaintiffs reasonably relied upon the defendants' alleged representations that the sale of the Connecticut distribution route was necessary to comply with the defendants' sales policy or to address an alleged theft (*see Riggs v Brooklyn Hosp. Ctr.*, 207 AD3d 405, 406-407 [2022]; *Avery v WJM Dev. Corp.*, 197 AD3d 1141, 1144 [2021]). Accordingly, the Supreme Court should have granted those branches of the defendants' separate motions which were to dismiss the eighth cause of action, alleging fraudulent inducement, insofar as asserted against each of them.

Contrary to the plaintiffs' contentions, the Supreme Court properly granted those branches of Brunckhorst's motion which were to dismiss the tenth cause of action and the demand for punitive damages insofar as asserted against it and properly, in effect, granted those branches of Boar's Head's motion which were to dismiss that cause of action and the demand for punitive damages insofar as asserted against it. Contrary to the defendants' contentions, the court properly denied those branches of their separate motions which were to dismiss the eleventh and twelfth causes of action insofar as asserted against each of them. Brathwaite Nelson, J.P., Christopher, Wan and Golia, JJ., concur. **[Prior Case History: 2020 NY Slip Op 31501(U).]**

15 LNV Corporation, Respondent, v Winston Almberg et al., Appellants, et al., Defendants. [248 NYS3d 675]—

Appeal—Matters Appealable—Judgment Entered

In an action to foreclose a mortgage, the defendants Winston Almberg and Tara Almberg appeal from (1) an order of the Supreme Court, Suffolk County (Thomas F. Whelan, J.), dated January 10, 2023, and (2) an order of the same court also dated January 10, 2023. The first order, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Winston Almberg and Tara Almberg

and for an order of reference. The second order, insofar as appealed from, granted the same relief to the plaintiff and appointed a referee to compute the amount due to the plaintiff.

Ordered that the appeals are dismissed, without costs or disbursements.

The appeals from the orders must be dismissed because the right of direct appeal therefrom terminated with the entry of an order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeals from the orders are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248; *LNV Corp. v Almberg*, 246 AD3d 896 [2026] [decided herewith]). Barros, J.P., Warhit, Ventura and Golia, JJ., concur.

16 LNV Corporation, Respondent, v Winston Almberg et al., Appellants, et al., Defendants. [251 NYS3d 729]—

Mortgages—Foreclosure—Standing—Possession of Note with Endorsements
Mortgages—Foreclosure—RPAPL 1304 Notice Requirement—Failure to
Submit Subservicer Agreement
Evidence—Business Records—Deficient Affidavit—Failed to Attest to Personal
Knowledge of Record Keeping Practices

In an action to foreclose a mortgage, the defendants Winston Almberg and Tara Almberg appeal from (1) an order of the Supreme Court, Suffolk County (Thomas F. Whelan, J.), dated November 6, 2023, and (2) an order and judgment of foreclosure and sale (one paper) of the same court also dated November 6, 2023. The order granted the plaintiff's motion to confirm a referee's report and for a judgment of foreclosure and sale. The order and judgment of foreclosure and sale, upon two orders of the same court, both dated January 10, 2023, *inter alia*, granting those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Winston Almberg and Tara Almberg and for an order of reference, granted the same relief to the plaintiff as the order dated November 6, 2023, confirmed the referee's report, and directed the sale of the subject property.

Ordered that the appeal from the order dated November 6, 2023, is dismissed; and it is further,

Ordered that order and judgment of foreclosure and sale is reversed, on the law, those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants Winston Almberg and Tara

Almberg and for an order of reference and the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale are denied, and the orders dated January 10, 2023, and the order dated November 6, 2023, are modified accordingly; and it is further,

Ordered that one bill of costs is awarded to the defendants Winston Almberg and Tara Almberg.

The appeal from the order dated November 6, 2023, must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see id.*).

In June 2014, the plaintiff commenced this action against the defendants Winston Almberg and Tara Almberg (hereinafter together the defendants), among others, to foreclose a mortgage on certain real property located in Mount Sinai. The defendants timely answered the complaint.

In September 2015, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendants, to strike the defendants' answer, and for an order of reference. The defendants opposed the motion and cross-moved for summary judgment dismissing the complaint insofar as asserted against them. In an order dated August 25, 2017, the Supreme Court, among other things, granted those branches of the plaintiff's motion and denied the defendants' cross-motion. The defendants appealed, and this Court reversed so much of the order as granted those branches of the plaintiff's motion (*see LNV Corp. v Almberg*, 194 AD3d 703 [2021]). This Court found that the plaintiff had failed to establish, prima facie, its standing to commence this action and its compliance with RPAPL 1304 (*see id.* at 704-705).

In March 2022, the defendants moved for leave to renew their prior cross-motion for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposed the motion.

In an order dated June 1, 2022, the Supreme Court denied the defendants' motion for leave to renew and directed the plaintiff to submit a motion for summary judgment and for an order of reference within 45 days of the entry of that order.

In July 2022, the plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the de-

defendants and for an order of reference. The defendants opposed the motion and cross-moved for summary judgment dismissing the complaint insofar as asserted against them.

In an order dated January 10, 2023, the Supreme Court, among other things, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference and denied the defendants' cross-motion for summary judgment dismissing the complaint insofar as asserted against them. In a separate order of the same date, the court, *inter alia*, granted the same relief to the plaintiff and appointed a referee to compute the amount due to the plaintiff.

In June 2023, the plaintiff moved to confirm the referee's report and for a judgment of foreclosure and sale. In an order dated November 6, 2023, the Supreme Court granted the motion. In an order and judgment of foreclosure and sale also dated November 6, 2023, the court granted the same relief to the plaintiff, confirmed the referee's report, and directed the sale of the property. The defendants appeal.

As an initial matter, under the circumstances herein, which include the Supreme Court's direction in the order dated June 1, 2022, that the plaintiff submit a motion for summary judgment and for order of reference within 45 days of the entry of that order, the plaintiff's second motion for summary judgment "did not offend the rule against successive motions for summary judgment" (*U.S. Bank N.A. v Bravo*, 238 AD3d 935, 937 [2025] [internal quotation marks omitted]; *see Wilmington Sav. Fund Socy., FSB v Novis*, 200 AD3d 739, 741 [2021]; *Greene v Sager*, 78 AD3d 777, 778 [2010]). Moreover, although "[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court[] as well as the appellate court . . . [and] operates to foreclose re-examination of the question absent a showing of subsequent evidence or change in law, this Court's determination on [the defendants'] prior appeal from [the prior order granting the plaintiff], *inter alia*, [summary] judgment . . . did not resolve the issue of standing [or of compliance with RPAPL 1304]" (*Central Mtge. Co. v Resheff*, 200 AD3d 640, 645 [2021] [citations and internal quotation marks omitted]).

"Generally, in a mortgage foreclosure action, a plaintiff demonstrates its *prima facie* entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of default" (*Deutsche Bank Natl. Trust Co. v Kingsbury*, 171 AD3d 871, 871 [2019]; *see Wells Fargo Bank, N.A. v Mitselmakher*, 216 AD3d 1056, 1057 [2023]). Where, as here,

the plaintiff's standing has been placed in issue by the defendant's answer, "the plaintiff must prove its standing as part of its prima facie showing on a motion for summary judgment" (*Deutsche Bank Natl. Trust Co. v Kingsbury*, 171 AD3d at 872). "[A] plaintiff may demonstrate its standing in a foreclosure action through proof that it was in possession of the subject note endorsed in blank, or the subject note and a firmly affixed allonge endorsed in blank, at the time of commencement of the action" (*US Bank Trust, N.A. v Loring*, 193 AD3d 1101, 1103 [2021]; see *Wells Fargo Bank, N.A. v Mitselmakher*, 216 AD3d at 1057-1058). For an endorsement to constitute "a valid transfer of the underlying note," it "must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof" (*HSBC Bank USA, N.A. v Roumiantseva*, 130 AD3d 983, 985 [2015] [emphasis added], quoting UCC 3-202). In that regard, the plaintiff submitted a copy of the complaint, attached to which was a copy of the note and allonges with endorsements (see *U.S. Bank N.A. v Hunte*, 215 AD3d 887, 889 [2023]; *M&T Bank v Bonilla*, 215 AD3d 813, 814 [2023]). The plaintiff also submitted an affidavit of Ralph S. Wheatly, a vice president of CLMG Corp. (hereinafter CLMG), the document custodian for the plaintiff, who stated that he had "personally examined" the business records maintained by his employer, as well as the "original documentation," and that the plaintiff was "in possession of the original indorsed Note (with Allonges firmly affixed thereto) on the date this action was commenced." In response to the plaintiff's prima facie showing of standing, the defendants failed to raise a triable issue of fact.

The defendants waived any defense based upon the plaintiff's alleged failure to comply with the condition precedent set forth in the mortgage agreement requiring a notice of default, since the defendant did not raise that defense in their answer (see CPLR 3015 [a]; *Deutsche Bank Natl. Trust Co. v Wentworth*, 211 AD3d 684, 687 [2022]). The complaint did not allege compliance with the notice requirements set forth in the mortgage agreement but only that the plaintiff "complied with all of the applicable provisions of Banking Law 595-a, and any rules and regulations promulgated thereunder, Banking Law 6-l and 6-m and RPAPL § 1304 and § 1306." Therefore, "the allegations in the complaint were not such that a general denial was sufficient to place the plaintiff's compliance with the condition precedent in issue" (*Deutsche Bank Natl. Trust Co. v Wentworth*, 211 AD3d at 687).

Nevertheless, the Supreme Court should have denied the

plaintiff's motion for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference, because the plaintiff failed to establish that RPAPL 1304 notices were sent by the "lender, assignee or mortgage loan servicer" as required by that statute (*id.* § 1304 [1]). With respect to the plaintiff's compliance with RPAPL 1304, the plaintiff submitted an affidavit from Victoria Wolff, an assistant secretary at Dovenmuehle Mortgage, Inc. (hereinafter DMI), the alleged subservicer for MGC Mortgage, Inc., the purported authorized loan servicer for the plaintiff, stating that RPAPL 1304 notices had been mailed by DMI. Attached to Wolff's affidavit was a document with the heading, "UNANIMOUS CONSENT OF THE BOARD OF DIRECTORS OF LNV CORPORATION" (hereinafter the Resolution), which sets forth a resolution of the plaintiff's board of directors regarding Wolff's appointment as an authorized signer of the plaintiff. The Resolution, stated, in relevant part, that authority was granted pursuant to a subservicing agreement dated February 19, 2010, which is not in the record. Accordingly, the Resolution itself, without the subservicing agreement, was insufficient to demonstrate that DMI possessed the authority to act on the plaintiff's behalf to establish the plaintiff's compliance with RPAPL 1304 (*see Citibank, N.A. v Herman*, 215 AD3d 626, 628 [2023]; *U.S. Bank N.A. v Tesoriero*, 204 AD3d 1066, 1068 [2022]).

Further, the referee's report was based upon an affidavit of Thomas Queen, an "authorized signer for LNV Corporation," setting forth the amounts due to the plaintiff. However, although the plaintiff stated that the affidavit was submitted together with the referee's oath and report, that affidavit was submitted for the first time as part of the plaintiff's reply papers and, therefore, should not have been considered in determining whether the referee's report was substantially supported by the record (*see HSBC Bank USA, N.A. v Rahman*, 194 AD3d 792, 795 [2021]). In any event, the affidavit was deficient. Although Queen stated that he was "familiar with business records maintained by LNV Corporation, for the purpose of servicing mortgage loans," that these records were "made near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by LNV Corporation," and that "[i]t is the regular practice of LNV Corporation to make these records," at least a portion of those records indicate that they were not created by the plaintiff. Since Queen failed to attest to his personal knowledge of the record-keeping practices

of either of those entities, or any other entity, and failed to allege that the documents that he attached to his affidavit were incorporated into the plaintiff's records and routinely relied upon by the plaintiff in its business, his affidavit did not provide a foundation for the admission of those business records (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 210 [2019]).

Accordingly, we reverse the order and judgment of foreclosure and sale, deny those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against the defendants and for an order of reference and the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, and modify the orders dated January 10, 2023, and the order dated November 6, 2023, accordingly. Barros, J.P., Warhit, Ventura and Golia, JJ., concur.

17 Kathleen Lynch, as Administratrix of the Estate of Phillip Lynch, Also Known as Phillip Lynch, Sr., Deceased, Appellant, v John H. Wang, M.D., et al., Respondents. [251 NYS3d 294]—

Physicians and Surgeons—Malpractice—Expert Testimony

In an action to recover damages for medical malpractice, etc., the plaintiff appeals from a judgment of the Supreme Court, Queens County (Pam Jackman Brown, J.), entered September 27, 2023. The judgment, upon the granting of the defendants' oral application to dismiss the complaint, is in favor of the defendants and against the plaintiff dismissing the complaint.

Ordered that the judgment is reversed, on the law and in the exercise of discretion, with costs, the defendants' oral application to dismiss the complaint is denied, the complaint is reinstated, and the matter is remitted to the Supreme Court, Queens County, for a new trial.

In April 2018, this action was commenced, inter alia, to recover damages for medical malpractice against the defendants. The complaint alleged, among other things, that the defendant John H. Wang negligently performed a robotic assisted laparoscopic adrenalectomy on Phillip Lynch, Sr. (hereinafter the decedent), during which Wang sheared the decedent's splenic vein.

At trial, the Supreme Court granted the defendants' oral application to preclude the plaintiff's expert, Richard Batista, a board certified general surgeon, from testifying as to the appropriate standard of care for a robotic assisted laparoscopic

adrenalectomy, on the ground that he was not qualified to testify with respect to robotic treatment of the decedent. The court also granted the defendants' oral application to dismiss the complaint, concluding that the plaintiff would be unable to establish a *prima facie* case without such expert testimony. On September 27, 2023, a judgment was entered in favor of the defendants and against the plaintiff dismissing the complaint. The plaintiff appeals.

The Supreme Court improvidently exercised its discretion in precluding the testimony of the plaintiff's expert. "A medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, but the witness should be possessed of the requisite skill, training, education, knowledge, or experience from which it can be assumed that the opinion rendered is reliable" (*Alao v Richmond Univ. Med. Ctr.*, 213 AD3d 722, 724 [2023]; see *DiLorenzo v Zaso*, 148 AD3d 1111, 1112-1113 [2017]). Here, the plaintiff's expert, a board certified general surgeon, testified that he had knowledge of adrenalectomies and the splenic vein based on his education and training, had performed surgeries involving the adrenal gland, and had extensive experience performing laparoscopic surgeries, and he opined that the principles of good surgical practice with respect to the isolation, preservation, and protection of adjacent organs were the same regardless of whether a surgery was performed openly, laparoscopically, or robotically. This testimony was sufficient to demonstrate that the plaintiff's expert was qualified to render an opinion regarding the standard of care for a robotic assisted laparoscopic adrenalectomy (see *Alao v Richmond Univ. Med. Ctr.*, 213 AD3d at 724; *Ariola v Long*, 197 AD2d 605, 605 [1993]). The expert's lack of experience in performing robotic assisted laparoscopic adrenalectomies goes to the weight of his testimony, not its admissibility (see *Maestri v Pasha*, 198 AD3d 632, 634 [2021]; *Ariola v Long*, 197 AD2d at 605). Accordingly, the court should have denied the defendants' oral applications to preclude the plaintiff's expert from testifying as to the appropriate standard of care for a robotic assisted laparoscopic adrenalectomy and to dismiss the complaint, and we remit the matter to the Supreme Court, Queens County, for a new trial.

The plaintiff's remaining contention need not be reached in light of our determination. LaSalle, P.J., Brathwaite Nelson, Dowling and Ventura, JJ., concur.

18 Gina Marsh, Appellant, v Mandalay Leasing Limited Partnership, Defendant, and AMCO Group, Inc., Respondent. [252 NYS3d 188]—

Parties—Death of Party—Substitution—Delay in Petitioning for Letters of Administration

In an action to recover damages for personal injuries, the appeal is from an order of the Supreme Court, Queens County (Maurice E. Muir, J.), entered February 20, 2024. The order, insofar as appealed from, granted that branch of the motion of the defendant AMCO Group, Inc., which was pursuant to CPLR 1021 to dismiss the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

In December 2015, Gina Marsh (hereinafter the decedent) commenced this action against the defendants, Mandalay Leasing Limited Partnership and AMCO Group, Inc. (hereinafter AMCO), to recover damages for personal injuries she allegedly sustained in December 2014 when she tripped and fell on a tarp in the hallway of her apartment building.

The decedent died on November 2, 2017, and the decedent's attorney notified the Supreme Court of the decedent's death by letter dated March 29, 2018. In May 2023, AMCO moved, inter alia, pursuant to CPLR 1021 to dismiss the complaint for failure to seek a timely substitution for the decedent. Following receipt of AMCO's motion, the decedent's son filed a petition for letters of administration, dated June 2, 2023, and thereafter, the decedent's attorney filed papers in opposition to AMCO's motion. In an order entered February 20, 2024, the court, among other things, granted that branch of AMCO's motion which was pursuant to CPLR 1021 to dismiss the complaint. This appeal ensued.

"A motion for substitution pursuant to CPLR 1021 is the method by which the court acquires jurisdiction" over a deceased party's successors in interest, and such motion "is not a mere technicality" (*Bossert v Ford Motor Co.*, 140 AD2d 480, 480 [1988]; see *Matter of Einstoss*, 26 NY2d 181, 189-190 [1970]; *Green v Maimonides Med. Ctr.*, 172 AD3d 824 [2019]). CPLR 1021 provides, in relevant part, that "[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made." "The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or defense has potential merit" (*Green v Maimonides Med. Ctr.*, 172 AD3d at 826 [internal quotation marks omitted]; see *Hemmings v Rolling Frito-Lay Sales, LP*, 220 AD3d 754, 757 [2023]).

Here, there is no documentation that the decedent's counsel took any steps to substitute a representative for the decedent prior to receipt of AMCO's motion. The more than five-year delay in seeking letters of administration shows a lack of diligence (see *Mesniankina v 302 BBA, LLC*, 219 AD3d 1516, 1518 [2023]; *Navas v New York Hosp. Med. Ctr. of Queens*, 180 AD3d 796, 798 [2020]; *Terpis v Regal Hgts. Rehabilitation & Health Care Ctr., Inc.*, 108 AD3d 618, 619 [2013]). Moreover, the decedent failed to demonstrate a potentially meritorious cause of action. Neither the attorney affirmation, verified complaint, nor bill of particulars constituted an affidavit of merit, as counsel had no personal knowledge of the facts of this case (see *Mesniankina v 302 BBA, LLC*, 219 AD3d at 1518; *Byner v Murray-Taylor*, 208 AD3d 1214, 1216 [2022]; *Juseinoski v Board of Educ. of City of N.Y.*, 15 AD3d 353, 356 [2005]). Since an affidavit of merit was not submitted and no reasonable justification for the delay in petitioning for letters of administration was provided, the Supreme Court properly granted that branch of AMCO's motion which was pursuant to CPLR 1021 to dismiss the complaint, even where the defendants were not prejudiced by the delay in moving for substitution (see *Linyard v Long Is. Coll. Hosp.*, 234 AD3d 677, 679 [2025]; *Byner v Murray-Taylor*, 208 AD3d at 1216; *Rose v Frankel*, 83 AD3d 607 [2011]). Iannacci, J.P., Voutsinas, Taylor and Love, JJ., concur.

19 In the Matter of 2214 Rt 208, LLC, Appellant, v Town of Montgomery Zoning Board of Appeals et al., Respondents. [252 NYS3d 599]—

Parties—Necessary Parties—Impact on Interests—Applicant for Special Use Exception Permit

Limitation of Actions—What Statute Governs—Declaratory Judgment Action—Resolved Pursuant to CPLR Article 78

Limitation of Actions—Defendants United in Interest—Relation-Back Doctrine—Failure to Show Judgment Will Affect Both Similarly

In a hybrid proceeding pursuant to CPLR article 78 to review a determination of the Town of Montgomery Zoning Board of Appeals filed May 17, 2022, and action for declaratory relief, the petitioner/plaintiff appeals from (1) an order of the Supreme Court, Orange County (Sandra B. Sciortino, J.), dated January 6, 2023, and (2) an order of the same court dated October 31, 2023. The order dated January 6, 2023, insofar as appealed from, granted that branch of the motion of the Town of Montgomery Zoning Board of Appeals which was pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the causes of action seeking relief pursuant to CPLR article 78. The order dated

October 31, 2023, following service and filing of a second amended complaint asserting causes of action against DBC Partners, LLC, among others, as permitted by the order dated January 6, 2023, granted the motion of DBC Partners, LLC, pursuant to CPLR 3211 (a) to dismiss the second amended complaint insofar as asserted against it, and directed dismissal of the second amended complaint insofar as asserted against the remaining parties.

Ordered that on the Court's own motion, the notice of appeal from the order dated January 6, 2023, is deemed to be an application for leave to appeal from that order, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that on the Court's own motion, the notice of appeal from so much of the order dated October 31, 2023, as directed dismissal of the second amended complaint insofar as asserted against all parties other than DBC Partners, LLC, is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order dated January 6, 2023, is affirmed insofar as appealed from; and it is further,

Ordered that the order dated October 31, 2023, is affirmed; and it is further,

Ordered that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

In February 2021, DBC Partners, LLC (hereinafter DBC), applied, *inter alia*, for a special exception use permit for the use of a "Gasoline Station with Convenience Store" as defined pursuant to Code of the Town of Montgomery § 235-3.2 for its property located in the Town of Montgomery. In a determination dated November 8, 2021, the Town's Building Inspector and Code Enforcement Officer, James M. Farr (hereinafter Farr), found that the proposed convenience store use could be separated from the other uses of the proposed building such that the store would require an area variance of 1,480.5 square feet in a 6,730 square foot building. In January 2022, the petitioner/plaintiff (hereinafter the petitioner), a neighboring landowner, appealed Farr's determination to the Town's Zoning Board of Appeals (hereinafter the ZBA), seeking, among other things, to annul the determination. In a determination filed May 17, 2022, the ZBA denied the petitioner's appeal and upheld Farr's determination.

In June 2022, the petitioner commenced this hybrid proceeding pursuant to CPLR article 78 and action for declaratory

relief against the ZBA, but not DBC, and subsequently filed an amended petition/complaint against only the ZBA. In August 2022, the ZBA moved pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the amended petition/complaint for failure to join DBC as a necessary party. In an order dated January 6, 2023, the Supreme Court granted that branch of the ZBA's motion which was to dismiss the causes of action seeking relief pursuant to CPLR article 78, determining that DBC was a necessary party whose rights would be significantly affected by the outcome of the amended petition/complaint. In addition, the court directed the petitioner to serve and file a second amended complaint naming DBC, among others, as a defendant, and the petitioner served and filed the second amended complaint in February 2023. In June 2023, DBC moved pursuant to CPLR 3211 (a) to dismiss the second amended complaint insofar as asserted against it. In an order dated October 31, 2023, the court granted DBC's motion, and also directed dismissal of the second amended complaint insofar as asserted against the remaining parties. The petitioner appeals from both orders.

An action for a declaratory judgment is generally governed by a six-year statute of limitations (*see id.* § 213 [1]). “However, where a declaratory judgment action involves ‘claims that could have been made in another proceeding for which a specific limitation period is provided, the action is subject to the shorter limitations period’ ” (*Kinsella v Long Is. Power Auth.*, 236 AD3d 770, 773 [2025], quoting *Save the View Now v Brooklyn Bridge Park Corp.*, 156 AD3d 928, 931 [2017]). “In making this determination, courts consider whether the parties’ rights could have been resolved in a CPLR article 78 proceeding” (*id.*; *see Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]).

A proceeding pursuant to CPLR article 78 seeking review of a determination of a zoning board of appeals “shall be instituted within thirty days after the filing of a decision of the board in the office of the town clerk” (Town Law § 267-c [1]; *see Matter of Coden v Town of Huntington*, 235 AD3d 744, 745 [2025]; *Matter of Greenville Fire Dist. v Zoning Bd. of Appeals of the Town of Greenburgh*, 202 AD3d 959, 961 [2022]). A party whose interest may be adversely affected by a potential judgment in a CPLR article 78 proceeding is a necessary party to the proceeding (*see* CPLR 1001 [a]; *Matter of Karmel v White Plains Common Council*, 284 AD2d 464, 465 [2001]).

Here, the Supreme Court properly granted that branch of the ZBA's motion which was pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the causes of action seeking relief pursuant

to CPLR article 78 because DBC was a necessary party to the proceeding (see *Matter of Gross v Zoning Bd. of Appeals of the Vil. of Warwick*, 233 AD3d 942, 944 [2024]). DBC's interests, as an applicant for a special exception use permit, would be impacted by a CPLR article 78 proceeding seeking to annul Farr's determination pertaining to the same proposed building (see *Matter of Karmel v White Plains Common Council*, 284 AD2d at 465).

Further, despite being couched in declaratory judgment language, the Supreme Court properly determined that the causes of action against DBC seeking declaratory relief would have been available in a CPLR article 78 proceeding, and thus, the 30-day statute of limitations applied to those causes of action (see *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d at 194; *Matter of Coden v Town of Huntington*, 235 AD3d at 746). Accordingly, the court properly granted DBC's motion pursuant to CPLR 3211 (a) to dismiss the second amended complaint insofar as asserted against it as time-barred, since the second amended complaint was filed outside the 30-day statute of limitations applicable to the relief sought pursuant to CPLR article 78 (see Town Law § 267-c [1]; *Holihan v Town of Orangetown*, 152 AD3d 747, 749 [2017]).

Contrary to the petitioner's contentions, it failed to establish that the relation-back doctrine applied. The relation-back doctrine "allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest'" (*Buran v Coupal*, 87 NY2d 173, 177 [1995], quoting CPLR 203 [b]; see *Patrick v Comprehensive Med. Supply, LLC*, 225 AD3d 777, 779 [2024]; *Matter of Mensch v Planning Bd. of the Vil. of Warwick*, 189 AD3d 1245, 1248 [2020]). "Defendants are united in interest only when their interest in the subject-matter [of the action] is such that [the defendants] stand or fall together and that judgment against one will similarly affect the other" (*Patrick v Comprehensive Med. Supply, LLC*, 225 AD3d at 779 [internal quotation marks omitted]; see *Matter of Nemeth v K-Tooling*, 40 NY3d 405, 415 [2023]).

Here, although the causes of action all arose out of the same conduct, the petitioner failed to establish that the ZBA and DBC were united in interest as required to satisfy the second prong of the relation-back doctrine (see *Patrick v Comprehensive Med. Supply, LLC*, 225 AD3d at 779; *Matter of Mensch v Planning Bd. of the Vil. of Warwick*, 189 AD3d at 1248).

The petitioner's remaining contention is without merit.

Accordingly, we affirm the order dated January 6, 2023, insofar as appealed from, and the order dated October 31, 2023. Connolly, J.P., Voutsinas, Landicino and Hom, JJ., concur.

20 In the Matter of Destinee A. Shawn M. et al., Respondents; Administration for Children's Services, Respondent; Jacquelyn M. et al., Appellants. In the Matter of Kaylee A. Shawn M. et al., Respondents; Administration for Children's Services, Respondent; Jacquelyn M. et al., Appellants. In the Matter of Kholee A. Shawn M. et al., Respondents; Administration for Children's Services, Respondent; Jacquelyn M. et al., Appellants. [251 NYS3d 722]—

Parent, Child and Family—Custody—Appointment of Kinship Guardian—Extraordinary Circumstances

Parent, Child and Family—Custody—Appointment of Kinship Guardian—Best Interests of Child

Parent, Child and Family—Visitation—Determination of Parental Access

In related guardianship proceedings pursuant to Family Court Act article 6, the father appeals, and the mother separately appeals, from three orders of the Family Court, Kings County (Alicia Elloras-Ally, J.) (one as to each child), all dated September 4, 2024. The orders, insofar as appealed from by the father, after a hearing, granted the petitions of the maternal grandfather and his wife to be appointed guardians of the subject children and denied the father court-ordered parental access with the children, but permitted the father to have informal parental access with the children Destinee A. and Kaylee A. upon those children's consent. The orders, insofar as appealed from by the mother, after a hearing, denied the mother court-ordered parental access with the children Destinee A. and Kaylee A., but permitted the mother to have informal parental access with those children upon their consent, and set forth a schedule for certain parental access with the child Kholee A.

Ordered that the orders are modified, on the law, by deleting the provisions thereof conditioning the father's and the mother's informal parental access with the subject children Destinee A. and Kaylee A. upon those children's consent; as so modified, the orders are affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Family Court, Kings County, for further proceedings consistent herewith.

The maternal grandfather and his wife (hereinafter the petitioners) filed petitions to be appointed kinship guardians of the subject children, Destinee A., Kaylee A., and Kholee A. After a hearing, the Family Court, inter alia, granted the peti-

tions over the father's objection, denied the father court-ordered parental access with the children, permitted the father to have informal parental access with Destinee A. and Kaylee A. upon those children's consent, denied the mother court-ordered parental access with Destinee A. and Kaylee A., permitted the mother to have informal parental access with Destinee A. and Kaylee A. upon those children's consent, and awarded the mother biweekly virtual and monthly supervised parental access with Kholee A. The father and the mother separately appeal.

Contrary to the father's contention, the Family Court properly determined that the petitioners met their burden of demonstrating the requisite extraordinary circumstances to be appointed the kinship guardians of the children over objection (*see* Family Ct Act § 1055-b [a] [iv] [A]; *Matter of Tanisha M.M. [Toni D.S.—Anthony M.]*, 170 AD3d 841, 841-842 [2019]). The children were removed from the parents' custody in 2015 and placed into foster care. From approximately 2018 to 2020, both parents were incarcerated. The record further established that both parents had a history of substance abuse, failed to comply with the foster care agency's drug testing requirement, and failed to sign HIPAA waivers to permit the foster care agency to confirm their compliance with drug treatment. The petitioners assumed full responsibility for the care of the children at least three years prior to the hearing, and the youngest child, Kholee A., had lived with the petitioners for most of her life. These circumstances constitute extraordinary circumstances that justified the appointment of the petitioners as kinship guardians over the father's objection (*see Matter of Tanisha M.M. [Toni D.S.—Anthony M.]*, 170 AD3d at 841-842; *Matter of Caron C.G.G. [Alicia G.—Jasmine D.]*, 165 AD3d 476, 476-477 [2018]).

The Family Court providently exercised its discretion in finding that the appointment of the petitioners as kinship guardians of the children was in the children's best interest (*see* Family Ct Act §§ 661 [c]; 1055-b [a] [ii]; *Matter of Caron C.G.G. [Alicia G.—Jasmine D.]*, 165 AD3d at 476-477; *see also Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]). "Findings of the Family Court which have a sound and substantial basis in the record are generally entitled to great deference on appeal because any custody determination depends to a great extent on the court's assessment of the credibility of the witnesses and the character, temperament, and sincerity of the parties" (*Matter of Agyapon v Zungia*, 150 AD3d 1226, 1227 [2017]; *see Matter of Ra El v Aroepa-Hughley*, 151 AD3d 974,

974 [2017]). The hearing record established, inter alia, that the petitioners provided for the medical, educational, and special needs of the children and provided a stable home for the children. Under these circumstances, the Family Court's determination that the appointment of the petitioners as kinship guardians was in the best interests of the children has a sound and substantial basis in the record (see *Matter of Tanisha M.M. [Toni D.S.—Anthony M.]*, 170 AD3d at 842; *Matter of Caron C.G.G. [Alicia G.—Jasmine D.]*, 165 AD3d at 476-477).

Contrary to the father's contention, the Family Court's determination to deny him parental access with Kholee A. was in her best interest and has a sound and substantial basis in the record (see *Matter of Ejiogu v ACS-Kings*, 176 AD3d 816, 818 [2019]; *Matter of Smith v Dawn F.B.*, 88 AD3d 729, 729-730 [2011]).

Contrary to the mother's contention, the Family Court providently exercised its discretion in crafting her parental access schedule with Kholee A., which is supported by a sound and substantial basis in the record (see *Matter of Steward v Okon*, 238 AD3d 1055, 1058 [2025]).

As the father and the mother correctly contend, “[a] court may not delegate its authority to determine parental access to either a parent or a child” (*Matter of Mondschein v Mondschein*, 175 AD3d 686, 687 [2019]; see *Matter of Clezidor v Lexune*, 192 AD3d 792, 794 [2021]). Here, the Family Court improperly delegated its authority to determine the father's and the mother's parental access with Destinee A. and Kaylee A. to those children. Accordingly, we remit the matter to the Family Court, Kings County, for a new determination as to the father's and the mother's parental access with Destinee A. and Kaylee A. in accordance with the best interests of those children (see *Matter of Shah v Shah*, 186 AD3d 1692, 1694 [2020]). Genovesi, J.P., Ford, Landicino and Quirk, JJ., concur.

21 In the Matter of Umara Amin, Respondent, v Asad Hus-sain, Appellant. [252 NYS3d 594]—

Appeal—Academic and Moot Questions—Expiration of Period of Incarceration

Parent, Child and Family—Support—Willful Violation of Order—Failure to Present Evidence of Inability to Comply

In a proceeding pursuant to Family Court Act article 4, the father appeals from an order of commitment of the Family Court, Nassau County (Robin M. Kent, J.), dated July 18, 2024. The order of commitment, after a hearing, in effect, confirmed so much of an order of the same court (Lisa M. Williams, S.M.)

dated June 7, 2024, made after a hearing, as found that the father willfully violated an order of child support dated November 9, 2022, and committed him to the custody of the Nassau County Correctional Facility for a period of 90 days unless the father paid the purge amount of \$9,000.

Ordered that the appeal from so much of the order of commitment as committed the father to the custody of the Nassau County Correctional Facility for a period of 90 days is dismissed as academic, without costs or disbursements, as the period of incarceration has expired (*see Matter of Nestor v Nestor*, 236 AD3d 794, 794 [2025]; *Matter of Stein-Zimic v Zimic*, 194 AD3d 823, 824 [2021]); and it is further,

Ordered that the order of commitment is affirmed insofar as reviewed, without costs or disbursements.

In this proceeding pursuant to Family Court Act article 4, the mother alleged that the father was in willful violation of an order of child support dated November 9, 2022 (hereinafter the child support order), pursuant to which the Family Court directed the father to pay child support in the sum of \$1,000 per month. In May 2024, a hearing was held on the mother's petition and each party testified on their own behalf.

Following the hearing, the Support Magistrate issued an order dated June 7, 2024 (hereinafter the violation order), finding that the father willfully violated the child support order, determining that the father owed support arrears in the sum of \$13,432.66, directing that the mother be awarded a money judgment in that amount, and referring the matter to a Family Court Judge for a confirmation hearing.

After a hearing, in an order of commitment dated July 18, 2024, the Family Court, in effect, confirmed so much of the violation order as found that the father willfully violated the child support order and committed the father to the custody of the Nassau County Correctional Facility for a period of 90 days unless he paid the purge amount of \$9,000. The father appeals.

Although the appeal from so much of the order of commitment as committed the father to the custody of the Nassau County Correctional Facility for a period of 90 days must be dismissed as academic, in light of the enduring consequences that could flow from the finding that the father willfully violated the child support order, the appeal from so much of the order of commitment as, in effect, confirmed the finding that the father was in willful violation of the child support order is not academic (*see Matter of Nestor v Nestor*, 236 AD3d 794, 795 [2025]; *Matter of Stein-Zimic v Zimic*, 194 AD3d 823, 824 [2021]).

The Family Court did not err by, in effect, confirming the Support Magistrate's finding that the father willfully violated the child support order. At a hearing to determine whether a respondent has willfully failed to obey a lawful order of support, the burden is on the petitioner to establish that the respondent willfully violated the terms of the support order by failing to pay the required support (*see* Family Ct Act § 454 [3] [a]; *Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]; *Matter of Martinez v Lauretano*, 240 AD3d 597, 598 [2025]). "Evidence that the respondent failed to pay child support as ordered constitutes prima facie evidence of a willful violation" (*Matter of Martinez v Lauretano*, 240 AD3d at 598; *Matter of Nestor v Nestor*, 236 AD3d at 795).

Here, in response to the mother's prima facie showing of the father's willful violation of the child support order, the father failed to present credible and competent evidence of his financial inability to comply with that order, as the Family Court properly determined (*see Matter of Pifferrer v Barrera*, 236 AD3d 1044, 1045 [2025]; *Matter of Franco v Paez*, 228 AD3d 656, 657 [2024]; *Matter of Martucci v Nerone*, 192 AD3d 1107, 1109 [2021]). Genovesi, J.P., Christopher, Warhit and Ventura, JJ., concur.

22 In the Matter of David Avigdor et al., Respondents-Appellants, v Morton Avigdor et al., Respondents, and Choice Abstract Corp., as Escrowee, Appellant-Respondent. [252 NYS3d 596]—

Execution—Real Property—Interested Persons
Stipulations—Stipulation of Settlement—Debtor's Placement of Funds in Escrow—Subject to Claims Brought by Creditors

In a proceeding, inter alia, pursuant to CPLR 5239 to determine adverse claims to money held in escrow, Choice Abstract Corp. appeals, and the petitioners cross-appeal, from an order of the Supreme Court, Kings County (Carl J. Landicino, J.), dated May 31, 2023. The order, insofar as appealed from, determined that the petitioners had standing to commence this proceeding. The order, insofar as cross-appealed from, denied the petition.

Ordered that the appeal is dismissed, without costs or disbursements, as Choice Abstract Corp. is not aggrieved by the order appealed from (*see* CPLR 5511); and it is further,

Ordered that the order is affirmed insofar as cross-appealed from, without costs or disbursements.

In 2014, Moshe Twersky, as executor of the estate of Elias Gelbwachs, obtained a money judgment against Morton Avigdor

(hereinafter the Twersky judgment). The Twersky judgment was docketed against Morton in the Kings County Clerk's Office. In June 2019, the petitioners, David Avigdor and Merrill Avigdor, Morton's brothers, obtained an arbitration award against Morton arising out of Morton's misappropriation of funds relating to their mother's estate. Upon learning that Morton had contracted to sell his home in Brooklyn (hereinafter the subject property), David, as executor of his mother's estate, commenced a proceeding against Morton pursuant to CPLR article 75 to confirm the arbitration award, and Morton was enjoined from selling the subject property. In a so-ordered stipulation of settlement executed by, among others, Morton, David, and Merrill, it was agreed that David would withdraw the proceeding against Morton without prejudice and that upon the closing of the sale of the subject property, Morton would deposit into escrow the sum of \$700,000 (hereinafter the escrow funds), to be held by Choice Abstract Corp. (hereinafter Choice), as escrow agent. Thereafter, Morton sold the subject property, and \$700,000 of the sale proceeds was held by Choice in escrow.

In March 2020, the petitioners commenced a proceeding against Morton pursuant to CPLR article 75 to confirm the arbitration award. In an order dated July 30, 2021, the Supreme Court, *inter alia*, confirmed the arbitration award. In a letter dated November 25, 2021, the petitioners, Morton, and another sibling requested that Choice release \$631,000 of the escrow funds to David and the balance of the escrow funds to Morton in accordance with the stipulation of settlement. In a letter dated January 5, 2022, the attorney for Gelbwachs's estate and Twersky, as executor of Gelbwachs's estate, advised Choice of the Twersky judgment and directed Choice "not to release the [escrow] funds . . . pending resolution of this matter."

In March 2022, the petitioners commenced this proceeding pursuant to CPLR 5239 and 5240 to determine adverse claims to the escrow funds against, among others, Morton, Choice, Gelbwachs's estate, and Twersky, individually and as executor of Gelbwachs's estate, asserting that the escrow funds should be released to the petitioners. Choice answered the petition and asserted a counterclaim against the petitioners and a cross-claim against Morton. Gelbwachs's estate and Twersky (hereinafter together the Twersky respondents) submitted papers in opposition to the petition. In an order dated May 31, 2023, the Supreme Court, among other things, determined that the petitioners had standing to commence this proceeding under CPLR 5239 and 5240, *inter alia*, as interested persons

and denied the petition. Choice appeals, and the petitioners cross-appeal.

The appeal by Choice must be dismissed. “A party is not aggrieved merely because it ‘disagrees with the particular findings, rationale or the opinion supporting’ a judgment or order” (*Moore v City of New York*, 220 AD3d 767, 768 [2023], quoting *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983]). “That an order ‘may contain language or reasoning which . . . parties deem adverse to their interests does not furnish them with a basis for standing to take an appeal’ ” (*Moore v City of New York*, 220 AD3d at 768, quoting *Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473 [1986]).

CPLR 5239 provides that “[p]rior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt.” In such a proceeding, “[t]he court may vacate the execution or order, void the levy, direct the disposition of the property or debt, or direct that damages be awarded” (*id.*).

Here, contrary to Choice’s contention, which is raised as an alternative ground for affirmance, the Supreme Court properly determined that the petitioners had standing to commence this proceeding as “interested person[s]” (*id.*; see *Born to Build, LLC v Saleh*, 125 AD3d 706, 707 [2015]).

The petitioners contend that the stipulation of settlement and the order dated July 30, 2021, confirming the arbitration award put the escrow funds beyond the Twersky respondents’ reach. This contention is without merit. “Where a debtor places funds in escrow for the payment of specific creditors, as long as those funds remain subject to the debtor’s ‘present or future control,’ those funds are subject to claims brought by other creditors who know about the escrow funds” (*Freedman v Hason*, 155 AD3d 831, 832 [2017], quoting *Potter v MacLean*, 75 AD3d 686, 687 [2010]).

Here, the escrow funds were not transferred to anyone at the time of the sale of the subject property. The November 25, 2021 letter, which directed Choice to release the escrow funds, demonstrated that the petitioners and Morton retained control over the escrow funds (*see id.*). Accordingly, the Supreme Court properly denied the petition.

The petitioners’ remaining contentions either are without merit or need not be reached in light of our determination. Iannacci, J.P., Wooten, Dowling and Love, JJ., concur.

23 In the Matter of Dionis F., Respondent, v Daniela Z., Respondent. Dionel F., Nonparty Appellant. [248 NYS3d 678]—

Parent, Child and Family—Custody—In Camera Interview—Sufficient Information to Assess Child’s Best Interests

In a proceeding pursuant to Family Court Act article 6, the subject child appeals from an order of the Family Court, Queens County (Jaimee L. Nelsen, Ct. Atty. Ref.), dated October 8, 2024. The order, insofar as appealed from, awarded the father certain parental access with the child.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

The relevant factual and procedural history are set forth in a prior decision and order of this Court (*see Matter of Dionis F. v Daniela Z.*, 229 AD3d 624 [2024]), which determined a prior appeal by the child in this proceeding. Insofar as relevant here, the parties resolved the father’s petition for parental access with the child pursuant to a stipulation of settlement so-ordered by the Family Court. In the prior appeal, this Court determined that remittal was necessary for the Family Court to conduct an in camera interview with the child before making any determination as to what parental access would be in the child’s best interests (*see id.* at 625-626).

Following remittal, the Family Court conducted an in camera interview with the child and, thereafter, in an order dated October 8, 2024, again approved the parties’ stipulation of settlement and awarded the father certain parental access with the child. The child appeals.

Notwithstanding the child’s objections, after conducting an in camera interview with the child, the Family Court had sufficient information to assess the child’s best interests and the child had a full and fair opportunity to be heard (*see id.* at 625; *Matter of Kylie P. [Carlos P.—Karen G.]*, 213 AD3d 463, 463 [2023]). Furthermore, the court’s determination with respect to the father’s parental access had a sound and substantial basis in the record and, therefore, will not be disturbed (*see Matter of Cruz v Williams*, 239 AD3d 847, 848 [2025]; *Matter of Barrow v Carcaterra*, 210 AD3d 889, 891 [2022]).

The child’s remaining contention is without merit.

Accordingly, we affirm the order insofar as appealed from. Duffy, J.P., Wooten, Taylor and Hom, JJ., concur.

24 In the Matter of Melissa Grajales, Respondent, v Joshua Trotman, Appellant. [250 NYS3d 634]—

Parent, Child and Family—Custody—Granted Sole Legal and Physical

Custody—Witness Credibility Determination

In a proceeding pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Queens County (Joseph J. Esposito, J.), dated October 28, 2022. The order, upon a decision of the same court dated October 26, 2022, made after a hearing, granted the mother's petition for sole legal and physical custody of the parties' child. The notice of appeal from the decision is deemed to be a notice of appeal from the order (*see* CPLR 5512 [a]).

Ordered that the order is affirmed, without costs or disbursements.

The mother and the father, who were never married to each other, have one child together. In September 2019, the mother filed a petition for sole legal and physical custody of the child. After conducting a hearing, the Family Court granted the mother's petition and awarded her sole legal and physical custody of the child. The father appeals.

In a child custody case, the court's paramount concern is to determine, under the totality of the circumstances, what is in the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Bell v Pierre*, 239 AD3d 973, 974 [2025]). In making an initial child custody determination, the court should consider several factors, including, but not limited to, the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent (*see Matter of Bell v Pierre*, 239 AD3d at 974-975; *Matter of Eckstein v Young*, 176 AD3d 813, 815 [2019]). Further, if domestic violence is alleged and proven by a preponderance of the evidence, then the court must consider the impact of such domestic violence upon the best interests of the child (*see Matter of Bell v Pierre*, 239 AD3d at 975).

Any custody determination depends to a great extent upon the hearing court's assessment of the witnesses' credibility and the character, temperament, and sincerity of the parties (*see Matter of Bell v Pierre*, 239 AD3d at 975; *Matter of Eckstein v Young*, 176 AD3d at 815). The hearing court's credibility findings are accorded great weight and its custody determination should not be disturbed unless it lacks a sound and substantial basis in the record (*see Matter of Bell v Pierre*, 239 AD3d at 975; *Matter of Eckstein v Young*, 176 AD3d at 815).

Here, the Family Court's determination granting the mother's petition for sole legal and physical custody of the child has a sound and substantial basis in the record and should not be disturbed. In reaching its determination, the court credited the testimony of the mother that she has been the primary caretaker of the child and found that although the father also loves the child, the father was not credible with respect to some of the issues pertaining to the best interests of the child (*see Matter of Vidal v Taneja*, 218 AD3d 594, 595 [2023]).

Contrary to the contention of the attorney for the child, the appeal is not academic (*see Wisholek v Douglas*, 97 NY2d 740, 742 [2002]). The father's remaining contentions are either unpreserved for appellate review or without merit. Duffy, J.P., Wooten, Landicino and Quirk, JJ., concur.

25 In the Matter of Kimora L.H. Administration for Children's Services, Appellant; Shanel W. et al., Respondents. (Proceeding No. 1.) In the Matter of Kimarui W. Administration for Children's Services, Appellant; Shanel W. et al., Respondents. (Proceeding No. 2.) [250 NYS3d 632]—

Parent, Child and Family—Abused or Neglected Child—Unsupervised Overnight Parental Access

In related proceedings pursuant to Family Court Act article 10, the Administration for Children's Services appeals from an order of the Family Court, Kings County (Ben Darvil, Jr., J.), dated August 1, 2024. The order, after a hearing, in effect, modified an order of disposition of the same court dated August 24, 2023, so as to permit the mother to have unsupervised parental access with the subject children, including overnight parental access at any home cleared by the assigned foster care agency.

Ordered that the order is affirmed, without costs or disbursements.

The Administration for Children's Services (hereinafter ACS) commenced these proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother derivatively abused the subject children based upon the death of the children's half-sibling (hereinafter the deceased child). After a fact-finding hearing, the Family Court, among other things, found that ACS established, by a preponderance of the evidence, that the mother abused the deceased child and derivatively abused the children. In an order of disposition dated August 24, 2023, the court placed the children in the custody of ACS, to be placed in kinship foster care. During the proceedings, the mother was

initially permitted supervised parental access with the children and ultimately permitted unsupervised parental access up to three hours at a time, which was reflected in the order of disposition. After a hearing in 2024, the court, in effect, modified the order of disposition so as to permit the mother to have unsupervised overnight parental access with the children at any home cleared by the assigned foster care agency. ACS appeals.

In a child protective proceeding pursuant to Family Court Act article 10, “[t]he best interests of the children determine whether [parental access] should be permitted to a parent who has committed abuse or neglect” (*Matter of Amparo B.T. [Carlos B.E.]*, 118 AD3d 809, 811 [2014]; see Family Ct Act § 1030 [c]). Moreover, “pursuant to Family Court Act § 1061, the Family Court may, for good cause shown, set aside, modify, or vacate any order issued in the course of a child protective proceeding” (*Matter of Jahred S. [Wilbert S.]*, 149 AD3d 963, 965 [2017]; see Family Ct Act §§ 1031 [d]; 1061). “As with an initial order, the modified order must reflect a resolution consistent with the best interests of the children after consideration of all relevant circumstances, and must be supported by a sound and substantial basis in the record” (*Matter of Jahred S. [Wilbert S.]*, 149 AD3d at 965).

Contrary to ACS’s contention, the Family Court’s determination to permit the mother to have unsupervised overnight parental access with the children at any home cleared by the assigned foster care agency does not lack a sound and substantial basis in the record. Here, the testimony, including from the foster care agency caseworker, along with the documentary evidence, showed that the mother had completed the services requested of her, continued to engage in therapy, and adhered to the parental access schedule, including unsupervised visits, with the children. On this record, the court providently exercised its discretion in granting the mother unsupervised overnight parental access with the children (see generally *Matter of Matthew W. [Mei Qi B.]*, 125 AD3d 677, 678 [2015]). Duffy, J.P., Wooten, Taylor and Hom, JJ., concur.

26 In the *Matter of Kirtisha Clarke Mitchell*, Respondent, v *Lancelot Mitchell*, Appellant. [248 NYS3d 677]—

Parent, Child and Family—Support—Objections to Support Magistrate’s Orders—Specific within Meaning of Family Court Act § 439 (e)

In a proceeding pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Kings County (Robert A. Markoff, J.), dated June 3, 2025. The order denied

the father's objections to an order of the same court (Nicholas J. Palos, S.M.) dated April 11, 2025.

Ordered that the order dated June 3, 2025, is affirmed, without costs or disbursements.

Lancelot Mitchell (hereinafter the father) and Kirtisha Clarke Mitchell (hereinafter the mother) were married in 2017 and have one child together. In January 2020, the mother filed a petition for support in the Family Court, Kings County. In February 2020, the Support Magistrate issued a temporary order of support. Subsequently, the parties were divorced by a judgment of the Superior Court of New Jersey, Chancery Division-Family Part, Essex County, entered in October 2021.

In November 2022, the Support Magistrate directed the father to pay certain child support and certain retroactive spousal support. The father made five motions between May and October 2024, which the Support Magistrate denied in five separate orders. Notably, the orders denying three of the motions were dated April 11, 2025.

In April 2025, the father filed objections to an unspecified order dated April 11, 2025. In an order dated June 3, 2025, the Family Court denied the father's objections on the ground, among others, that they lacked specificity. The father appeals.

Family Court Act § 439 (e) provides, in pertinent part, that "[s]pecific written objections to a final order of a support magistrate may be filed by either party with the [Family Court] within thirty days after receipt of the order" (*see Matter of Licitra v Licitra*, 219 AD3d 837, 837-838 [2023]). " 'An order of a Support Magistrate is final, and the Family Court's review of objections to such an order is the equivalent of appellate review' " (*id.* at 838, quoting *Matter of Cherrez v Lazo*, 102 AD3d 781, 782 [2013]; *see Matter of Taylor v Taylor*, 148 AD3d 1161, 1162-1163 [2017]). Since the father's objections to the Support Magistrate's orders were not specific within the meaning of Family Court Act § 439 (e), the Family Court properly denied his objections on that ground (*see Matter of Licitra v Licitra*, 219 AD3d at 838; *Matter of Cherrez v Lazo*, 102 AD3d at 782).

The father's remaining contentions are without merit. Iannacci, J.P., Ford, Ventura and Quirk, JJ., concur.

27 In the Matter of Claire Pearce, Also Known as Claire Antoinette Pearce, Deceased. Holly Pearce, Respondent; Michael Pearce, Appellant. [251 NYS3d 725]—

Wills—Construction—Extrinsic Evidence—Ambiguous Meaning of Primary Residence

Wills—Construction—Counsel Fees

In a will construction proceeding, the objectant appeals from an order of the Surrogate's Court, Kings County (Bernard J. Graham, S.), dated March 14, 2024. The order granted those branches of the petitioner's motion which were for summary judgment construing Article SECOND of the last will and testament of Claire Pearce, also known as Claire Antoinette Pearce, to bequeath a lot located at 95 Park Place in Brooklyn to the petitioner and for an award of attorneys' fees payable from the residuary estate of Claire Pearce, also known as Claire Antoinette Pearce, and denied the objectant's cross-motion for summary judgment construing Article THIRD of the last will and testament of Claire Pearce, also known as Claire Antoinette Pearce, to include as part of the residuary estate of Claire Pearce, also known as Claire Antoinette Pearce, the lot located at 95 Park Place in Brooklyn.

Ordered that the order is affirmed, with costs payable by the objectant personally.

Claire Pearce, also known as Claire Antoinette Pearce (hereinafter the decedent), died in 2019. The decedent was survived by her children, Holly Pearce (hereinafter the petitioner) and Michael Pearce (hereinafter the objectant), whom she designated as co-executors of her estate.

Article SECOND of the decedent's last will and testament provided that the decedent bequeathed to the petitioner her "primary residence at the time of [her] death." Article THIRD of the decedent's will divided the residuary of the decedent's estate equally between the petitioner and the objectant. At the time of her death, the decedent owned, among other things, two parcels of property in Brooklyn located at 107 6th Avenue and 95 Park Place, which were connected contiguously. The decedent resided in a two-family brownstone located at 107 6th Avenue (hereinafter the brownstone). The property upon which the brownstone was situated connected to an adjacent lot containing a backyard with a garden, a walking path, and a parking pad located at 95 Park Place (hereinafter the lot).

In February 2020, the petitioner and the objectant entered into a stipulation whereby, inter alia, the decedent's will was admitted to probate and they reserved their rights to commence a will construction proceeding concerning the ownership of the lot. In November 2020, the petitioner commenced this proceeding for the construction of Article SECOND of the decedent's will. In February 2021, the objectant filed an affidavit answering and objecting to the petition. In June 2022, the petitioner moved, among other things, for summary judgment

construing Article SECOND of the decedent's will to bequeath the lot to her and for an award of attorneys' fees payable from the residuary estate of the decedent. The objectant opposed the motion and cross-moved for summary judgment construing Article THIRD of the decedent's will to include the lot as part of the residuary estate of the decedent. In an order dated March 14, 2024, the Surrogate's Court granted those branches of the petitioner's motion and denied the objectant's cross-motion, determining, inter alia, that the decedent's will bequeathed the lot to the petitioner. The objectant appeals.

"The cardinal rule of construction of a will is to carry out the intent of the testator" (*Matter of Guide*, 302 AD2d 387, 388 [2003]; see *Matter of Sochurek*, 174 AD3d 908, 910 [2019]; *Matter of Levine*, 136 AD3d 920, 921 [2016]). "All rules of interpretation are subordinated to the requirement that the actual purpose of the testatrix is sought and effectuated as far as is consonant with principles of law and public policy" (*Matter of Guide*, 302 AD2d at 388; see *Matter of Levine*, 136 AD3d at 921). Intent is understood from the will as a whole, as well as the circumstances surrounding the will's creation (see *Matter of Levine*, 136 AD3d at 921; *Matter of Guide*, 302 AD2d at 388).

"[T]he best indicator of the testator's intent is found in the clear and unambiguous language of the will itself and, thus, where no ambiguity exists, [e]xtrinsic evidence is inadmissible to vary the terms of a will" (*Matter of Phillips*, 101 AD3d 1706, 1708 [2012] [internal quotation marks omitted]; see *Matter of Cord*, 58 NY2d 539, 544 [1983]). "If, on the other hand, a provision of the will is ambiguous, extrinsic evidence is properly considered in discerning the testator's true intent" (*Matter of Phillips*, 101 AD3d at 1708 [internal quotation marks omitted]; see *Matter of Peters*, 230 AD3d 1540, 1542 [2024]). "A latent ambiguity emanates from a situation where 'the equivocality of expression or obscurity of intention does not arise from the words themselves, but from the ambiguous or obscure state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by a mere development of extraneous facts without altering or adding to the written language or requiring more to be understood thereby than will fairly comport with the extraordinary or legal sense of the words made use of'" (*Lerner v Lerner*, 120 AD2d 243, 247 [1986], quoting 22 NY Jur, Evidence § 617, at 127; see *Matter of Phillips*, 101 AD3d at 1708; *Teig v Suffolk Oral Surgery Assoc.*, 2 AD3d 836, 837 [2003]).

Here, the Surrogate's Court properly determined that a latent ambiguity existed with respect to the phrase "primary

residence.” The plain meaning of the phrase is “[t]he place where a person lives most of the time,” which is seemingly unambiguous on its face (Black’s Law Dictionary [12th ed 2024], principal residence). However, while the petitioner contended that the decedent’s “primary residence” consisted of the brownstone and the lot, which are contiguously connected, the objectant argued, among other things, that the lot is not part of the decedent’s “primary residence,” as the brownstone and the lot are legally separate properties that are assigned two separate lot numbers for tax purposes. Thus, the court properly considered extrinsic evidence to clarify the decedent’s intent and to explain whether the lot was encompassed in the phrase “primary residence” as referenced in the decedent’s will (see *Matter of Phillips*, 101 AD3d at 1708; see also *Teig v Suffolk Oral Surgery Assoc.*, 2 AD3d at 837; *Lerner v Lerner*, 120 AD2d at 247).

Upon consideration of the extrinsic evidence, the petitioner established, prima facie, that the decedent intended the lot to be included as part of her “primary residence” (see *Matter of Sochurek*, 174 AD3d at 910; *Matter of Levine*, 136 AD3d at 921; *Matter of Guide*, 302 AD2d at 388). The petitioner established that not only were the brownstone and the lot physically connected, but that the decedent made no distinction between the two, always treating and using the brownstone and the lot as one property. In opposition, the objectant failed to raise a triable issue of fact. Accordingly, the Surrogate’s Court properly granted that branch of the petitioner’s motion which was for summary judgment construing Article SECOND of the decedent’s will to bequeath the lot to her and denied the objectant’s cross-motion for summary judgment construing Article THIRD of the decedent’s will to include the lot as part of the residuary estate of the decedent.

The Surrogate’s Court did not improvidently exercise its discretion in awarding the petitioner attorneys’ fees payable from the residuary estate of the decedent (see *Matter of Greatsinger*, 67 NY2d 177, 184-185 [1986]). Under the Surrogate’s Court Procedure Act, “[i]n a proceeding to construe a will . . . the court may award to a fiduciary or any party to the proceeding such sum as it deems reasonable for his, her or its counsel fees and other expenses necessarily incurred in the proceeding” (SCPA 2302 [6]). The petitioner was successful in this will construction proceeding, which was necessary to settle the decedent’s estate (see *Matter of Greatsinger*, 67 NY2d at 182).

The objectant’s remaining contention is without merit. Iannacci, J.P., Christopher, Wan and McCormack, JJ., concur.

28 In the Matter of Lisa Meredith Preston, Respondent, v Yonathan Hormadaly, Appellant. [253 NYS3d 307]—

Parent, Child and Family—Custody—Change in Circumstances—Limitation of Parental Access

Parent, Child and Family—Family Offense Proceeding—Harassment

In related proceedings pursuant to Family Court Act articles 6 and 8, the father appeals from (1) an order of the Family Court, Queens County (Tamra Walker, J.), dated December 3, 2024, and (2) an order of protection of the same court dated December 4, 2024. The order, insofar as appealed from, after a hearing, granted the mother's petition to modify a prior order of the same court (Diane Costanzo, J.) dated February 22, 2017, so as to limit the father's parental access with the subject child to supervised parental access, found that the father committed the family offense of harassment in the second degree against the mother and the child, and, upon granting the mother's motion to dismiss the father's petition to modify the order dated February 22, 2017, so as to expand his parental access with the child and the father's petitions to hold the mother in civil contempt for violating the order dated February 22, 2017, for failure to establish a prima facie case, dismissed the father's petitions. The order of protection, upon so much of the order dated December 3, 2024, as found that the father committed the family offense of harassment in the second degree against the mother and the child, inter alia, directed the father to refrain from certain conduct with respect to the mother until and including December 4, 2029.

Ordered that the appeal from so much of the order dated December 3, 2024, as found that the father committed the family offense of harassment in the second degree against the mother and the child is dismissed, without costs or disbursements, on the ground that no appeal lies as of right from a nondispositional order in a proceeding pursuant to Family Court Act article 8 (Family Ct Act § 1112); and it is further,

Ordered that the order dated December 3, 2024, is affirmed insofar as reviewed, without costs or disbursements; and it is further,

Ordered that the order of protection is affirmed, without costs or disbursements.

The parties are the parents of one child, born in 2014. In an order dated February 22, 2017 (hereinafter the custody order), the Family Court awarded the mother sole legal and residential custody of the child and granted the father certain parental access. In October 2019, the father filed petitions to hold the mother in civil contempt for violating the custody order, and to

modify the custody order so as to expand his parental access with the child. In February 2020, the father filed another petition to hold the mother in civil contempt for further violations of the custody order.

In November 2020, the mother filed a petition alleging that the father had committed various family offenses against her and the child, including harassment in the second degree. Thereafter, in August 2021, the mother moved, *inter alia*, to modify the custody order so as to limit the father's parental access with the child to supervised parental access. In November 2022, the mother filed a petition alleging that the father had committed various family offenses against the child.

In an order dated December 3, 2024, after a hearing, the Family Court, among other things, granted the mother's petition to modify the custody order so as to limit the father's parental access with the child to supervised parental access, found that the father committed the family offense of harassment in the second degree against the mother and the child, and, upon granting the mother's motion to dismiss the father's petitions to hold the mother in civil contempt for violating the custody order and to modify the custody order so as to expand his parental access for failure to establish a *prima facie* case, dismissed the father's petitions. On December 4, 2024, the court issued an order of protection, *inter alia*, directing the father to refrain from certain conduct with respect to the mother until and including December 4, 2029. The father appeals.

"In order to modify an existing custody or parental access arrangement, there must be a showing of a change of circumstances such that modification is required to protect the best interests of the child" (*Matter of Felgueiras v Cabral*, 204 AD3d 790, 791 [2022]; *see Matter of Levy v Binette*, 211 AD3d 840, 841 [2022]). "Supervised parental access is appropriately required only where it is established that unsupervised parental access would be detrimental to the child" (*Matter of Masri v Masri*, 171 AD3d 1183, 1185 [2019]; *see Matter of Gray v Tyson*, 205 AD3d 720, 722 [2022]). "The determination of whether parental access should be supervised is a matter within the sound discretion of the hearing court, and its findings will not be disturbed on appeal unless they lack a sound and substantial basis in the record" (*Matter of Masri v Masri*, 171 AD3d at 1185; *see Matter of Gray v Tyson*, 205 AD3d at 722).

Here, contrary to the father's contention, the Family Court's determination that there had been a change in circumstances

since the custody order and that it was in the best interests of the child to limit the father's parental access to supervised parental access is supported by a sound and substantial basis in the record and, thus, will not be disturbed (*see Matter of Vicente v Diaz*, 241 AD3d 1571, 1572 [2025]; *Matter of Gray v Tyson*, 205 AD3d at 722).

"In a family offense proceeding, the petitioner has the burden of establishing the offense by a fair preponderance of the evidence" (*Matter of Davis v Wright*, 140 AD3d 753, 754 [2016]; *see Matter of Cook v Berehowsky*, 211 AD3d 727, 728 [2022]). "Whether a family offense was committed is a factual issue to be resolved by the Family Court, and that court's determination of credibility issues is entitled to great weight on appeal and should not be disturbed unless clearly unsupported by the record" (*Matter of Davis v Wright*, 140 AD3d at 754).

Here, a fair preponderance of the evidence adduced at the hearing established that the father committed the family offense of harassment in the second degree against the mother and the child (*see Matter of Roman v Deceus*, 239 AD3d 751, 752 [2025]; *Matter of Inez A. v David A.*, 222 AD3d 547 [2023]). The Family Court's finding that the father committed the family offense of harassment in the second degree was based upon its credibility assessments and is supported by the record (*see Matter of Safir v Safir*, 214 AD3d 888, 889 [2023]; *Matter of Livesey v Gulick*, 194 AD3d 1045, 1047 [2021]). Further, the father's intent to commit harassment in the second degree is properly inferred from his conduct and the surrounding circumstances (*see Matter of Safir v Safir*, 214 AD3d at 889).

The father's remaining contentions are without merit. Barros, J.P., Brathwaite Nelson, Warhit and Goldberg Velazquez, JJ., concur.

29 In the Matter of Harmony Q. Administration for Children's Services, Respondent; Jasmine D.Q., Appellant. [252 NYS3d 196]—

Appeal—Academic and Moot Questions—Adjudication of Derivative Neglect Parent, Child and Family—Abused or Neglected Child—Derivative Neglect—Proximate in Time to Instant Proceeding

In a proceeding pursuant to Family Court Act article 10, the mother appeals from an order of disposition of the Family Court, Kings County (Robert D. Hettleman, J.), dated September 3, 2024. The order of disposition, upon an order dated September 3, 2024, granting that branch of the petitioner's motion which was for summary judgment on so much of the petition as alleged that the mother derivatively neglected the

subject child, and after a dispositional hearing, continued the child's placement in the custody of the petitioner until the completion of the next permanency hearing.

Ordered that the appeal from the order of disposition is dismissed as academic, without costs or disbursements, except insofar as it brings up for review the order dated September 3, 2024, granting that branch of the petitioner's motion which was for summary judgment on so much of the petition as alleged that the mother derivatively neglected the subject child; and it is further,

Ordered that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

The appeal from so much of the order of disposition as continued the subject child's placement in the custody of the petitioner, Administration for Children's Services (hereinafter ACS), until the completion of the next permanency hearing must be dismissed as academic, as that portion of the order has expired by its own terms (*see Matter of Joshua J. [Tameka J.]*, 44 NY3d 394 [2025]). However, an adjudication of derivative neglect constitutes a permanent and significant stigma which might indirectly affect a parent's status in any future proceedings. Therefore, the appeal from so much of the order of disposition as brings up for review the finding of derivative neglect of the child is not academic (*see Matter of Samynee L. [Tashae T.]*, 243 AD3d 569 [2025]; *Matter of Pawel S. [Stanislaw S.]*, 143 AD3d 724 [2016]).

ACS commenced this proceeding pursuant to Family Court Act article 10, alleging, inter alia, that the mother derivatively neglected the child based on a prior finding in 2023 that the mother neglected the child's older sibling. ACS moved for summary judgment on the petition. In an order dated September 3, 2024, the Family Court granted that branch of ACS's motion which was for summary judgment on so much of the petition as alleged that the mother derivatively neglected the child. In an order of disposition dated September 3, 2024, the court continued the child's placement in the custody of ACS until the completion of the next permanency hearing. The mother appeals.

In a decision and order dated June 25, 2025, this Court affirmed an order of fact-finding and disposition finding that the mother neglected the child's older sibling, setting forth that ACS had established that "the mother threatened another shelter resident with a knife while leaving the [older sibling], who had been diagnosed with autism and required close supervision, unattended in their shelter unit for at least 40

minutes[, which] resulted in a two-week involuntary hospitalization of the mother, during which she continued to display paranoid behavior and a lack of insight into her mental illness” (*Matter of Kamani K.L. [Jasmine D.Q.]*, 239 AD3d 980, 981 [2025]).

Here, the petitioner established, *prima facie*, that the mother derivatively neglected the child based upon the prior finding that the mother had neglected the child’s older sibling (*see Matter of Sebastian R. [Debra S.]*, 171 AD3d 928 [2019]; *Matter of Jerell P. [Qubilah G.]*, 157 AD3d 443 [2018]). In opposition, the mother failed to raise a triable issue of fact. Although the prior acts of neglect occurred about six months before the child was born, taking into account the nature of the mother’s conduct and other pertinent considerations, the conduct which formed the basis for the finding of neglect as to the older sibling was so proximate in time to the instant derivative proceeding that it can reasonably be concluded that the condition still exists (*see Matter of Serenity R. [Truman C.]*, 215 AD3d 854, 857 [2023]; *Matter of Sebastian R. [Debra S.]*, 171 AD3d at 929), and the mother failed to sustain her burden of proving that the conduct or condition cannot reasonably be expected to exist currently or in the foreseeable future (*see Matter of Sebastian R. [Debra S.]*, 171 AD3d at 928; *Matter of Hope P. [Stephanie B.]*, 149 AD3d 947, 948 [2017]).

Accordingly, we affirm the Family Court’s finding of derivative neglect (*see Matter of Sebastian R. [Debra S.]*, 171 AD3d 928 [2019]; *Matter of Madison B. [Daniel B.]*, 123 AD3d 1027 [2014]). Dillon, J.P., Chambers, Wan and Love, JJ., concur.

30 In the Matter of Donia Thabit Sawwan, Appellant, v Amjad T. Farhoud, Respondent. [251 NYS3d 735]—

Pleading—Answer—Extension of Time to Answer—Unreasonable Law Office Belief That it Had 20 Days to File

In a proceeding pursuant to CPLR article 77 for the judicial construction of a trust agreement, the petitioner appeals from an order of the Surrogate’s Court, Kings County (Rosemarie Montalbano, J.), dated April 15, 2024. The order granted the respondent’s motion to vacate his default in appearing or answering the amended petition and pursuant to CPLR 2004 for an extension of time to respond to an amended order to show cause and the amended petition to the extent of deeming the respondent’s answer and cross-petition to have been served on the petitioner.

Ordered that the order is reversed, on the law and in the exercise of discretion, with costs, and the respondent’s motion

to vacate his default in appearing or answering the amended petition and pursuant to CPLR 2004 for an extension of time to respond to the amended order to show cause and the amended petition is denied.

The petitioner commenced this proceeding pursuant to CPLR article 77 to resolve a dispute over whether she or the respondent, her brother, is the trustee of the Hiam Farhoud Trust, a trust established by their mother. The amended petition states that the original trust document made the respondent the trustee of the trust, while an amended trust document made the petitioner the trustee of the trust. The amended petition alleges that despite this valid change, the respondent still holds himself out as trustee of the trust, which has affected the petitioner's ability to properly manage the assets in the trust.

The petitioner filed an order to show cause, which was signed by the Surrogate's Court on October 20, 2023. The order to show cause set a return date for the petition of November 28, 2023, and directed the respondent to serve his responsive papers on or before November 17, 2023. The petitioner then filed an amended petition and an amended order to show cause, which set a return date for the amended petition of December 12, 2023. The respondent neither served papers in response to the amended petition nor appeared on the return date of the amended petition. The respondent attempted to file and serve an answer and cross-petition, but these documents were rejected by the petitioner.

Prior to attempting to serve an answer and cross-petition, the respondent moved to vacate his default in appearing or answering the amended petition and pursuant to CPLR 2004 for an extension of time to respond to the amended order to show cause and the amended petition. In so doing, the respondent stated that law office failure led to the date his responsive papers were due being miscalendared for 20 days from November 28, 2023, that is, December 18, 2023, rather than the noticed return date of December 12, 2023.

In an order dated April 15, 2024, the Surrogate's Court granted the respondent's motion to the extent of deeming the respondent's answer and cross-petition to have been served on the petitioner. The petitioner appeals.

For a defendant, or, in this case, the respondent, to obtain an extension of time to serve and file its answer under CPLR 2004, it must show that it has, in addition to a reasonable excuse for its default, a potentially meritorious defense (*see Singh v Pradhan*, 229 AD3d 472 [2024]; *National Loan Invs., L.P. v Bruno*, 191 AD3d 999 [2021]; *HSBC Bank USA, N.A. v Lafazan*, 115

AD3d 647 [2014]). Where the proffered reasonable excuse is based on law office failure, that excuse must be supported by a detailed and credible explanation (*see Singh v Pradhan*, 229 AD3d at 473; *National Loan Invs., L.P. v Bruno*, 191 AD3d at 1001).

Here, the respondent's excuse of law office failure presented neither a detailed nor credible excuse for the delay. Counsel provided no reasonable basis for its office's belief that it had 20 days to file answering papers in response to the amended order to show cause or amended petition.

In light of the respondent's failure to proffer a reasonable excuse for his delay, it is not necessary to determine whether there is a potentially meritorious defense to the proceeding (*see Singh v Pradhan*, 229 AD3d at 473; *National Loan Invs., L.P. v Bruno*, 191 AD3d at 1001; *Bank of Am., N.A. v Welga*, 157 AD3d 753 [2018]; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647 [2014]).

Accordingly, the Surrogate's Court should have denied the respondent's motion, inter alia, pursuant to CPLR 2004 for an extension of time to respond to the amended order to show cause and the amended petition. Connolly, J.P., Christopher, Voutsinas and Hom, JJ., concur.

31 In the Matter of Sephardic Synagogue of Plainview, Appellant, v Rita Byrne, as Chairwoman, et al., Respondents. [252 NYS3d 190]—

Municipal Corporations—Zoning—Variance—Proposed Religious Use

In a hybrid proceeding pursuant to CPLR article 78 to review a determination of the Town of Oyster Bay Zoning Board of Appeals dated February 15, 2023, which, after a hearing, denied the petitioner/plaintiff's application for certain area variances, and action for declaratory relief, the petitioner/plaintiff appeals from an order and judgment (one paper) of the Supreme Court, Nassau County (David J. Gugerty, J.), entered March 1, 2024. The order and judgment granted the respondents/defendants' motion pursuant to CPLR 3211 (a) and 7804 (f) to dismiss the petition/complaint, denied the petition/complaint, and, in effect, dismissed the proceeding/action.

Ordered that the order and judgment is modified, on the law, by (1) deleting the provision thereof granting that branch of the respondents/defendants' motion which was pursuant to CPLR 3211 (a) and 7804 (f) to dismiss that branch of the petition/complaint which was to review the determination of the Town of Oyster Bay Zoning Board of Appeals dated February 15, 2023, and substituting therefor a provision denying

that branch of the motion, and (2) deleting the provision thereof denying that branch of the petition/complaint which was to review the determination of the Town of Oyster Bay Zoning Board of Appeals dated February 15, 2023, and, in effect, dismissing that portion of the proceeding/action, and substituting therefor a provision granting that branch of the petition/complaint to the extent of annulling that determination; as so modified, the order and judgment is affirmed, without costs or disbursements, and the matter is remitted to the Town of Oyster Bay Zoning Board of Appeals for a new determination in accordance herewith.

In 2004, the petitioner/plaintiff, Sephardic Synagogue of Plainview (hereinafter the petitioner), purchased certain real property located in Plainview. The property is located in the Town of Oyster Bay's R1-7 one-family residential zoning district (*see* Code of Town of Oyster Bay [hereinafter Town Code] § 246-3.1). In 2014, the petitioner received a building permit from the Town of Oyster Bay Department of Planning and Development to reconstruct the existing one-story dwelling on the property into a two-story single-family dwelling to accommodate its use as the "Rabbi's Residence of the Sephardic Synagogue of Plainview." It is undisputed, however, that the property was already being used as a synagogue when that building permit was issued.

In July 2021, the petitioner applied to the Town of Oyster Bay Department of Planning and Development to change the use of the property from one family to place of worship accessory to one family. The Town Code permits a single-family dwelling to be used as a house of worship subject to certain requirements, including a minimum lot size of one acre, landscape buffers, and off-street parking requirements (*see id.* §§ 246-5.2, 246-5.5.19, 246-7.2, 246-8.2.1). The petitioner's application was denied on the basis that the property did not meet the requirements of Town Code §§ 246-5.5.19, 246-7.2, and 246-8.2.1. Thereafter, the petitioner applied to the Town of Oyster Bay Zoning Board of Appeals (hereinafter the Board) for variances from those provisions of the Town Code. The Board conducted a public hearing, at which the petitioner presented evidence in favor of its variance application, including, among other things, testimony from witnesses regarding the petitioner's landscape buffering, parking requirements for the proposed synagogue, and the effect of the synagogue on property values. The petitioner also presented evidence that it had entered into a nonexclusive license agreement for parking with nearby Mercaz Academy. One individual who lived in the vicin-

ity of the property spoke in opposition to the application. After the hearing, in a determination dated February 15, 2023, the Board denied the petitioner's application.

The petitioner subsequently commenced this hybrid proceeding pursuant to CPLR article 78 to review the Board's determination dated February 15, 2023, and action for declaratory relief. The defendants/respondents, members of the Board, answered the petition and moved pursuant to CPLR 3211 (a) (7) and 7804 (f) to dismiss the petition/complaint. In an order and judgment entered March 1, 2024, the Supreme Court granted the motion, denied the petition/complaint, and, in effect, dismissed the proceeding/action. The petitioner appeals.

"[W]hile religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made" (*Matter of Genesis Assembly of God v Davies*, 208 AD2d 627, 628 [1994]; see *Matter of Cohen v Town of Ramapo Bldg., Planning & Zoning Dept.*, 150 AD3d 993, 994 [2017]; *Matter of Gospel Faith Mission Intl., Inc. v Weiss*, 112 AD3d 824, 825 [2013]). "[E]ducational and religious institutions are presumed to have a beneficial effect on the community" (*Matter of Pine Knolls Alliance Church v Zoning Bd. of Appeals of Town of Moreau*, 5 NY3d 407, 412 [2005]). "[T]his presumption can be rebutted 'with evidence of a significant impact on traffic congestion, property values, municipal services and the like'" (*id.*, quoting *Cornell Univ. v Bagnardi*, 68 NY2d 583, 595 [1986]).

Here, the record reflects that the Board denied the petitioner's application without making any attempt to accommodate the proposed religious use (see *Matter of Gospel Faith Mission Intl., Inc. v Weiss*, 112 AD3d at 826; *Matter of Harrison Orthodox Minyan v Town Bd. of Harrison*, 159 AD2d 572, 573 [1990]). Despite the conditions proposed by the petitioner to mitigate the impact on the surrounding community, the Board denied the petitioner's application in its entirety, even though the proposed religious use could have been substantially accommodated (see *Matter of Gospel Faith Mission Intl., Inc. v Weiss*, 112 AD3d at 826; *Matter of Capriola v Wright*, 73 AD3d 1043, 1046 [2010]). Furthermore, the evidence, taken as a whole, was insufficient to rebut the presumed beneficial effect of the proposed religious use (see *Matter of Pine Knolls Alliance Church v Zoning Bd. of Appeals of Town of Moreau*, 5 NY3d at 412; *Matter of Gospel Faith Mission Intl., Inc. v Weiss*, 112 AD3d at 826; *Matter of Tabernacle of Victory Pentecostal Church v Weiss*, 101 AD3d 738, 740 [2012]).

The petitioner's remaining contention is without merit.

Accordingly, we grant that branch of the petition/complaint which was to review the Board's determination to the extent of annulling that determination and remit the matter to the Board with a direction to grant the petitioner's application for area variances under such reasonable conditions as will allow the proposed religious use while mitigating any detrimental or adverse effects upon the surrounding community (*see Matter of Tabernacle of Victory Pentecostal Church v Weiss*, 101 AD3d at 740-741; *Matter of Capriola v Wright*, 73 AD3d at 1043). Barros, J.P., Warhit, Voutsinas and Wan, JJ., concur.

32 In the Matter of Alisha Stanley, Respondent, v Kelvin H. Lomax, Appellant. [250 NYS3d 636]—

Parent, Child and Family—Support—Imputed Income—Derived from Tax Return

In a proceeding pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Orange County (Christine P. Krahulik, J.), dated March 25, 2025. The order denied the father's objections to an order of the same court (Barbara O. Afriyie, S.M.) dated October 7, 2024, which, after a hearing, and upon findings of fact dated October 7, 2024, *inter alia*, in effect, granted the mother's petition for child support and directed the father to pay child support in the sum of \$2,028 per month.

Ordered that the order dated March 25, 2025, is affirmed, without costs or disbursements.

In June 2023, the mother commenced this proceeding pursuant to Family Court Act article 4 for child support for the parties' two children. After a hearing, and upon findings of fact dated October 7, 2024, in an order dated October 7, 2024, the Support Magistrate, *inter alia*, in effect, granted the mother's petition and directed the father to pay child support in the sum of \$2,028 per month. The father filed objections to the Support Magistrate's order. In an order dated March 25, 2025, the Family Court denied the father's objections. The father appeals.

"The level of child support is determined by the parents' ability to provide for their children rather than their current economic situation" (*Matter of Evans v Evans*, 186 AD3d 1684, 1684 [2020] [internal quotation marks omitted]). "The court has considerable discretion in determining whether income should be imputed to a party and the court's credibility determinations are accorded deference on appeal" (*Matter of Monti v DiBedendetto*, 151 AD3d 864, 866 [2017]). A court need

not rely upon a party's own account of his or her finances, but may impute income based upon that party's past income or demonstrated future potential earnings, their employment history, their future earning capacity, or other relevant factors (see *Matter of Morales v Foley*, 242 AD3d 888, 889 [2025]; *Matter of Rohme v Burns*, 92 AD3d 946, 947 [2012]).

Here, the amount of income imputed to the father is supported by the record and should not be disturbed (see *Qazi v Qazi*, 220 AD3d 660, 661 [2023]). The amount of income imputed to the father by the Support Magistrate was derived from the father's federal tax return transcript for the tax period ending December 31, 2022. The father failed to provide requested financial documentation to the Family Court and merely claimed that he had retired in May 2023 without corroboration. Thus, the imputation of income to the father based upon his actual income potential was appropriate (see *Matter of Rohme v Burns*, 92 AD3d at 947; *Liles v Liles*, 56 AD3d 531, 532 [2008]). Duffy, J.P., Christopher, Warhit and Goldberg Velazquez, JJ., concur.

33 In the Matter of Tameka Walton, Appellant, v Milton Walters, Respondent. [250 NYS3d 638]—

Parent, Child and Family—Family Offense Proceeding—Harassment—Alarm or Serious Annoyance

In a proceeding pursuant to Family Court Act article 8, the petitioner appeals from an order of the Family Court, Kings County (Laura M. Paley, Ct. Atty. Ref.), dated June 10, 2024. The order, after a hearing, in effect, denied the petition and dismissed the proceeding.

Ordered that the order is affirmed, without costs or disbursements.

The petitioner commenced this family offense proceeding against the respondent, her former boyfriend, alleging that he had committed acts constituting, among other things, the family offense of harassment in the second degree. Following a hearing, the Family Court, in effect, denied the petition and dismissed the proceeding, concluding that the petitioner failed to establish that the respondent committed a family offense. The petitioner appeals.

“In a family offense proceeding, the petitioner has the burden of establishing the family offense by a fair preponderance of the evidence” (*Matter of Hossain v Chowdhury*, 238 AD3d 751, 752 [2025] [internal quotation marks omitted]; see Family Ct Act § 832). “The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court,

and its determinations regarding the credibility of witnesses are entitled to great weight on appeal, such that they will not be disturbed unless clearly unsupported by the record” (*Matter of Warren v Brandofino*, 236 AD3d 917, 918 [2025] [internal quotation marks omitted]; see *Matter of Mitchell-George v George*, 234 AD3d 969, 969 [2025]). “As relevant here, a person commits the family offense of harassment in the second degree when, with intent to harass, annoy, or alarm another person, he or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose” (*Matter of Martinez v Toole*, 239 AD3d 855, 857 [2025] [internal quotation marks omitted]; see Penal Law § 240.26 [3]; *Matter of Williams v Rodriguez*, 225 AD3d 776, 777 [2024]).

Here, the petitioner failed to establish by a fair preponderance of the evidence that the respondent committed the family offense of harassment in the second degree (Penal Law § 240.26 [3]; see *Matter of Martinez v Toole*, 239 AD3d at 858). The petitioner failed to adduce evidence that would support a finding that the respondent engaged in a course of conduct or repeatedly committed acts that alarmed or seriously annoyed the petitioner and that served no legitimate purpose (Penal Law § 240.26 [3]).

The petitioner’s remaining contention is not properly before this Court.

Accordingly, the Family Court properly, in effect, denied the petition and dismissed the proceeding. Dillon, J.P., Dowling, Landicino and McCormack, JJ., concur.

34 N & P Engineering, Architecture & Land Surveying, PLLC, Appellant, v Ridge Fire Department, Respondent. [252 NYS3d 604]—

Municipal Corporations—Notice of Claim—Action against Fire District—Improperly Sued Fire Department Instead of Fire District

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Maureen T. Liccione, J.), dated December 14, 2023. The order granted that branch of the defendant’s motion which was pursuant to CPLR 3211 (a) to dismiss the complaint and denied the plaintiff’s cross-motion pursuant to CPLR 305 (c) for leave to amend the caption to add Ridge Fire District as a defendant.

Ordered that the order is affirmed, with costs.

In September 2018, the plaintiff entered into a contract with Ridge Fire District (hereinafter the Fire District) to provide

engineering and other services for the construction of a firehouse. In March 2023, following a breakdown in negotiations regarding the amount due under the contract, the plaintiff filed a notice of claim naming Ridge Fire Department (hereinafter the Fire Department) as the respondent.

In May 2023, the plaintiff commenced this action, inter alia, to recover damages for breach of contract against the Fire Department.

The Fire Department moved, among other things, pursuant to CPLR 3211 (a) to dismiss the complaint based on the plaintiff's failure to comply with Town Law § 180. The plaintiff cross-moved pursuant to CPLR 305 (c) to amend the caption to add the Fire District as a defendant. In an order dated December 14, 2023, the Supreme Court granted that branch of the Fire Department's motion which was pursuant to CPLR 3211 (a) to dismiss the complaint and denied the plaintiff's cross-motion. The plaintiff appeals.

Town Law § 180 states that “[n]o action shall be maintained against a fire district upon or arising out of a contract entered into by the fire district, unless the same shall be commenced within eighteen months after the cause of action thereof shall have accrued, nor unless a written verified claim shall have been filed with the fire district secretary within six months after the cause of action shall have accrued, but no such action shall be brought upon any such claim until forty days have elapsed after the filing of the claim in the office of the fire district secretary.” The proper filing of the notice of claim is a condition precedent to the commencement of an action against a fire district (*see JNS Heating Serv., Inc. v Stony Brook Fire Dist.*, 216 AD3d 627, 628 [2023]). Contrary to the plaintiff's contention, courts have no authority to disregard lack of compliance with such a provision (*see id.*; *Matter of Elmont Fire Dist. v Lapeka Constr. Corp.*, 232 AD2d 636, 637 [1996]). Much like its counterpart provision pertaining directly to towns and town governments, Town Law § 65 (3), Town Law § 180 “‘contains no provision allowing the court to excuse noncompliance with its requirements’” (*Dannemann v Town of E. Hampton Dept. of Land Acquisition & Mgt.*, 221 AD3d 960, 962 [2023], quoting *McCulloch v Town of Milan*, 74 AD3d 1034, 1035 [2010]). Here, in improperly bringing this action against the Fire Department and not the Fire District, the plaintiff commenced an action against a department of the municipal entity that is not amenable to being sued (*see Brown v City of New York*, 192 AD3d 963, 965 [2021]; *Bartnicki v Centereach Fire Dept.*, 222 AD2d 637 [1995]).

The plaintiff's remaining contention is without merit.

Accordingly, the Supreme Court properly granted that branch of the Fire Department's motion which was pursuant to CPLR 3211 (a) to dismiss the complaint and denied the plaintiff's cross-motion pursuant to CPLR 305 (c) to amend the caption to add the Fire District as a defendant.

The Fire Department's remaining contentions need not be reached in light of our determination. Barros, J.P., Warhit, Voutsinas and Wan, JJ., concur.

35 The People of the State of New York, Respondent, v Darus S. Bassono, Appellant. [248 NYS3d 675]—

Crimes—Appeal—Invalid Waiver of Right to Appeal—Discussed after Guilty Plea and Failed to Confirm Understanding
Crimes—Sentence—Surcharge and Fees

Appeal by the defendant from a judgment of the Supreme Court, Queens County (John F. Zoll, J.), rendered December 13, 2022, convicting him of attempted criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is modified, on the law and as a matter of discretion in the interest of justice, by vacating the imposition of a mandatory surcharge and fees; as so modified, the judgment is affirmed.

Contrary to the People's contention, the record does not demonstrate that the defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]). The Supreme Court did not mention the appeal waiver as part of the plea agreement being offered to the defendant before the agreement was reached, and it was not until after the defendant had already admitted his guilt that the court discussed the waiver with the defendant (*see People v Hopkins*, 227 AD3d 734 [2024]; *People v Smith*, 224 AD3d 785 [2024]). Moreover, the court informed the defendant that he was not forfeiting his right to challenge whether or not the sentence was lawful but made no distinction between the legality and the excessiveness of the sentence (*see People v Risco*, 165 AD3d 703, 704 [2018]). Although the defendant executed a written appeal waiver form, the court failed to confirm that the defendant understood the content of the written waiver or discussed the form with counsel (*see People v Hopkins*, 227 AD3d at 734; *People v Risco*, 165 AD3d at 704). Thus, the purported waiver does not preclude appellate review of the defendant's contention that the mandatory surcharge and fees imposed at sentencing should be waived pursuant to CPL 420.35 (2-a).

Criminal Procedure Law § 420.35 (2-a) permits the waiver of surcharges and fees for individuals, such as the defendant, who were less than 21 years old at the time of the crime (*see People v Cabrera*, 222 AD3d 878, 879 [2023]). Pursuant to the exercise of our interest of justice jurisdiction, we modify the judgment by vacating the mandatory surcharge and fees imposed upon the defendant at sentencing (*see* CPL 420.35 [2-a] [c]; *People v Aiken*, 244 AD3d 994 [2025]). Genovesi, J.P., Ford, Landicino and Quirk, JJ., concur.

36 The People of the State of New York, Respondent, v Donavin Boomer, Appellant. [248 NYS3d 326]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Barry E. Warhit, J.), imposed December 3, 2019, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Duffy, J.P., Genovesi, Ford, Taylor and McCormack, JJ., concur.

37 The People of the State of New York, Respondent, v Randy N. Davis, Appellant. [252 NYS3d 193]—

Crimes—Right to Counsel—Withdrawal of Counsel—Failure of Brief to Adequately Analyze Potential Appellate Issues
Crimes—Appeal—Existence of Nonfrivolous Issues

On the Court's own motion, it is ordered that the decision and order on motion of this Court dated February 11, 2026 (*People v Davis*, 2026 NY Slip Op 00793 [2d Dept 2026]), in the above entitled-action is recalled and vacated, and the following decision and order on motion is substituted therefor:

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Christopher G. Quinn, J.), rendered May 9, 2019, convicting him of robbery in the first degree (two counts), robbery in the second degree (two counts), assault in the second degree (two counts), and criminal possession of a weapon in the fourth degree, upon a jury verdict, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which he moves for leave to withdraw as counsel for the appellant.

Ordered that the motion of Stephen R. Mahler for leave to withdraw as counsel for the appellant is granted, and he is directed to turn over all papers in his possession to new counsel assigned herein; and it is further,

Ordered that Steven A. Feldman, 1129 Northern Boulevard,

Suite 404, Manhasset, NY, 11030, is assigned as counsel to prosecute the appeal; and it is further,

Ordered that the respondent is directed to furnish a copy of the certified transcript of the proceedings to the appellant's new assigned counsel; and it is further,

Ordered that new counsel shall serve and file a brief on behalf of the appellant within 90 days of the date of this decision and order on motion, and the respondent shall serve and file its brief within 30 days after the brief on behalf of the appellant is served and filed. By prior decision and order on motion of this Court dated June 27, 2019, the appellant was granted a waiver of costs, fees, and expenses and the assignment of counsel, with the appeal to be heard on the original papers (including a certified transcript of the proceedings) and on the briefs of the parties. The parties are directed to upload, through the digital portal on this Court's website, digital copies of their respective briefs, with proof of service (*see* 22 NYCRR 670.9 [a]).

“An appellate court’s role in reviewing an attorney’s motion to be relieved pursuant to *Anders v California* (386 US 738 [1967]) consists of two separate and distinct steps” (*People v Bolton*, 216 AD3d 812, 813 [2023]). First, the court evaluates assigned counsel’s brief, “which must, to be adequate, discuss ‘relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority’ ” (*People v Murray*, 169 AD3d 227, 232 [2019], quoting *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252, 258 [2011]). “The second step is to determine whether counsel’s assessment that there are no nonfrivolous issues for appeal is correct” (*People v Bolton*, 216 AD3d at 813). “In analyzing whether nonfrivolous appellate issues exist, it is essential to appreciate the distinction between a potential appellate argument that is merely meritless or unlikely to prevail and one that is frivolous” (*Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 258). “Appeals that present issues that may be arguable on their merits—even if weakly or marginally so—must be perfected to fulfill the defendant’s right to receive, and the attorney’s obligation to provide, zealous representation” (*People v Murray*, 169 AD3d at 231). If the court concludes that nonfrivolous issues could be raised on appeal, the court must assign new counsel to pursue the appeal on the defendant’s behalf (*see Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 258).

The brief submitted by the appellant’s assigned counsel pur-

suant to *Anders v California* (386 US 738 [1967]) is deficient because it fails to adequately analyze potential appellate issues or highlight facts in the record that might arguably support the appeal (see *People v Spencer*, 135 AD3d 971, 972 [2016]; *People v Abdul*, 102 AD3d 976, 976 [2013]; *People v Poznanski*, 97 AD3d 701, 701-702 [2012]; *People v Williams*, 96 AD3d 884, 885 [2012]; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 256). Since the brief does not demonstrate that assigned counsel has fulfilled his obligations under *Anders v California*, we must assign new counsel to represent the appellant (see *People v Spencer*, 135 AD3d at 972; *People v Heine*, 114 AD3d 806, 807 [2014]; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d at 258).

Moreover, upon our independent review of the record, we agree with the People that nonfrivolous issues exist, including, but not necessarily limited to, whether the defendant validly waived his right to counsel, whether the court denied the defendant his right to make a statement at sentencing, and whether the sentence imposed was excessive (see CPL 380.50 [1]; *People v Crampe*, 17 NY3d 469, 481-482 [2011]; *People v Suinte*, 90 AD2d 80 [1982]). Chambers, J.P., Dowling, Wan and McCormack, JJ., concur.

38 The People of the State of New York, Respondent, v Jennifer Molyneaux, Appellant. [248 NYS3d 326]—

Crimes—Appeal—Invalid Waiver of Right to Appeal—Mischaracterization as Absolute Bar

Appeal by the defendant from a judgment of the County Court, Orange County (Nicholas DeRosa, J.), rendered May 17, 2017, convicting her of murder in the second degree, upon her plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the People's contention, the defendant's purported waiver of her right to appeal was invalid. The County Court's terse oral colloquy mischaracterized the nature of the appeal waiver as an absolute bar to the taking of a direct appeal by stating only that it was "a waiver of your right to appeal your sentence as well as your conviction" (see *People v Thomas*, 34 NY3d 545 [2019]; *People v Muhammad*, 231 AD3d 868, 869 [2024]). In addition, the written appeal waiver did not contain clarifying language that appellate review remained available for certain issues (see *People v Shanks*, 37 NY3d 244, 253 [2021]). Accordingly, the purported waiver of the right to appeal does not preclude appellate review of the defendant's excessive sentence claim (see *People v Lawrence*, 227 AD3d 829, 829 [2024]; *People v Richards*, 224 AD3d 782, 783 [2024]).

Nonetheless, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Genovesi, J.P., Ford, Landicino and Quirk, JJ., concur.

39 The People of the State of New York, Respondent, v Jennifer Molyneaux, Appellant. [251 NYS3d 737]—

Crimes—Sentence—Domestic Violence Survivors Justice Act—Failure to Show Victim of Domestic Violence at Time of Offense

Appeal by the defendant from an order of the County Court, Orange County (Craig Stephen Brown, J.), dated April 12, 2024, which, after a hearing, denied her motion pursuant to CPL 440.47 to vacate her sentence and to be resentenced in accordance with Penal Law § 60.12.

Ordered that the order is affirmed.

On August 2, 2014, the defendant strangled and killed a victim during the commission of a robbery. The victim's house was then set on fire. Thereafter, the defendant pleaded guilty to murder in the second degree. She was sentenced to an indeterminate term of imprisonment of 19 years to life.

In 2020, the defendant moved pursuant to CPL 440.47 to vacate her sentence and to be resentenced in accordance with Penal Law § 60.12, which was amended by the Domestic Violence Survivors Justice Act (DVSJA) (L 2019, ch 31, § 1; L 2019, ch 55, § 1, part WW, § 1 [eff May 14, 2019]). Following a hearing, the County Court, in an order dated April 12, 2024, denied the motion.

“The DVSJA permits courts to impose reduced alternative, less severe, sentences in certain cases involving defendants who are victims of domestic violence” (*People v Burns*, 207 AD3d 646, 648 [2022]; *see People v Addimando*, 197 AD3d 106, 109 [2021]). “Specifically, Penal Law § 60.12 (1) provides that a sentencing court ‘may instead impose’ the alternate, reduced sentencing scheme where the defendant stands convicted of certain offenses, if the court concludes, ‘upon a determination following a hearing,’ that: (1) ‘at the time of the instant offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the defendant’; (2) ‘such abuse was a significant contributing factor to the defendant’s criminal behavior’; and (3) ‘having regard for the nature and circumstances of the crime and the history, character and condition of the defendant, . . . a sentence of imprisonment pursuant to [Penal Law §§ 70.00, 70.02, 70.06, 70.71 (2) or (3)] would be unduly harsh’” (*People v Hudson*, 232 AD3d 200, 204-205 [2024], *lv granted* 42 NY3d 1080, quot-

ing Penal Law § 60.12 [1]). “ ‘The preponderance of the evidence standard applies’ ” (*People v Jennifer F.*, 235 AD3d 776, 777 [2025], quoting *People v Rivera*, 230 AD3d 517, 519 [2024]).

Here, as the County Court held, the defendant’s evidence at the hearing did not establish that, at the time of the offense, the defendant was a victim of domestic violence subjected to substantial physical, sexual, or psychological abuse at the hands of the defendant’s accomplice (*see People v Jennifer F.*, 235 AD3d at 777; *People v Angela VV.*, 229 AD3d 955, 956-957 [2024], *affd* 44 NY3d 1061 [2025]; *cf. People v Addimando*, 197 AD3d at 113 n, 115-116). Accordingly, the court did not err in denying the defendant’s motion for resentencing.

In light of our determination, the defendant’s remaining contentions need not be reached. Genovesi, J.P., Ford, Landicino and Quirk, JJ., concur.

40 The People of the State of New York, Respondent, v Juan C. Morales, Appellant. [252 NYS3d 199]—

Crimes—Verdict—Sufficiency of Evidence

Crimes—Fair Trial—Judge Questioning Witnesses—Function and Appearance as Advocate

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Stephen A. Knopf, J.), rendered February 15, 2019, convicting him of robbery in the second degree (two counts), grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree, unauthorized use of a vehicle in the third degree, criminal mischief in the fourth degree, driving while intoxicated (two counts), and unlicensed operation of a motor vehicle, upon a jury verdict, and imposing sentence.

Ordered that the judgment is reversed, as a matter of discretion in the interest of justice, and the matter is remitted to the Supreme Court, Queens County, for a new trial before a different Justice.

The defendant was convicted of robbery in the second degree, grand larceny in the fourth degree, and criminal possession of stolen property in fourth degree, among other crimes, arising out of the defendant’s theft of a taxicab from its driver.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that the evidence was legally sufficient to establish the defendant’s guilt of robbery in the second degree, grand larceny in the fourth degree, and criminal possession of stolen property in fourth degree beyond a reasonable doubt. Moreover, in fulfill-

ing our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 348 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633, 643-644 [2006]).

The defendant failed to preserve for appellate review his contention that he was deprived of a fair trial by the Supreme Court's participation in the questioning of trial witnesses (*see* CPL 470.05 [2]; *People v Parker*, 197 AD3d 732, 733 [2021]). However, we reach that issue in the exercise of our interest of justice jurisdiction.

"[A] trial judge is permitted to question witnesses to clarify testimony and to facilitate the progress of trial, and, if necessary, to develop factual information,' so long as the judge does not take on the function or appearance of an advocate" (*People v Pulliam*, 217 AD3d 968, 970 [2023] [internal quotation marks omitted], quoting *People v Adams*, 117 AD3d 104, 109 [2014]; *see People v Coleman*, 245 AD3d 735 [2026]). Here, the Supreme Court engaged extensively in its own areas of inquiry, asked numerous leading questions of the People's witnesses, including the complainant and a police officer, as to their observations of the defendant, elicited identification testimony, and guided the prosecution at length in its questioning.

Viewing the record as a whole, the Supreme Court improperly took on the function and appearance of an advocate. The court's conduct left the impression that its opinion favored the credibility of the People's witnesses and the merits of the People's case (*see People v Moulton*, 43 NY2d 944, 945 [1978]; *People v Coleman*, 245 AD3d 735 [2026]), thus depriving the defendant of a fair trial (*see People v Yut Wai Tom*, 53 NY2d 44 [1981]; *People v Coleman*, 245 AD3d 735 [2026]; *People v Pulliam*, 217 AD3d at 970).

Accordingly, a new trial is warranted.

The defendant's remaining contentions need not be addressed in light of our determination. Barros, J.P., Dowling, Ventura and McCormack, JJ., concur.

41 The People of the State of New York, Respondent, v Rodney Smith, Appellant. [248 NYS3d 679]—

Crimes—Sentence—Youthful Offender—Failure to Make Determination Despite Eligibility

Appeal by the defendant from a judgment of the Supreme

Court, Kings County (Eugene M. Guarino, J.), rendered November 29, 2023, convicting him of robbery in the third degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is modified, on the law and as a matter of discretion in the interest of justice, (1) by vacating the sentence imposed, and (2) by vacating the imposition of a mandatory surcharge and fees; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for further proceedings in accordance herewith.

CPL 720.20 requires “that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain” (*People v Rudolph*, 21 NY3d 497, 501 [2013]). As the People correctly concede, the record does not demonstrate that the Supreme Court made a youthful offender determination despite the defendant’s eligibility. Accordingly, we vacate the sentence and remit the matter to the Supreme Court, Kings County, for resentencing after making a determination as to whether the defendant should be afforded youthful offender treatment (*see People v Powell*, 208 AD3d 1366, 1366-1367 [2022]). In light of our determination, the defendant’s contention that the sentence imposed was excessive has been rendered academic (*see id.*; *People v Johnson*, 193 AD3d 1076, 1077 [2021]).

As consented to by the People, we further modify the judgment by vacating the surcharge and fees imposed (*see* CPL 420.35 [2-a]; *People v Powell*, 208 AD3d at 1366-1367).

The defendant’s contentions with respect to orders of protection issued at the time of sentencing are unpreserved for appellate review, and we decline to reach them in the exercise of our interest of justice jurisdiction (*see People v Thomas*, 193 AD3d 889 [2021]; *People v Castillo*, 174 AD3d 918, 918 [2019]). Barros, J.P., Dowling, Ventura and McCormack, JJ., concur.

42 The People of the State of New York, Respondent, v Jesse Sosa, Appellant. [248 NYS3d 680]—

Crimes—Appeal—Preservation of Issue for Review—Failure to Announce Duration of Order of Protection

Crimes—Order of Protection—Did Not Credit for Jail Time Served

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Matthew A. Sciarrino, Jr., J.), rendered July 7, 2023, convicting him of attempted robbery in the third degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review an order of protection issued at the time of sentencing.

Ordered that upon the appeal from the judgment, so much of the order of protection as directed that it remain in effect until and including July 6, 2034, is vacated, on the law, and the matter is remitted to the Supreme Court, Kings County, for a new determination of the duration of the order of protection consistent herewith; and it is further,

Ordered that pending a new determination as to the duration of the order of protection, the order of protection shall remain in effect; and it is further,

Ordered that the judgment is affirmed.

Although the defendant did not object to the duration of the order of protection on the ground that he was not credited for jail time served, he had no practical ability to register a timely objection on that basis, since the Supreme Court did not announce the duration of the order of protection at either the plea or sentencing proceedings (*see People v Delaurentis*, 216 AD3d 664, 665 [2023]; *People v Gonzalez*, 207 AD3d 656, 657 [2022]). Thus, the rule of preservation does not apply (*see People v Delaurentis*, 216 AD3d at 665). The People do not dispute the defendant's contention that the order of protection issued at the time of sentencing did not credit the defendant for jail time served. Accordingly, we remit the matter to the Supreme Court, Kings County, for a new determination of the duration of the order of protection (*see People v Newman*, 234 AD3d 877, 878 [2025]; *People v Delaurentis*, 216 AD3d at 665). Genovesi, J.P., Ford, Landicino and Quirk, JJ., concur.

43 The People of the State of New York, Respondent, v Jonathan Mishk, Appellant. [248 NYS3d 681]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure

Appeal by the defendant from an order of the County Court, Dutchess County (Edward T. McLoughlin, J.), dated September 9, 2024, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

The defendant was convicted, upon his plea of guilty, of two counts of rape in the third degree. After a hearing pursuant to the Sex Offender Registration Act (Correction Law art 6-C), the County Court assessed the defendant 105 points on the risk assessment instrument, denied his application for a downward departure from his presumptive risk level, and designated him a level two sex offender. The defendant appeals.

A defendant seeking a downward departure from a presumptive risk level has the initial burden of “(1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence” (*People v Wyatt*, 89 AD3d 112, 128 [2011]; see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [hereinafter Guidelines]; *People v Gillotti*, 23 NY3d 841, 861 [2014]). If the defendant makes that twofold showing, “the court must exercise its discretion by weighing the . . . mitigating factor[] to determine whether the totality of the circumstances warrants a departure to avoid an [overassessment] of the defendant’s dangerousness and risk of sexual recidivism” (*People v Gillotti*, 23 NY3d at 861).

Here, the defendant failed to sustain his burden of proof in support of his application for a downward departure, as the purported mitigating factors identified by the defendant either were adequately taken into account by the Guidelines or did not establish a lower likelihood of reoffense or danger to the community (see *People v Correa*, 242 AD3d 1225 [2025]; *People v Permenter*, 208 AD3d 905 [2022]).

Accordingly, the County Court properly denied the defendant’s application for a downward departure and designated him a level two sex offender. Duffy, J.P., Christopher, Warhit and Goldberg Velazquez, JJ., concur.

44 Pratt Paper (NY), Inc., Respondent, v Atlanta Gear Works, Inc., Appellant. [252 NYS3d 619]—

Limitation of Actions—Six-Year Statute of Limitations—Breach of Contract—Failure to Establish Revival of Action at Later Date

Limitation of Actions—Four-Year Statute of Limitations—Breach of Warranty Contracts—Breach or Performance of Contract—Duplicative Tort Claim—Duty Independent of That Imposed by Contract

In an action, inter alia, to recover damages for breach of contract, the defendant appeals from an order of the Supreme Court, Richmond County (Catherine M. DiDomenico, J.), dated August 16, 2023. The order, insofar as appealed from, denied the defendant’s cross-motion for summary judgment dismissing the complaint.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the defendant’s cross-motion for summary judgment dismissing the complaint is granted.

In November 2019, the plaintiff commenced this action

against the defendant alleging breach of contract, breach of warranty, and negligence. The defendant interposed an answer asserting various affirmative defenses, including that the action was barred by the applicable statute of limitations. A representative for the defendant testified at his deposition that the plaintiff and the defendant had entered into an agreement for the defendant to rebuild a gearbox that the plaintiff used in its paper mill. Additionally, the defendant produced evidence during discovery that the agreement included a limited express warranty, *inter alia*, limiting the defendant's liability to products manufactured by it for a period of 12 months. At their depositions, representatives of both parties testified that the defendant completed the contracted work on the gearbox in July 2011, and thereafter tendered delivery to the plaintiff. The representatives also testified that the gearbox was stored at the plaintiff's paper mill until November 2016, when the plaintiff noticed that a lubrication nozzle had not been installed in the gearbox. A machinist for the defendant testified at his deposition that, in January 2017, he was sent to install the nozzle. The plaintiff's engineering and maintenance engineer testified at his deposition that the gearbox was subsequently put into service in April 2017, and then failed approximately one year later as a result of the breakdown of 12 bolts.

In February 2023, the plaintiff moved pursuant to CPLR 3211 (b) to dismiss the affirmative defense of statute of limitations and the defendant subsequently cross-moved for summary judgment dismissing the complaint. In an order dated August 16, 2023, the Supreme Court, *inter alia*, denied the defendant's cross-motion. The defendant appeals.

The Supreme Court should have granted that branch of the defendant's cross-motion which was for summary judgment dismissing the cause of action alleging breach of contract. The statute of limitations for a cause of action alleging breach of contract is six years (*see* CPLR 213 [2]). “[A] breach of contract cause of action accrues at the time of the breach” (*Filasky v Andover Cos.*, 230 AD3d 1297, 1300 [2024], quoting *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *see Kefalas v Pappas*, 226 AD3d 757, 761 [2024]). Here, the defendant demonstrated that the cause of action alleging breach of contract accrued on July 11, 2011, when the work on the gearbox was completed. Contrary to the plaintiff's contention, the statute of limitations was not revived upon the installation of the lubrication nozzle in January 2017 (*see Cabrini Med. Ctr. v Desina*, 64 NY2d 1059, 1061 [1985]). Thus, the defendant established that the plaintiff failed to commence this action

within the six-year limitations period (*see* CPLR 213 [2]; *St. Hillaire v Torres*, 229 AD3d 476, 477 [2024]; *Sears, Roebuck & Co. v Patchogue Assoc., LLC*, 87 AD3d 629, 630 [2011]). In opposition, the plaintiff failed to raise a triable issue of fact.

A cause of action alleging breach of warranty is governed by a statute of limitations of four years (*see* UCC 2-725 [1]). “Generally, a breach of warranty action accrues when tender of delivery is made” (*Coakley v Regal Cinemas, Inc.*, 188 AD3d 796, 799 [2020] [internal quotation marks omitted], quoting *Schwatka v Super Millwork, Inc.*, 106 AD3d 897, 899 [2013]). Here, the defendant established that the cause of action alleging breach of warranty accrued in July 2011 when it tendered delivery of the gearbox, and the plaintiff commenced this action more than four years after that date (*see* UCC 2-725). In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of the defendant’s cross-motion which was for summary judgment dismissing the cause of action alleging breach of warranty.

Moreover, the Supreme Court should have granted that branch of the defendant’s cross-motion which was for summary judgment dismissing the cause of action alleging negligence as duplicative of the cause of action alleging breach of contract. “[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated,” and where a “plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory” (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d 277, 290 [2023] [internal quotation marks omitted]; *see Meserole Hub, LLC v Rosenzweig*, 234 AD3d 751, 751 [2025]). In determining whether a tort claim lies, courts evaluate “the nature of the injury, how the injury occurred and the harm it caused” (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 711 [2018]; *see Meserole Hub, LLC v Rosenzweig*, 234 AD3d at 751).

Here, the complaint did not allege facts that would give rise to a duty owed to the plaintiff that was independent of the duty imposed by the parties’ contract, and the plaintiff was essentially seeking the contractual benefit of its bargain (*see Meserole Hub, LLC v Rosenzweig*, 234 AD3d at 751; *Michael Davis Constr., Inc. v 129 Parsonage Lane, LLC*, 194 AD3d 805, 807 [2021]). The injury alleged was the result of the defendant’s alleged failure to perform under the contract, and thus, there was no injury alleged here that is not already encompassed in the cause of action alleging breach of contract (*see*

Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 30 NY3d at 713).

Accordingly, the Supreme Court should have granted the defendant's cross-motion for summary judgment dismissing the complaint.

The parties' remaining contentions either need not be reached in light of our determination or are without merit. Barros, J.P., Chambers, Warhit and Golia, JJ., concur.

45 Premium Productions, Inc., Appellant, v Michael O'Malley et al., Respondents. [251 NYS3d 296]—

Copyrights and Literary Property—Federal Preemption—Qualitative Distinction of State Law Claim—Extra Element

Trademarks, Trade Names and Unfair Competition—Unfair Competition—Bad Faith Misappropriation of Commercial Advantage—Exploited Proprietary Information and Trade Secrets

Employment Relationships—Restrictive Covenant in Employment Contract—Existence of Trade Secrets—Not Available to Public and Highly Valuable

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Westchester County (Lawrence H. Ecker, J.), dated May 31, 2022. The order, insofar as appealed from, denied the plaintiff's motion for a preliminary injunction and granted those branches of the defendants' separate cross-motions which were pursuant to CPLR 3211 (a) to dismiss so much of the first cause of action as sought a judgment declaring that the noncompete and nonsolicitation covenants in the subject employment agreement are enforceable and the second through eighth causes of action insofar as asserted against each of them.

Ordered that the order is modified, on the law, (1) by deleting the provision thereof denying the plaintiff's motion for a preliminary injunction, and substituting therefor a provision granting the motion to the extent of enjoining the defendants from disclosing the plaintiff's proprietary and confidential information, and otherwise denying the motion, (2) by deleting the provision thereof granting those branches of the defendants' separate cross-motions which were pursuant to CPLR 3211 (a) to dismiss so much of the first cause of action as sought a judgment declaring that the noncompete and nonsolicitation covenants in the subject employment agreement are enforceable and the second, fifth, sixth, and seventh causes of action insofar as asserted against each of them, and substituting therefor a provision denying those branches of the cross-motions, and (3) by deleting the provision thereof granting that branch of the cross-motion of the defendant Michael O'Malley

which was pursuant to CPLR 3211 (a) to dismiss the eighth cause of action insofar as asserted against him, and substituting therefor a provision denying that branch of the cross-motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the plaintiff.

The defendant Michael O'Malley was employed as a salesperson by the plaintiff, which is in the business of providing advertising and promotional materials to markets, including automobile dealerships, marketing agencies, and retail stores throughout the United States, from 2001 until 2020. According to O'Malley, throughout his tenure, he "primarily focused on selling direct-mail products and marketing services to automobile dealerships." The plaintiff alleged that as part of O'Malley's job responsibilities, he was provided "access to extensive confidential and strategically sensitive material developed by [the plaintiff], including customer lists, trade secrets, pricing strategies, product development, advertising product copyrights, [and] market analyses." The plaintiff alleged that it compiled this information through considerable effort and resources, and that the information was not available to the public. The plaintiff further alleged that the information created a competitive advantage for the plaintiff in servicing its current clients. In 2020, O'Malley resigned from his position, and shortly thereafter, he returned to work for the plaintiff. Upon doing so, O'Malley signed an employment agreement, which included nondisclosure, nonsolicitation, and noncompete covenants.

In 2021, O'Malley resigned from his position with the plaintiff and obtained work with the defendant Jacobs Marketing Group, LLC (hereinafter JMG), as an advertising salesperson. JMG is in a similar, competing business with the plaintiff. The plaintiff alleged that it later discovered that the defendants infringed its copyright on direct mail automotive advertising products by proposing them to Plaza Auto Mall (hereinafter Plaza), a longtime client of the plaintiff. According to the plaintiff, Plaza ceased using the plaintiff's services.

Subsequently, the plaintiff commenced this action, *inter alia*, to recover damages for breach of the employment agreement. The plaintiff moved for a preliminary injunction, among other things, enjoining the defendants from disclosing the plaintiff's proprietary and confidential information, which O'Malley obtained as a result of his employment with the plaintiff. The defendants separately cross-moved pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against each of them on the grounds of lack of subject matter jurisdiction (*see*

id. § 3211 [a] [2]) and failure to state a cause of action (*see id.* § 3211 [a] [7]). In an order dated May 31, 2022, the Supreme Court, *inter alia*, denied the plaintiff's motion for a preliminary injunction and granted those branches of the defendants' cross-motions which were pursuant to CPLR 3211 (a) to dismiss so much of the first cause of action as sought a judgment declaring that the noncompete and nonsolicitation covenants in the employment agreement are enforceable and the second through eighth causes of action insofar as asserted against each of them. The plaintiff appeals.

Contrary to the plaintiff's contention, the Supreme Court properly determined that the third cause of action, seeking a judgment declaring that the plaintiff is the owner of the copyright at issue, and the fourth cause of action, alleging common-law copyright infringement, were preempted by the federal Copyright Act (*see Briarpatch Ltd., L.P v Phoenix Pictures, Inc.*, 373 F3d 296, 305 [2d Cir 2004]; *Raffoler, Ltd. v Peabody & Wright, Ltd.*, 671 F Supp 947, 950 [ED NY 1987]). There is no dispute that the advertising materials at issue fall within the broad subject matter categories protected by the Copyright Act (*see* 17 USC § 102 [a] [1]; *Want Ad Digest, Inc. v Display Adv., Inc.*, 653 F Supp 2d 171, 175 [ND NY 2009]; *Raffoler, Ltd. v Peabody & Wright, Ltd.*, 671 F Supp at 950). Further, the third cause of action focuses solely on reproduction and distribution rights. Those rights asserted in the complaint and sought to be protected by a declaratory judgment are equivalent to the exclusive rights to display, reproduce, distribute, or sell such advertising products that are within the general scope of copyright protection. Under these circumstances, the court properly granted dismissal of the third cause of action (*see Editorial Photocolor Archives v Granger Collection*, 61 NY2d 517, 521-522 [1984]). Moreover, since the advertising materials at issue are within the subject matter of copyright law as specified by the Copyright Act (*see* 17 USC § 102 [a] [1]; *Raffoler, Ltd. v Peabody & Wright, Ltd.*, 671 F Supp at 950), the plaintiff "must rely for protection on federal statutory copyright" (*We Shall Overcome Found. v Richmond Org., Inc. [TRO Inc.]*, 221 F Supp 3d 396, 408 [SD NY 2016] [internal quotation marks omitted]). Therefore, the court properly granted dismissal of the fourth cause of action (*see Capitol Records, Inc. v Naxos of Am., Inc.*, 4 NY3d 540, 559 [2005]).

However, the Supreme Court erred in granting those branches of the defendants' cross-motions which were pursuant to CPLR 3211 (a) to dismiss the fifth cause of action, sounding in unfair competition, insofar as asserted against each of them.

“Section 301 of the Copyright Act preempts a state law claim if: ‘(i) the work at issue comes within the subject matter of copyright and (ii) the right being asserted is equivalent to any of the exclusive rights within the general scope of copyright’ ” (*We Shall Overcome Found. v Richmond Org., Inc. [TRO Inc.]*, 221 F Supp 3d at 410, quoting *Forest Park Pictures v Universal Tel. Network, Inc.*, 683 F3d 424, 429 [2d Cir 2012]). Section 106 of the Copyright Act provides copyright owners the exclusive rights, among other things, to reproduce a copyrighted work, to prepare derivative works, to distribute copies of the work to the public, and to display the work publicly (*see* 17 USC § 106). “A state law right is equivalent to one of the exclusive rights of copyright if it may be abridged by an act which, in and of itself, would infringe one of the exclusive rights” (*Forest Park Pictures v Universal Tel. Network, Inc.*, 683 F3d at 430 [internal quotation marks omitted]). A claim is not equivalent “if an extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action,” and in such circumstances, there is no preemption (*id.* [internal quotation marks omitted]; *see Harper & Row Publs., Inc. v Nation Enters.*, 723 F2d 195, 200 [2d Cir 1983], *revd* 471 US 539 [1985]). Here, contrary to the defendants’ contentions, the plaintiff sufficiently alleged an extra element—violation of a duty of confidentiality and breach of the employment agreement—in addition to acts of reproduction, adaptation, performance, distribution, or display, that renders the state right qualitatively distinct from the federal right, thereby foreclosing preemption (*see Computer Assoc. Intl., Inc. v Altai, Inc.*, 982 F2d 693, 719 [2d Cir 1992]; *Smith v Weinstein*, 578 F Supp 1297, 1307 [SD NY 1984]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), a court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “[T]he allegations of a complaint, supplemented by a plaintiff’s additional submissions, if any, must be given their most favorable intendment” (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). “The ultimate question is whether, accepting the allegations and affording these inferences, plaintiff can succeed upon any reasonable view of the facts stated” (*Doe v Bloomberg L.P.*, 36 NY3d 450, 454 [2021] [internal quotation marks omitted]).

“A cause of action based on unfair competition may be

predicated upon trademark infringement or dilution in violation of General Business Law §§ 360-k and 360-l, or ‘upon the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets’ ” (*Out of Box Promotions, LLC v Koschitzki*, 55 AD3d 575, 578 [2008] [internal quotation marks omitted], quoting *Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 20 AD3d 439, 439-440 [2005]). Here, the complaint stated a cause of action alleging unfair competition on the basis of an alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets. Specifically, the allegations in the complaint, as amplified by an affidavit of Mitchell Krohnengold, the president of the plaintiff, that the defendants exploited proprietary information and trade secrets acquired by O’Malley during his employment with the plaintiff by “poach[ing]” one of its clients, and that O’Malley, prior to his resignation and without authorization, “had downloaded and emailed numerous communications and documents” that contained the plaintiff’s “customer contacts, proprietary sales information, price plans, and [the plaintiff’s] copyright advertising products,” were sufficient to state a cause of action alleging unfair competition based on the theory of an alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets (*see Parekh v Cain*, 96 AD3d 812, 816 [2012]; *Beverage Mktg. USA, Inc. v South Beach Beverage Co., Inc.*, 20 AD3d at 440; *Bender Ins. Agency v Treiber Ins. Agency*, 283 AD2d 448, 450 [2001]).

A restrictive covenant in an employment agreement is reasonable only if it “(1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public” (*BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999] [emphasis omitted]; *see Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307 [1976]). An employer’s interests justifying a restrictive covenant are limited “to the protection against misappropriation of the employer’s trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary” (*BDO Seidman v Hirshberg*, 93 NY2d at 389; *see Reed, Roberts Assoc. v Strauman*, 40 NY2d at 308). Contrary to the Supreme Court’s determination, the plaintiff sufficiently alleged the existence of trade secrets warranting protection. Although there is generally no accepted definition of a trade secret, one that has been cited with approval by the Court of Appeals is “any formula, pattern, device or compila-

tion of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Mgt. v Janien*, 82 NY2d 395, 407 [1993] [internal quotation marks omitted]). The complaint, as amplified by Krohnengold's affidavit, alleged that the information in the plaintiff's client list and pricing strategies was not available to the public and was highly valuable to the plaintiff and its competitors, and that considerable effort and money was expended in obtaining the information. To guard the secrecy of the information, the plaintiff implemented a confidentiality policy and distributed an employee handbook containing confidentiality and nondisclosure provisions.

The nonsolicitation covenant in the employment agreement is overbroad in that it does not specify the geographic boundaries and prohibits O'Malley "at any time" from soliciting the plaintiff's "customers . . . for marketing or advertising or promotional services" for himself or anyone engaged "in the same or similar business," even those customers whom O'Malley had never met and did not know about and for whom he had done no work. Further, the noncompete covenant in the employment agreement is overbroad in that it does not specify the geographic boundaries and prohibits O'Malley from working "in a like kind or similar business as [the plaintiff]," including but not limited to direct mail or digital marketing services or "sales of any type that [the plaintiff] currently services or shall service during the course of his employment." However, "[a]ny meaningful trade secret, through the use of which the second party might gain an unfair advantage which he [or she] might not have gained had he [or she] not been in possession of the trade secret, will be sufficient to render an otherwise reasonable restrictive covenant enforceable" (*Greenwich Mills Co. v Barrie House Coffee Co.*, 91 AD2d 398, 405 [1983]). "[A] court, upon finding part of a restrictive employment covenant to be enforceable and part not so, may sever the respective portions of the covenant and give effect only to the enforceable part" (*id.* at 401). The determination of whether an overly broad restrictive covenant should be enforced to the extent necessary to protect an employer's legitimate interest involves "a case specific analysis, focusing on the conduct of the employer in imposing the terms of the agreement" (*BDO Seidman v Hirschberg*, 93 NY2d at 394). Partial enforcement may be justified if an employer demonstrates, in addition to the legitimate business interest, "an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct" (*id.*).

Here, since the record is not sufficiently factually developed

to establish whether the plaintiff engaged in overreaching or coercively used dominant bargaining power to obtain the restrictive covenants, the Supreme Court should not have granted those branches of the defendants' cross-motions which were pursuant to CPLR 3211 (a) to dismiss so much of the first cause of action as sought a judgment declaring that the noncompete and nonsolicitation covenants in the employment agreement are enforceable (*see Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 371-372 [2015]). Thus, although ultimately it may be inappropriate to partially enforce the restrictive covenants in this case, at the pleading stage, the court erred in concluding that the restrictive covenants are unenforceable (*see id.*). Further, at this procedural posture, it is not apparent from the face of the employment agreement that the unlimited temporal duration as to the nonsolicitation covenant and the unidentified geographic scope of the noncompete and nonsolicitation covenants were essential to the agreement. Such a determination must await a more fully developed record (*see Twitchell Tech. Prods., LLC v Mechoshade Sys., LLC*, 227 AD3d 45, 62 [2024]).

Further, the allegations, inter alia, that O'Malley, prior to his resignation and without authorization, "had downloaded and emailed numerous communications and documents" that contained the plaintiff's "customer contacts, proprietary sales information, price plans, and [the plaintiff's] copyright advertising products" were sufficient to defeat those branches of the defendants' cross-motions which were pursuant to CPLR 3211 (a) to dismiss the second cause of action, alleging breach of the employment agreement, insofar as asserted against each of them (*see Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d 806, 806-807 [2008]; *Stanley Tulchin Assoc. v Vignola*, 186 AD2d 183, 185 [1992]).

We turn next to the plaintiff's motion for a preliminary injunction. "To obtain a preliminary injunction, the moving party must establish, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor" (*Ashirova v Cevallos*, 186 AD3d 791, 792 [2020] [internal quotation marks omitted]; *see* CPLR 6301). Here, the plaintiff showed that trade secrets existed and established a likelihood of success on the merits (*see Washington Deluxe Bus, Inc. v Sharmash Bus Corp.*, 47 AD3d at 806-807; *Stanley Tulchin Assoc. v Vignola*, 186 AD2d at 185; *McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165, 173 [1986]). To the extent that O'Malley denies misappropriating confidential informa-

tion, “[e]ven when the facts are in dispute, a court may find a likelihood of success on the merits; conclusive proof is not required” (*McNeil v Mohammed*, 32 AD3d 829, 830 [2006] [internal quotation marks omitted]). The plaintiff also established irreparable harm absent the granting of a preliminary injunction and that the equities balance in its favor (see *Ingenuit, Ltd. v Harriff*, 33 AD3d 589, 590 [2006]; *Eastern Bus. Sys. v Specialty Bus. Solutions*, 292 AD2d 336, 338 [2002]; *Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631, 633 [1992]). Accordingly, the Supreme Court should have granted the plaintiff’s motion for a preliminary injunction to the extent necessary to protect its legitimate business interests in protecting the use of its trade secrets and confidential customer information (see *Stanley Tulchin Assoc. v Vignola*, 186 AD2d at 185).

Further, contrary to defendants’ contentions, at this stage of the litigation, it is premature to conclude that the allegations in the complaint are insufficient to support a finding that the defendants acted so recklessly or wantonly as to warrant awards of damages and punitive damages under the sixth and seventh causes of action, respectively (see *Gipe v DBT Xpress, LLC*, 150 AD3d 1208, 1210 [2017]; *Island Sports Ctr. v Belli Constr. Corp.*, 212 AD2d 241, 247-248 [1995]).

“Under the general rule, attorney’s fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]; see *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]). “New York public policy disfavors any award of attorneys’ fees to the prevailing party in a litigation” (*LG Funding, LLC v Johnson & Son Locksmith, Inc.*, 170 AD3d 1153, 1154 [2019] [internal quotation marks omitted]). Consequently, “a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assoc. v AGS Computers*, 74 NY2d at 491; see *LG Funding, LLC v Johnson & Son Locksmith, Inc.*, 170 AD3d at 1154). Here, since JMG was not a party to the employment agreement, in the absence of any clear indication that JMG agreed to undertake the obligation to pay O’Malley’s or the plaintiff’s attorneys’ fees, and since there is no statute, court rule, or other legal basis for an award of attorneys’ fees against JMG in this case, the Supreme Court properly granted that branch of JMG’s cross-motion which was pursuant to CPLR 3211 (a) to dismiss the eighth cause of action, seeking an award of at-

torneys' fees, insofar as asserted against it (*see E.M.R. Mgt. Corp. v Halstead Harrison Assoc.*, 299 AD2d 393, 394 [2002]).

In addition, contrary to O'Malley's contention, the employment agreement contains a provision requiring him to reimburse the plaintiff for "all . . . costs and expenses, including, but not limited to Legal Fees for his breach of this agreement." At this stage of the litigation, it is premature to conclude that the plaintiff would not be entitled to an award of attorneys' fees pursuant to the employment agreement. Accordingly, that branch of O'Malley's cross-motion which was pursuant to CPLR 3211 (a) to dismiss the eighth cause of action insofar as asserted against him should have been denied (*see e.g. Board of Mgrs. of Golfview Condominium I v Island Condo Mgt. Corp.*, 181 AD3d 915, 916 [2020]). Connolly, J.P., Chambers, Voutsinas and Landicino, JJ., concur.

46 Beverly Quentin, Respondent, v Grannell E. Knox, Appellant. [250 NYS3d 640]—

Trial—Verdict—Weight of Evidence—Credited One Witness in Conflicting Testimony

Trial—Argument and Conduct of Counsel—Deprivation of Fair Trial—Comments during Summation and Cross-Examination Question

Damages—Inadequate and Excessive Damages—Past and Future Pain and Suffering—Deviation from Reasonable Compensation

In an action to recover damages for personal injuries, the defendant appeals from a judgment of the Supreme Court, Westchester County (Helen M. Blackwood, J.), dated August 27, 2024. The judgment, upon a jury verdict in favor of the plaintiff on the issue of liability and upon a separate jury verdict on the issue of damages awarding the plaintiff the sums of \$3,000,000 for past pain and suffering, \$1,000,000 for future pain and suffering, and \$1,000,000 for punitive damages, and upon an order of the same court dated April 5, 2024, denying the defendant's motion pursuant to CPLR 4404 (a) to set aside the jury verdict on the issue of liability as contrary to the weight of the evidence or in the interest of justice and for a new trial on the issue of liability or, in the alternative, to set aside, as excessive, the jury verdict on the issue of damages, is in favor of the plaintiff and against the defendant in the principal sum of \$5,000,000.

Ordered that the judgment is affirmed, with costs.

The plaintiff commenced this action against the defendant pursuant to the Child Victims Act (CVA) (*see* CPLR 214-g), alleging, among other things, that the defendant, her paternal uncle, repeatedly sexually abused her as a child in the 1960s. After a jury trial on the issue of liability, the jury found that

there was sexual contact between the plaintiff and the defendant when the plaintiff was under the age of 14. Following a trial on the issue of damages, the jury awarded the plaintiff the sums of \$3,000,000 for past pain and suffering, \$1,000,000 for future pain and suffering, and \$1,000,000 for punitive damages.

Subsequently, the defendant moved pursuant to CPLR 4404 (a) to set aside the jury verdict on the issue of liability as contrary to the weight of the evidence or in the interest of justice and for a new trial on the issue of liability or, in the alternative, to set aside, as excessive, the verdict on the issue of damages. In an order dated April 5, 2024, the Supreme Court denied the defendant's motion. The court issued a judgment dated August 27, 2024, in favor of the plaintiff and against the defendant in the principal sum of \$5,000,000. The defendant appeals.

"A jury verdict may be set aside as contrary to the weight of the evidence [under CPLR 4404 (a)] only if the evidence so preponderated in favor of the [moving party] that the verdict could not have been reached on any fair interpretation of the evidence" (*Pen v Wheels, Inc.*, 231 AD3d 848, 848 [2024] [internal quotation marks omitted]; see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). "It is for the jury to make determinations as to the credibility of the witnesses, and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses" (*Angieri v Musso*, 225 AD3d 43, 51 [2024] [internal quotation marks omitted]; see *Bacchus v Restaurant Depot, LLC*, 234 AD3d 903, 904 [2025]).

Here, the record provides no basis for disturbing the jury's determination to credit the plaintiff's testimony over that of the defendant's testimony, and a fair interpretation of the evidence supports the jury's finding that there was sexual contact between the plaintiff and the defendant while the plaintiff was under the age of 14 (see *Hannays v Miskiewicz*, 240 AD3d 582, 584 [2025]). Thus, the jury's verdict on the issue of liability was not contrary to the weight of the evidence.

"A motion pursuant to CPLR 4404 (a) to set aside a verdict and for a new trial in the interest of justice encompasses errors in the trial court's rulings on the admissibility of evidence, mistakes in the charge, misconduct, newly discovered evidence, and surprise" (*Bhim v Platz*, 207 AD3d 511, 513 [2022] [internal quotation marks omitted]; see *Hervey v Northern Westchester Hosp.*, 238 AD3d 1117, 1118 [2025]). In considering such a motion, a trial judge must decide "whether substantial justice has been done" and "whether it is likely that the verdict has been

affected” and must rely on his or her “own common sense, experience and sense of fairness” (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 381 [1976] [internal quotation marks omitted]; see *Hervey v Northern Westchester Hosp.*, 238 AD3d at 1118). On appeal, “this Court is invested with the power to decide whether the trial court providently exercised its discretion” (*Yu v New York City Health & Hosps. Corp.*, 191 AD3d 1040, 1042 [2021] [internal quotation marks omitted]; see *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d at 381).

The defendant’s contentions regarding certain summation comments and a cross-examination question by the plaintiff’s counsel are largely unpreserved for appellate review (see *Farias-Alvarez v Interim Healthcare of Greater N.Y.*, 166 AD3d 945, 947 [2018]; *Coma v City of New York*, 97 AD3d 715, 716 [2012]). To the extent that the contentions are preserved, “litigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court” (*Rodriguez v City of New York*, 67 AD3d 884, 886 [2009]; see *Fortune v New York City Hous. Auth.*, 201 AD3d 705, 708 [2022]). “The interest of justice thus requires a court to order a new trial where comments by an attorney for a party’s adversary deprived that party of a fair trial or unduly influenced a jury” (*Rodriguez v City of New York*, 67 AD3d at 885; see *Bacchus v Restaurant Depot, LLC*, 234 AD3d at 905). Here, some of the challenged conduct by the plaintiff’s counsel was improper, and we do not condone it (see *Fortune v New York City Hous. Auth.*, 201 AD3d at 708; *Lariviere v New York City Tr. Auth.*, 131 AD3d 1130, 1132 [2015]). Nonetheless, the conduct was not so pervasive or prejudicial as to have deprived the defendant of a fair trial (see *Fortune v New York City Hous. Auth.*, 201 AD3d at 708; *Lariviere v New York City Tr. Auth.*, 131 AD3d at 1132).

The defendant’s contentions that the Supreme Court improperly admitted testimony regarding the plaintiff’s outcry to her mother and a college dorm mate into evidence is unpreserved for appellate review (see *People v Darby*, 196 AD3d 643, 644 [2021]; *Burke v Carrion*, 101 AD3d 920, 922 [2012]). The defendant’s contentions concerning the admission of testimony regarding his failure to respond to a phone call and the court’s response to a jury note asking for a readback of that testimony are also unpreserved for appellate review (see *Torres v Hickman*, 162 AD3d 821, 823 [2018]; *Burke v Carrion*, 101 AD3d at 922).

“The amount of damages to be awarded to a plaintiff for personal injuries is a question for the jury, and its determina-

tion will not be disturbed unless the award deviates materially from what would be reasonable compensation” (*Wynter v Transdev Servs., Inc.*, 207 AD3d 785, 787 [2022]; see CPLR 5501 [c]). “Since the inherently subjective nature of noneconomic awards cannot produce mathematically precise results, the reasonableness of compensation must be measured against the relevant precedent of comparable cases” (*Liciaga v New York City Tr. Auth.*, 231 AD3d 250, 255 [2024] [internal quotation marks omitted]). “Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation” (*Aguilar v Graham Terrace, LLC*, 237 AD3d 1149, 1151 [2025] [internal quotation marks omitted]). “However, consideration should also be given to other factors, including the nature and extent of the injuries” (*Liciaga v New York City Tr. Auth.*, 231 AD3d at 256 [internal quotation marks omitted]; see *Fuentes v Ingram*, 235 AD3d 850, 852 [2025]).

Here, considering the nature and extent of the injuries sustained by the plaintiff and the relevant precedent, the damages awards for past and future pain and suffering did not deviate materially from what would be reasonable compensation (see CPLR 5501 [c]; *Splawn v Lextaj Corp.*, 197 AD2d 479, 480-481 [1993]; *Breest v Haggis*, 2023 WL 374404, *3, 2023 NY Misc LEXIS 23487, *7-9 [Sup Ct, NY County, Jan. 24, 2023, No. 161137/2017]; see also *Stines v Sanchez*, 2025 WL 3701734, *7, 2025 US Dist LEXIS 263453, *18-19 [SD NY, Dec. 22, 2025, No. 21 Civ. 7884 (DEH) (GWG)]).

Moreover, contrary to the defendant’s contention, the punitive damages award was not excessive (see generally *Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]; *Frankson v Brown & Williamson Tobacco Corp.*, 67 AD3d 213, 219 [2009]).

The defendant’s remaining contention is without merit. Duffy, J.P., Wooten, Taylor and Hom, JJ., concur.

47 John Reinhardt et al., Respondents, v Freedom Mortgage Corporation, Defendant, and Mortgage Electronic Registration Systems, Inc., Appellant. [252 NYS3d 616]—

Mortgages—Validity—Challenge to Deed—Mortgage Contained Warranty That Plaintiffs Owned Property

In an action pursuant to RPAPL article 15 to determine claims to real property and for declaratory relief, the defendant Mortgage Electronic Registration Systems, Inc., appeals from an order of the Supreme Court, Queens County (Karina E. Alomar, J.), dated October 13, 2022. The order, insofar as ap-

pealed from, denied that branch of that defendant's motion which was for summary judgment on its counterclaim for a judgment declaring that the subject mortgage is valid, and granted that branch of the plaintiffs' cross-motion which was for summary judgment on the amended complaint insofar as asserted against that defendant and for a judgment declaring that the subject mortgage is void.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, that branch of the motion of the defendant Mortgage Electronic Registration Systems, Inc., which was for summary judgment on its counterclaim for a judgment declaring that the subject mortgage is valid is granted, that branch of the plaintiffs' cross-motion which was for summary judgment on the amended complaint insofar as asserted against that defendant and for a judgment declaring that the subject mortgage is void is denied, and the matter is remitted to the Supreme Court, Queens County, for the entry of a judgment, *inter alia*, declaring that the subject mortgage is valid.

By deed dated September 30, 2013, Valerie Rezzolla, as administrator of the estate of Oscar Rezzolla, conveyed the subject property, located in Queens, to the plaintiffs, John Reinhardt and Patrice Gay-Reinhardt. The deed was recorded on November 26, 2013. On April 24, 2015, John Reinhardt executed a note in the amount of \$625,500 in favor of the defendant Freedom Mortgage Corporation (hereinafter Freedom). The note was secured by a mortgage on the property in favor of the defendant Mortgage Electronic Registration Systems, Inc. (hereinafter MERS). The mortgage was signed by both plaintiffs and recorded on May 11, 2015. The mortgage stated, in relevant part: "I promise that: (A) I lawfully own the Property; (B) I have the right to mortgage, grant and convey the Property to Lender."

In an order and decree dated May 4, 2017, the Surrogate's Court determined that the deed dated September 30, 2013, was void *ab initio* and subject to cancellation, as was the mortgage, upon the court's finding that the deed was never subscribed by the grantor and, by extension, never delivered.

In a quitclaim deed dated October 12, 2021, Lois M. Rosenblatt, as Public Administrator for the estate of Oscar Rezzolla, conveyed the property to the plaintiffs. This deed was recorded on November 4, 2021.

Thereafter, the plaintiffs commenced this action against Freedom and MERS, alleging that the mortgage is void since the plaintiffs did not legally own the property at the time the mortgage was given. The plaintiffs sought a judgment cancel-

ling and discharging the mortgage and declaring that they are the owners of the property free of any encumbrances. MERS interposed an answer asserting various affirmative defenses and a counterclaim for a judgment declaring that the mortgage is valid. Thereafter, MERS moved, inter alia, for summary judgment on its counterclaim. The plaintiffs opposed the motion and cross-moved, among other things, for summary judgment on the amended complaint insofar as asserted against MERS and for a judgment declaring that the mortgage is void. In an order dated October 13, 2022, the Supreme Court, inter alia, denied that branch of MERS's motion and granted that branch of the plaintiffs' cross-motion. MERS appeals.

"A deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid" (*Matter of Bowser*, 167 AD3d 1001, 1002 [2018]; see *Selene Fin., L.P. v Jones*, 203 AD3d 1191, 1194 [2022]). Here, however, the mortgage in favor of MERS contained a warranty that the plaintiffs owned the property, and the plaintiffs subsequently acquired title to the property. Under the circumstances, the doctrine of equitable estoppel precludes the plaintiffs from asserting that the mortgage is void (see *Collins v Tashjian*, 124 AD2d 629, 631 [1986]; *Village of Tarrytown v Woodland Lake Estates*, 97 AD2d 338, 342 [1983]; *Fries v Clearview Gardens Sixth Corp.*, 285 App Div 568, 569 [1955]; cf. *Bernard v Citibank, N.A.*, 195 AD3d 783, 789 [2021]).

Accordingly, the Supreme Court should have granted that branch of MERS's motion which was for summary judgment on its counterclaim for a judgment declaring that the mortgage is valid and denied that branch of the plaintiffs' cross-motion which was for summary judgment on the amended complaint insofar as asserted against MERS and for a judgment declaring that the mortgage is void.

The parties' remaining contentions need not be reached in light of our determination.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Queens County, for the entry of a judgment, inter alia, declaring that the mortgage is valid (see *Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Dillon, J.P., Chambers, Ventura and McCormack, JJ., concur.

48 S. Garson, LLC, Respondent, v Jessica Luck et al., Appellants. [253 NYS3d 186]—

Motions and Orders—Reargument or Renewal—Amend Caption to Correct Name—Prejudice to Opposing Party

Parties—Capacity to Sue—Foreign Company Authorized to Do Business in

New York**Pleading—Sufficiency of Pleading—Breach of Lease Agreement—Notice of Occurrences at Issue**

In an action, inter alia, to recover damages for breach of contract, the defendants appeal from an order of the Supreme Court, Westchester County (Thomas Quiñones, J.), dated May 30, 2024. The order, insofar as appealed from, granted the plaintiff's renewed motion to amend the caption to correct the name of the plaintiff and denied those branches of the defendants' cross-motion which were pursuant to CPLR 3211 (a) to dismiss the amended complaint and to require the plaintiff to post a bond as security for costs.

Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

In July 2018, the plaintiff, S. Garson, LLC, as landlord, and the defendants Jessica Luck and Joseph Castillo (hereinafter together the tenants), as tenants, entered into a lease agreement with respect to an apartment located at 500A East 87th Street in Manhattan for a term of one year. In February 2019, the tenants moved out of the apartment after complaining to the landlord about second-hand smoke.

In April 2022, the plaintiff, under the name "SB Garson, LLC," commenced this action against the tenants and another defendant (hereinafter collectively the defendants) to recover damages for breach of contract and related costs and fees. The plaintiff, which was actually named "S. Garson, LLC," subsequently made a renewed motion to amend the caption to correct its name. The defendants cross-moved, inter alia, pursuant to CPLR 3211 (a) to dismiss the amended complaint and to require the plaintiff to post a bond as security for costs. In an order dated May 30, 2024, the Supreme Court, among other things, granted the plaintiff's motion and denied those branches of the defendants' cross-motion. The defendants appeal.

Where the right party plaintiff is in court but under a defective name or title as party plaintiff, an amendment correcting the title is permissible (*see Glanz v Parkway Kosher Caterers*, 176 AD3d 686, 687 [2019]). "CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced, and CPLR 5019 (a) gives trial and appellate courts the discretion to cure mistakes, defects, and irregularities that do not affect substantial rights of parties" (*id.* at 687-688 [citations and internal quotation marks omitted]).

Here, the Supreme Court providently exercised its discretion

in granting the plaintiff's renewed motion to amend the caption to correct its name (*see id.*). Contrary to the defendants' contention, the plaintiff was not required to demonstrate a reasonable justification for its failure to submit an affidavit of its managing member on a prior motion it had made, as the relevant branch of that prior motion was denied with leave to renew (*see Smith v Realty on Fox Croft Corp.*, 233 AD3d 908, 909 [2024]). Inasmuch as the limited proposed correction was clearly described in the moving papers, the plaintiff's failure to submit a new copy of its proposed amended complaint did not prejudice the defendants (*see* CPLR 2001; *Putrelo Constr. Co. v Town of Marcy*, 137 AD3d 1591, 1592 [2016]; *Medina v City of New York*, 134 AD3d 433, 433 [2015]). Moreover, a substantial right of the defendants was not prejudiced by the typographical error of the plaintiff's name in the caption.

Since it is undisputed that the plaintiff is a foreign limited liability company authorized to do business in New York, the Supreme Court properly denied dismissal of the amended complaint pursuant to CPLR 3211 (a) on the ground that the plaintiff lacked capacity to sue and properly denied that branch of the defendant's cross-motion which was to require the plaintiff to post a bond as security for costs (*see* Limited Liability Company Law § 808 [a]; CPLR 8501 [a]; *1S REO Opportunity 1, LLC v Harlem Premier Residence, LLC*, 234 AD3d 401, 402-403 [2025]; *Solon Automated Servs. v Eastwood Mgt. Corp.*, 94 AD2d 961, 961 [1983]).

“‘On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’” (*Rosas v Morales*, 235 AD3d 678, 679 [2025], quoting *Jesberger v CVS Health Solutions, LLC*, 222 AD3d 849, 849 [2023]). “Further, ‘where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and the motion should not be granted unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it’” (*id.*, quoting *Matter of Chet's Garage, Inc. v Village of Goshen*, 161 AD3d 727, 731 [2018]). “A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence utterly refutes

the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Katsorhis v 718 W. Beech St, LLC*, 234 AD3d 744, 746 [2025]).

Here, accepting the allegations in the amended complaint as true, as supplemented by the affidavit submitted in opposition to the defendants' cross-motion, and according the plaintiff the benefit of every possible favorable inference, the plaintiff alleged facts sufficient to state causes of action to recover damages for breach of contract and related costs and fees (*see Guido v Orange Regional Med. Ctr.*, 102 AD3d 828, 832 [2013]). Since the defendants were able to identify "the correct apartment," the apparent typographical error in the proposed amended complaint identifying the subject property as "SOOA East 87th Street" was sufficient to give the Supreme Court and the parties notice of the occurrences at issue (*see* CPLR 3013, 3026). Contrary to the defendants' further contention, the lease identifying the plaintiff as landlord and the record conveying the property to an alleged affiliate of the plaintiff did not conclusively establish that the parties' lease agreement was a nullity (*cf. H.B.A. Realty Co. v Miller*, 14 AD2d 607, 607 [1961]). Furthermore, Real Property Law § 238-a (2) does not require dismissal of the plaintiff's cause of action to recover late fees. Accordingly, the Supreme Court properly denied dismissal of the amended complaint pursuant to CPLR 3211 (a) (1) and (7). Brathwaite Nelson, J.P., Ford, Voutsinas and Love, JJ., concur.

49 R.S. et al., Appellants, v City of New York et al., Respondents. [251 NYS3d 307]—

Municipal Corporations—Notice of Claim—Repeated Errors Regarding Date of Accident—Prejudice to Opposing Party

In an action to recover damages for personal injuries, the plaintiffs appeal from an order of the Supreme Court, Kings County (Patria Frias-Colón, J.), dated November 21, 2023. The order denied the plaintiffs' motion, inter alia, for leave to amend the notice of claim.

Ordered that the order is affirmed, with costs.

On June 2, 2017, the infant plaintiff allegedly was injured while running in a park owned and operated by the defendant City of New York, located in Brooklyn, when she tripped, fell, and sustained injuries. In a notice of claim, the infant plaintiff and her father, on her behalf, stated that the accident occurred on June 19, 2017. In March 2018, the plaintiffs commenced the instant action against the defendants to recover damages for personal injuries the infant plaintiff allegedly sustained in the fall. In the complaint, the plaintiffs alleged that the accident

occurred on June 19, 2017. The defendants interposed an answer denying the allegations.

In August 2022, the plaintiffs moved, inter alia, for leave to amend the notice of claim to correct the date of the accident. The defendants opposed the motion. In an order dated November 21, 2023, the Supreme Court denied the plaintiffs' motion. The plaintiffs appeal.

“A timely and sufficient notice of claim is a condition precedent to asserting a tort claim against a municipality or public benefit corporation” (*Mitchell v Jimenez*, 233 AD3d 773, 774 [2024], quoting *Se Dae Yang v New York City Health & Hosps. Corp.*, 140 AD3d 1051, 1052 [2016]; see *Matter of Johnson v County of Suffolk*, 167 AD3d 742, 743 [2018]). “General Municipal Law § 50-e (2) requires that the notice of claim set forth, among other things ‘the time when, the place where and the manner in which the claim arose’” (*T.N. v City of New York*, 227 AD3d 815, 816 [2024], quoting *Brown v City of New York*, 95 NY2d 389, 393 [2000]; see *Davis v City of New York*, 210 AD3d 865, 866 [2022]). “Pursuant to General Municipal Law § 50-e (6), a court has discretion to grant leave to serve an amended notice of claim where the error in the original notice was made in good faith and where the other party has not been prejudiced thereby” (*T.N. v City of New York*, 227 AD3d at 816-817; see *Hernandez-Panell v City of New York*, 232 AD3d 859, 860 [2024]). The plaintiff has the initial burden of establishing the absence of prejudice (see *Garland v City of New York*, 237 AD3d 669, 670 [2025]; *Matter of St. Hilaire v New York City Hous. Auth.*, 216 AD3d 645, 647 [2023]).

Here, the plaintiffs failed to meet their initial burden of demonstrating the absence of prejudice to the defendants arising from the plaintiffs' repeated errors regarding the date of the accident. There was an unexplained delay in seeking leave to amend the notice of claim of approximately two-and-a-half years after the plaintiffs' counsel became aware of the correct date of the accident (see *T.N. v City of New York*, 227 AD3d at 817; *Matter of DiMattia v City of New York*, 183 AD3d 823, 824 [2020]; *Torres v Town of Babylon*, 123 AD3d 1007, 1008 [2014]). Contrary to the plaintiffs' contentions, an occurrence report did not establish that the defendants had actual knowledge of the correct date of the accident, as the occurrence report did not give the defendants actual knowledge of the circumstances surrounding the infant plaintiff's alleged fall (see *Y.P. v City of New York*, 230 AD3d 1332, 1333-1334 [2024]; *Matter of Almeida v City of New York*, 227 AD3d 890, 892 [2024]; *Matter of DiMattia v City of New York*, 183 AD3d at 824).

Accordingly, the Supreme Court providently exercised its discretion in denying the plaintiffs' motion, among other things, for leave to amend the notice of claim. Barros, J.P., Chambers, Warhit and Golia, JJ., concur.

50 Preeya R. Sahadeo, by Her Co-Guardians, et al., Respondents, v Errol Gangaram, Respondent, and Jofaz Transportation, Inc., et al., Appellants. [251 NYS3d 741]—

Motor Vehicles—Injuries to Pedestrians—Child Hit by Car Passing School Bus—School Bus Driver's Compliance with Requirements while Discharging Children

In a consolidated action to recover damages for personal injuries, the defendants Jofaz Transportation, Inc., Anthony Haddaway, sued herein as John Doe, City of New York, and New York City Department of Education appeal from an order of the Supreme Court, Queens County (Chereé A. Buggs, J.), dated May 10, 2024. The order denied those defendants' motion for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them.

Ordered that the order is reversed, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, and the motion of the defendants Jofaz Transportation, Inc., Anthony Haddaway, sued herein as John Doe, City of New York, and New York City Department of Education for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them is granted.

On December 19, 2011, the infant plaintiff was crossing 103rd Avenue in Queens to board a school bus operated by Anthony Haddaway (hereinafter the bus driver), when a vehicle operated by the defendant Errol Gangaram pulled out from behind the bus, into the oncoming lane of traffic, and struck her. Thereafter, Gangaram was convicted of assault in the second degree, leaving the scene of an incident without reporting, failure to stop at a steady red signal, unsafe lane change, reckless driving, aggravated unlicensed operation of a motor vehicle in the third degree, and overtaking a school bus (*see People v Gangaram*, 132 AD3d 776 [2015]).

The infant plaintiff, by her mother and natural guardian, commenced separate actions, which were subsequently consolidated, against the defendants Jofaz Transportation Inc., the bus driver, sued herein as John Doe, City of New York, and New York City Department of Education (hereinafter collectively the bus defendants) and Gangaram to recover damages for personal injuries. Gangaram interposed an answer, assert-

ing cross-claims against the bus defendants seeking contribution on the ground that their negligence contributed to the infant plaintiff's injuries.

Following discovery, the bus defendants moved for summary judgment dismissing the complaint and all cross-claims insofar as asserted against them. In an order dated May 10, 2024, the Supreme Court denied the motion. The bus defendants appeal.

Defendants moving for summary judgment in a personal injury action may satisfy their initial burden by demonstrating, prima facie, that their conduct was not a proximate cause of the accident (*see Bender v East End Bus Lines, Inc.*, 237 AD3d 1019 [2025]; *Lewinski v City of New York*, 229 AD3d 456, 457 [2024]). "Since there can be more than one proximate cause of a plaintiff's injuries, the defendants do not carry their burden simply by establishing that another party's actions were a proximate cause; they must establish their own freedom from comparative fault as a matter of law" (*Bender v East End Bus Lines, Inc.*, 237 AD3d at 1020-1021; *see Hayes v County of Suffolk*, 222 AD3d 950, 952 [2023]).

Vehicle and Traffic Law § 1174 (b) "requires a school bus driver to instruct a child who needs to cross the street that he or she must cross in the front of the bus, and to keep the school bus stopped with red signal lights flashing until the child has reached the other side of the street" when receiving or discharging schoolchildren (*Begley v City of New York*, 111 AD3d 5, 23-24 [2013]). Contrary to the plaintiffs' contention, the bus defendants' submissions, including the transcripts of the depositions of the infant plaintiff's mother, the bus driver, and Gangaram and excerpts of transcripts of testimony from the criminal trial of Gangaram, established that the bus defendants complied with Vehicle and Traffic Law § 1174 (b) and that their conduct was not a proximate cause of the accident. The testimony established that the bus driver stopped the bus at the designated stop, activated the flashing red lights, extended the stop sign, and did not move from that position until after the accident.

In opposition, the plaintiffs and Gangaram failed to raise a triable issue of fact. The opinion of the plaintiffs' expert that the bus stop was at an unsafe location was conclusory in nature, and the location of the bus merely furnished the condition for the accident and was not a proximate cause of the accident (*see Hayes v County of Suffolk*, 222 AD3d 950, 953 [2023]).

Accordingly, the Supreme Court should have granted the bus defendants' motion for summary judgment dismissing the

complaint and all cross-claims insofar as asserted against them. Barros, J.P., Warhit, Taylor and Golia, JJ., concur.

51 Sal Savasta, Inc., et al., Respondents-Appellants, v Boar's Head Provisions Co., Inc., et al., Appellants-Respondents. [252 NYS3d 606]—

Release—Scope of Release—Indication of Unfairness—Threat to Deny Approval of Sale of Distribution Route

Contracts—Breach or Performance of Contract—Covenant of Good Faith and Fair Dealing—Confiscating Account and Termination of Distribution Agreement

Duress—Economic Duress—Immediate Possession of Needful Goods Threatened—Threat to Stop Selling Products

In an action, inter alia, to recover damages for breach of contract, the defendants appeal, and the plaintiffs cross-appeal, from an order of the Supreme Court, Kings County (Reginald A. Boddie, J.), dated March 8, 2021. The order, insofar as appealed from, denied those branches of the defendants' separate motions which were pursuant to CPLR 3211 (a) to dismiss the fifth and sixth causes of action insofar as asserted against each of them. The order, insofar as cross-appealed from, granted those branches of the motion of the defendant Frank Brunckhorst Co., LLC, which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, fourth, seventh, eighth, ninth, and tenth causes of action and the demand for punitive damages insofar as asserted against it and, in effect, granted those branches of the motion of the defendant Boar's Head Provisions Co., Inc., which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, fourth, seventh, eighth, ninth, and tenth causes of action and the demand for punitive damages insofar as asserted against it.

Ordered that the order is modified, on the law, (1) by deleting the provision thereof granting those branches of the motion of the defendant Frank Brunckhorst Co., LLC, which were pursuant to CPLR 3211 (a) to dismiss the second, fourth, seventh, eighth, ninth, and tenth causes of action insofar as asserted it, and substituting therefor a provision denying those branches of the motion, (2) by deleting the provision thereof, in effect, granting those branches of the motion of the defendant Boar's Head Provisions Co., Inc., which were pursuant to CPLR 3211 (a) to dismiss the second, fourth, seventh, eighth, ninth, and tenth causes of action insofar as asserted it, and substituting therefor a provision denying those branches of the motion, and (3) by deleting the provision thereof denying those branches of the defendants' separate motions which were pursuant to CPLR 3211 (a) to dismiss the fifth and sixth causes of action insofar as asserted against each of them, and substituting therefor a

provision granting those branches of the motions; as so modified, the order is affirmed insofar as cross-appealed from, without costs or disbursements.

The plaintiffs, Salvatore Savasta and his company, Sal Savasta, Inc., commenced this action in 2020 against the defendants, Boar's Head Provisions Co., Inc. (hereinafter Boar's Head), and Frank Brunckhorst Co., LLC (hereinafter Brunckhorst). The complaint alleged the following. Boar's Head produced "delicatessen edibles," which were distributed through Brunckhorst. Brunckhorst distributed the products to authorized distributors, who, in turn, distributed the products to stores through the acquisition of distribution routes. Boar's Head exercised a large degree of control over the authorized distributors and, among other things, required its approval of the sale of a distribution route from one authorized distributor to another and prohibited authorized distributors from engaging in any other food-related business. In 2004, the plaintiffs became authorized distributors and purchased a distribution route. In October 2015, the defendants wrongfully confiscated one of the plaintiffs' retail accounts and directed the plaintiffs to sell their distribution route in June 2019 for less than fair market value.

The complaint asserted 10 causes of action, alleging tortious interference with contract (first cause of action), breach of contract (second cause of action), fraudulent inducement (third cause of action), economic duress (fourth cause of action), violations of the Franchise Sales Act (General Business Law § 680 *et seq.*) (fifth and sixth causes of action), and violations of the Labor Law (seventh through tenth causes of action). The complaint also included a demand for punitive damages.

The defendants separately moved pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against each of them. In an order dated March 8, 2021, the Supreme Court, among other things, granted those branches of Brunckhorst's motion which were pursuant to CPLR 3211 (a) to dismiss the first, second, third, fourth, seventh, eighth, ninth, and tenth causes of action and the demand for punitive damages insofar as asserted against it, and, in effect, granted those branches of Boar's Head's motion which were pursuant to CPLR 3211 (a) to dismiss those causes of action and the demand for punitive damages insofar as asserted against it. The court denied those branches of the defendants' separate motions which were to dismiss the fifth and sixth causes of action insofar as asserted against each of them. The defendants appeal, and the plaintiffs cross-appeal.

On a motion to dismiss pursuant to CPLR 3211 (a), the complaint must be liberally construed (*see id.* § 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d at 87). In assessing a motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action, the court must “determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d at 87-88; *see Langley v Melville Fire Dist.*, 213 AD3d 748, 750 [2023]). Under CPLR 3211 (a) (1), dismissal is warranted “only where the documentary evidence utterly refutes [the] factual allegations [in the complaint], conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Leon v Martinez*, 84 NY2d at 88).

Pursuant to CPLR 3211 (a) (5), a party may move to dismiss a cause of action on the ground that it may not be maintained because of a release. “Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release shifts the burden of going forward to the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the release” (*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011] [alterations and internal quotation marks omitted]; *see Cames v Craig*, 181 AD3d 851, 852 [2020]). Here, while general releases executed by the plaintiffs, by their terms, released the defendants from all known and unknown causes of action that accrued on or before July 5, 2019, the allegation in the complaint that the defendants threatened to deny their approval of the plaintiffs’ sale of their distribution route was sufficient to support a possible finding that the general releases were obtained under circumstances that indicated unfairness (*see Farber v Breslin*, 47 AD3d 873, 877 [2008]; *see also China Dev. Indus. Bank v Morgan Stanley & Co. Inc.*, 86 AD3d 435, 437 [2011]; *Pashtrik Realty Corp. v Gjonlekaj*, 234 AD2d 54, 54 [1996]). The defendants’ contention that the plaintiffs ratified the general releases is not properly before this Court, because it relies on matter dehors the record (*see Yakubov v Gaft*, 231 AD3d 1099, 1101 [2024]). Accordingly, the Supreme Court properly denied dismissal of the complaint on the ground that the causes of action were barred by the general releases.

Contrary to the plaintiffs’ contention, the complaint failed to state a cause of action to recover damages for tortious interfer-

ence with contract, as it failed to allege a breach of a valid contract between the plaintiffs and a third party and failed to allege the defendants' intentional procurement of the third party's breach of such a contract (*see Delanerolle v St Catherine of Sienna Med. Ctr.*, 231 AD3d 1013, 1014-1015 [2024]; *Influx Capital, LLC v Pershin*, 186 AD3d 1622, 1624 [2020]). Accordingly, the Supreme Court properly granted that branch of Brunckhorst's motion which was to dismiss the first cause of action insofar as asserted against it and properly, in effect, granted that branch of Boar's Head's motion which was to dismiss that cause of action insofar as asserted against it.

However, the Supreme Court should have denied those branches of the defendants' separate motions which were to dismiss the second cause of action, alleging breach of contract, insofar as asserted against each of them. "Even if a party is not in breach of its express contractual obligations, it may be in breach of the implied covenant of good faith and fair dealing when it exercises a contractual right as part of a scheme to deprive the other party of the benefit of its bargain" (*JLO Dev. Corp. v Amalgamated Bank*, 232 AD3d 705, 706-707 [2024]; *see Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 770 [2017]). Here, the complaint adequately alleged that the defendants breached the implied covenant of good faith and fair dealing by confiscating one of the plaintiffs' accounts and terminating the parties' alleged distribution agreement without justification or good cause (*see JLO Dev. Corp. v Amalgamated Bank*, 232 AD3d at 706-707; *Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d at 770-771). Contrary to the defendants' contention, an excerpt of the defendants' sales policy and the plaintiffs' acknowledgment thereof did not utterly refute the plaintiffs' allegations (*see Array BioPharma, Inc. v AstraZeneca AB*, 184 AD3d 463, 464 [2020]; *Braddock v Braddock*, 60 AD3d 84, 91-92 [2009]).

Affording the complaint a liberal construction and accepting the facts as alleged therein as true, the complaint failed to state a cause of action to recover damages for fraudulent inducement, inasmuch as it failed to allege reasonable reliance by the plaintiffs upon the defendants' alleged misrepresentations (*see CPLR 3016 [b]*; *Riggs v Brooklyn Hosp. Ctr.*, 207 AD3d 405, 406-407 [2022]; *Avery v WJM Dev. Corp.*, 197 AD3d 1141, 1144 [2021]). Thus, contrary to the plaintiffs' contention, the Supreme Court properly granted that branch of Brunckhorst's motion which was to dismiss the third cause of action insofar as asserted against it and properly, in effect, granted

that branch of Boar's Head's motion which was to dismiss that cause of action insofar as asserted against it.

The fourth cause of action sought to recover damages for economic duress. Economic duress "permits a complaining party to void a contract and recover damages when it establishes that it was compelled to agree to the contract terms because of a wrongful threat by the other party which precluded the exercise of its free will" (*805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]). "The existence of economic duress or business compulsion is demonstrated by proof that immediate possession of needful goods is threatened or . . . by proof that one party to a contract has threatened to breach the agreement by withholding goods unless the other party agrees to some further demand" (*Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 [1971] [citation and internal quotation marks omitted]). Here, the complaint alleged that the defendants threatened to stop selling products to the plaintiffs and to deny approval of the sale of the plaintiffs' business without justification. These allegations were adequate to allege that the plaintiffs sold their business under unfair conditions and signed releases under economic duress (*see id.* at 130-131). Accordingly, the Supreme Court should have denied those branches of the defendants' separate motions which were to dismiss the fourth cause of action insofar as asserted against each of them.

The Supreme Court should have granted those branches of the defendants' separate motions which were to dismiss the fifth and sixth causes of action, alleging violations of the Franchise Sales Act, insofar as asserted against each of them. Pursuant to General Business Law § 691 (1), a person who offers or sells a franchise in violation of specified sections of the Franchise Sales Act "is liable to the person purchasing the franchise for damages" (*see Tyszka v Make & Take Holding, LLC*, 72 AD3d 1620, 1621 [2010]). However, an action for such damages must be commenced within three years after the act or transaction constituting the violation (*see* General Business Law § 691 [4]). Here, since the complaint alleged that the plaintiffs purchased their distribution route in 2004, the causes of action alleging violations of the Franchise Sales Act were time-barred.

The Supreme Court erred in granting dismissal of the seventh through tenth causes of action on the ground that Savasta was not an employee of the defendants. "[T]he critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the

purported employer over the results produced or the means used to achieve the results” (*Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). “Where the record shows more than incidental control, . . . an issue of fact arises as to whether there is an employer-employee relationship” (*Velasquez v Sunstone Red Oak, LLC*, 213 AD3d 883, 884 [2023]). Here, the complaint alleged that the defendants exerted more than incidental control over the results produced and the means employed to achieve those results, including setting rules for work hours, setting prices, dictating marketing campaigns, and enforcing cosmetic standards (see *Matter of Jani-King of N.Y., Inc. [Commissioner of Labor]*, 214 AD3d 1088, 1090-1091 [2023]). Accordingly, the Supreme Court should have denied those branches of the defendants’ separate motions which were to dismiss the seventh through tenth causes of action insofar as asserted against each of them.

Contrary to the plaintiffs’ contention, the complaint failed to allege an independent tort sufficient to warrant punitive damages (see *Michael Davis Constr., Inc. v 129 Parsonage Lane, LLC*, 194 AD3d 805, 808 [2021]). Brathwaite Nelson, J.P., Christopher, Wan and Golia, JJ., concur.

52 Ori Samuel, Respondent, v Petainer et al., Respondents, and GT’s Living Foods, LLC, Appellant. [250 NYS3d 214]—

Workers’ Compensation—Exclusiveness of Remedy—Special Employment Relationship—Retained for Payroll and Workers’ Compensation

Workers’ Compensation—Third-Party Action—Grave Injury—Injuries Did Not Fit within Meaning of Grave Injury

In an action to recover damages for personal injuries, the defendant GT’s Living Foods, LLC, appeals from an order of the Supreme Court, Kings County (Anne J. Swern, J.), dated March 28, 2024. The order, insofar as appealed from, denied that defendant’s motion for summary judgment dismissing the amended complaint and all cross-claims insofar as asserted against it.

Ordered that the order is modified, on the law, by deleting the provision thereof denying those branches of the motion of the defendant GT’s Living Foods, LLC, which were for summary judgment dismissing the amended complaint and all cross-claims for contribution and common-law indemnification insofar as asserted against it, and substituting therefor a provision granting those branches of the motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs payable by the plaintiff.

In October 2019, the plaintiff allegedly was injured when a

plastic keg containing kombucha exploded at a storage facility owned by the defendant SG Storage Management, LLC, doing business as Gotham Mini Storage (hereinafter Gotham), and leased by the defendant GT's Living Foods, LLC (hereinafter GTLF). At his deposition, the plaintiff testified that in mid-2018, he was hired by GTLF as a "brand ambassador" after interviewing with members of the GTLF team. After the plaintiff was hired, he was trained by employees of GTLF, and given work assignments and instructions on how to conduct his work by GTLF. At the time of the accident, the plaintiff was directed to remove items from the storage facility by his supervisors at GTLF so those items could be used at an event where the plaintiff would work as a brand ambassador representing GTLF kombucha products.

In an agreement entitled "Employer of Record Payrolling Managed Services Agreement," GTLF contracted with Atrium Payroll Services, LLC (hereinafter Atrium), to serve as the "employer of record" on behalf of GTLF with respect to certain "Referred Associates" of GTLF, including the plaintiff. Under this agreement, Atrium agreed to provide certain services to GTLF, including the calculation and payment of wages, the management of work-related claims, and the payment of Workers' Compensation benefits. The agreement also required GTLF to pay Atrium for all wages paid to the Referred Associates. Pursuant to the agreement, in July 2019, the plaintiff became an employee of Atrium. However, from July 2019 until his accident in October 2019, the plaintiff received no instruction from Atrium as to his work assignments or the manner in which his work should be performed. Instead, he continued to receive instruction from his supervisors at GTLF.

In May 2020, the plaintiff received a notice of decision from the Workers' Compensation Board, which determined that Atrium was required to pay certain awards to the plaintiff in connection with his accident.

In June 2020, the plaintiff commenced this action against the defendants Petainer and Petainer Manufacturing USA, Inc. (hereinafter together the Petainer defendants), and Gotham to recover damages for the injuries he allegedly sustained in connection with the accident. In an amended complaint dated October 15, 2020, the plaintiff added GTLF and the defendant G3 Enterprises, Inc. (hereinafter G3), as defendants. Thereafter, GTLF moved for summary judgment dismissing the amended complaint and all cross-claims insofar as asserted against it. The plaintiff, Gotham, the Petainer defendants, and G3 separately opposed the motion. By order

dated March 28, 2024, the Supreme Court, among other things, denied GTLF's motion. GTLF appeals.

For purposes of the Workers' Compensation Law, a person may be deemed to have more than one employer—a general employer and a special employer (see *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]; *Pena v Automatic Data Processing, Inc.*, 105 AD3d 924, 924-925 [2013]; *Kramer v NAB Constr. Corp.*, 250 AD2d 818, 818-819 [1998]). “The receipt of Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer” (*Pena v Automatic Data Processing, Inc.*, 105 AD3d at 924; see *Hofweber v Soros*, 57 AD3d 848, 849 [2008]).

“In determining whether a special employment relationship exists, ‘who controls and directs the manner, details and ultimate result of the employee’s work’ is a ‘significant and weighty feature,’ but is not determinative of the issue” (*Pena v Automatic Data Processing, Inc.*, 105 AD3d at 924-925, quoting *Thompson v Grumman Aerospace Corp.*, 78 NY2d at 558; see *Hofweber v Soros*, 57 AD3d at 849). Indeed, “[m]any factors are to be considered when deciding whether such a special employment relationship exists and not one factor is decisive” (*Kramer v NAB Constr. Corp.*, 250 AD2d at 819). Other principal factors to be considered include “who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer’s or the general employer’s business” (*Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 662 [2005]; see *Pena v Automatic Data Processing, Inc.*, 105 AD3d at 925; *Hofweber v Soros*, 57 AD3d at 849). General employment will be presumed to continue unless there is a “clear demonstration of surrender of control by the general employer and assumption of control by the special employer” (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557; see *Pena v Automatic Data Processing, Inc.*, 105 AD3d at 925; *Matter of Rosato v Thunderbird Constr. Co.*, 299 AD2d 670, 671 [2002]).

Here, in addition to a transcript of the plaintiff’s deposition testimony and a copy of the agreement between GTLF and Atrium, GTLF submitted an affidavit of its CEO, who averred, among other things, that after GTLF retained Atrium for “certain aspects of [the] plaintiff’s employment, including payroll and Workers’ Compensation insurance . . . [GTLF] maintained the same supervision and control of the plaintiff regarding his duties as a” brand ambassador. Based upon this

evidence, GTLF established, *prima facie*, that GTLF was the plaintiff's special employer (*see Martinez v Fifty Two W. Seventy Seventh St. Corp.*, 39 AD3d 503, 504 [2007]). In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of GTLF's motion which was for summary judgment dismissing the amended complaint insofar as asserted against it.

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]; *see Workers' Compensation Law* § 11; *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 1013 [2019]).

Here, on its motion, GTLF established its *prima facie* entitlement to judgment as a matter of law dismissing all cross-claims for contribution and common-law indemnification insofar as asserted against it by submitting the plaintiff's bill of particulars specifying the nature of his physical injuries, none of which constituted a grave injury within the meaning of Workers' Compensation Law § 11 (*see Skrok v Grand Loft Corp.*, 218 AD3d 702, 705 [2023]; *Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [2012]; *Marshall v Arias*, 12 AD3d 423, 423 [2004]). The transcript of the plaintiff's deposition testimony, which GTLF also submitted, did not detail a grave injury. The parties opposing GTLF's motion failed to raise a triable issue of fact in opposition (*see Marshall v Arias*, 12 AD3d at 423-424). Accordingly, the Supreme Court should have granted those branches of GTLF's motion which were for summary judgment dismissing all cross-claims for contribution and common-law indemnification insofar as asserted against it.

The parties' remaining contentions are without merit. Iannacci, J.P., Christopher, Wan and McCormack, JJ., concur.

53 Mauricio Sanchez, Appellant, v Uber Technologies, Inc., et al., Defendants, and Jose Chimborazo, Respondent. [251 NYS3d 739]—

Affidavits—Affidavit by Attorney—Affidavit of Good Faith—Compliance with Requirements

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated June 28, 2024. The order denied the plaintiff's motion pursuant to CPLR 3126 to strike the answer of the defendant Jose Chimborazo for failure to appear for a deposition or, in the alternative, to compel that de-

fendant to appear for a deposition, without prejudice to renewal upon the submission of an affirmation of good faith in full compliance with 22 NYCRR 202.7.

Ordered that the order is affirmed, with costs.

In October 2020, the plaintiff, Mauricio Sanchez, commenced this action against the defendant Jose Chimborazo (hereinafter the defendant), among others, to recover damages for personal injuries he allegedly sustained on September 9, 2018, in a motor vehicle accident. The defendant interposed an answer.

The Supreme Court issued a preliminary conference order dated June 29, 2021, directing, *inter alia*, that all depositions must be completed prior to a compliance conference, which was to be held on January 12, 2022.

A compliance conference order dated February 25, 2022, was issued by the Supreme Court, upon the default of all parties. The compliance conference order, among other things, directed that the plaintiff's deposition must be completed on or before September 8, 2022, and all remaining depositions must be completed on or before December 7, 2022.

The plaintiff's deposition was held on January 4, 2023, and the defendant's deposition was scheduled for January 17, 2023. On January 16, 2023, the plaintiff moved pursuant to CPLR 3126 to strike the defendant's answer for failure to appear for a deposition or, in the alternative, to compel the defendant to appear for a deposition. In an order dated February 10, 2023, the Supreme Court "denied [the plaintiff's motion] without prejudice and with leave to renew upon full compliance with 22 NYCRR 202.7 (c)."

In March 2024, the plaintiff moved to extend his time to file a note of issue. In an order dated April 30, 2024, the Supreme Court granted the plaintiff's motion without opposition, and directed the "Defendants to appear for [examination before trial] as scheduled on May 16, 2024." The court further directed that "[f]ailure to comply shall result in sanctions pursuant to CPLR 3126 upon further motion."

In May 2024, the plaintiff moved, for a second time, pursuant to CPLR 3126 to strike the defendant's answer for failure to appear for a deposition or, in the alternative, to compel the defendant to appear for a deposition. In an order dated June 28, 2024, the Supreme Court "denied [the plaintiff's motion] without prejudice to a motion and Affirmation of Good Faith made in full accordance with [22] NYCRR 202.7." The plaintiff appeals.

"All discovery motions must include 'an affirmation that

counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion’ ” (*Bayview Loan Servicing, LLC v Evanson*, 230 AD3d 1091, 1092 [2024], quoting 22 NYCRR 202.7 [a]). “The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held” (22 NYCRR 202.7 [c]; see *Sanchez v St. John’s Univ.*, 224 AD3d 859, 860 [2024]). “Failure to provide an affirmation of good faith which substantively complies with 22 NYCRR 202.7 (c) warrants denial of the motion” (*Bayview Loan Servicing, LLC v Evanson*, 230 AD3d at 1092 [internal quotation marks omitted]).

Here, the plaintiff failed, inter alia, to identify the names of the examination before trial clerks and the attorneys involved in the communications (see *Steele v Samaritan Found., Inc.*, 208 AD3d 1265, 1267 [2022]; *Bronstein v Charm City Hous., LLC*, 175 AD3d 454, 455 [2019]), nor did the plaintiff annex certain emails to the defendant to his motion papers (see *Adler v Oxford Health Plans [NY], Inc.*, 216 AD3d 710, 712 [2023]; *Matter of Cheryl LaBella Hoppenstein 2005 Trust*, 186 AD3d 1230, 1233 [2020]). Under these circumstances, the Supreme Court properly denied the plaintiff’s motion based on his failure to substantively comply with the requirements of 22 NYCRR 202.7 (see *Bayview Loan Servicing, LLC v Evanson*, 230 AD3d at 1092; *Steele v Samaritan Found., Inc.*, 208 AD3d at 1267).

In light of our determination, the plaintiff’s remaining contention has been rendered academic. Connolly, J.P., Christopher, Voutsinas and Hom, JJ., concur.

54 Santander Bank, N.A., Respondent, v Chef’s Orchid-The Grille, Inc., et al., Appellants. [252 NYS3d 612]—

Process—Service of Process—Nail and Mail Service—Three Attempts at Personal Service

Pleading—Amendment—Interposed Amended Answer—Failure to Obtain Leave of Court or Stipulation

Bills, Notes and Checks—Promissory Note—Notice Regarding Loan’s Upcoming Maturity—Emailed Notice

In an action, inter alia, to recover on a promissory note and a personal guaranty, the defendants appeal from a judgment of the Supreme Court, Queens County (Joseph J. Esposito, J.), entered August 30, 2023. The judgment, upon an order of the same court entered July 14, 2023, among other things, granting that branch of the plaintiff’s motion which was for summary

judgment on the complaint, is in favor of the plaintiff and against the defendants in the total sum of \$167,764.70.

Ordered that the judgment is affirmed, with costs.

In March 2019, the defendant Chef's Orchid-The Grille, Inc. (hereinafter the borrower), executed a promissory note in favor of the plaintiff. Pursuant to the terms of the promissory note, the plaintiff loaned the principal sum of \$145,000 in exchange for the borrower's promise to repay that sum with interest on or before March 16, 2020. Simultaneously, the defendant Otis Stone executed a commercial guaranty, personally guaranteeing all sums due under the promissory note.

In August 2022, the plaintiff commenced this action, inter alia, to recover on the promissory note and the guaranty, alleging that the defendants defaulted in making payments due under the terms of the promissory note and the guaranty. Subsequently, the plaintiff moved, among other things, for summary judgment on the complaint. The defendants opposed the plaintiff's motion and cross-moved, inter alia, for leave to serve an amended answer and/or, in the alternative, to compel the plaintiff to accept the defendants' amended answer, and pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action. Separately, Stone moved pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction due to improper service. The plaintiff opposed the defendants' cross-motion and Stone's motion. In an order entered July 14, 2023, the Supreme Court, among other things, granted that branch of the plaintiff's motion, denied Stone's motion, and denied those branches of the defendants' cross-motion. Thereafter, the court entered a judgment in favor of the plaintiff and against the defendants in the total sum of \$167,764.70. The defendants appeal.

"'Nail and mail' service pursuant to CPLR 308 (4) may be used only where personal service under CPLR 308 (1) and (2) cannot be made with due diligence" (*Lemberger v Khan*, 18 AD3d 447, 447 [2005]; see *JP Morgan Chase Bank, N.A. v Baldi*, 128 AD3d 777, 777 [2015]). The due diligence requirement, which "refers to the quality of the efforts made to effect personal service" (*Barnes v City of New York*, 70 AD2d 580, 580 [1979] [internal quotation marks omitted]), may be met with "a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times" (*Wells Fargo Bank, N.A. v Enitan*, 200 AD3d 736, 738 [2021] [internal quotation marks omitted]; see *Estate of*

Waterman v Jones, 46 AD3d 63, 66 [2007]). Here, the Supreme Court properly concluded that the three attempts made by the plaintiff's process server to personally serve Stone at his residence satisfied the due diligence requirement and that Stone's conclusory assertions were insufficient to overcome the presumption of valid service created by the process server's affidavit (see *Jackson 50-Lee LP v Rahul Exclusive, Inc.*, 235 AD3d 730, 730-731 [2025]; see also *Rodriguez v 60 Graham, LLC*, 173 AD3d 1095, 1095-1096 [2019]). Accordingly, the court properly denied Stone's motion pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction due to improper service.

"A party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it" (CPLR 3025 [a]). In addition, once that window to amend without leave is closed, "[a] party may amend his or her pleading, or supplement it . . . , at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just" (*id.* § 3025 [b]). "[M]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice" to the opposing party (*Toiny, LLC v Rahim*, 214 AD3d 1023, 1024 [2023]; see *BAC Home Loans Servicing, L.P. v Jackson*, 159 AD3d 861, 863 [2018]). Here, the defendants interposed an amended answer, which asserted new counterclaims and affirmative defenses, including one alleging lack of personal jurisdiction, after the 20-day amendment-as-of-right period and without first obtaining leave of court or a stipulation. Under the circumstances, the Supreme Court providently exercised its discretion in denying that branch of the defendants' cross-motion which was for leave to serve the amended answer and/or, in the alternative, to compel the plaintiff to accept the defendants' amended answer (see *Citimortgage, Inc. v Peralta*, 200 AD3d 755, 755 [2021]; see also *Tavor v Lane Towers Owners, Inc.*, 197 AD3d 584, 586 [2021]).

In an action to enforce a promissory note and guaranty, a plaintiff typically establishes its prima facie entitlement to judgment as a matter of law by submitting "evidence of the underlying note containing an unequivocal and unconditional obligation to repay, a guaranty, and the failure of the defendant to make payment in accordance with the terms of those instruments" (*Maksoud v Iskhakov*, 187 AD3d 1167, 1168 [2020]; see *Lira Holdings, LLC v IGE Group Corp.*, 235 AD3d 628, 629 [2025]).

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law by demonstrating the borrower's execution of the promissory note, Stone's execution of the guaranty, the borrower's receipt of the plaintiff's money, an unequivocal requirement of repayment by the maturity date unless timely notice of nonrenewal was given, and the defendants' default after the plaintiff properly notified the borrower of the loan's upcoming maturity (see *Lira Holdings, LLC v IGE Group Corp.*, 235 AD3d at 629; see also *Maksoud v Iskhakov*, 187 AD3d at 1168). In opposition, the defendants failed to raise a triable issue of fact. Their contention that the plaintiff provided insufficient or improper notice is unavailing, since neither the promissory note nor the guaranty requires the specific form of notice the defendants contend was necessary, and no evidence in the record rebuts the plaintiff's showing that an emailed "Notice of Upcoming Maturity" was sufficient. Moreover, the defendants' contention that the maturity date was orally extended beyond March 16, 2022—up to March 2023—is barred by General Obligations Law § 5-701, absent a signed writing. The defendants' continued payments, standing alone, do not constitute "unequivocally referable" part performance that would create an exception to the requirements of the statute of frauds, as the promissory note explicitly allows the plaintiff to term-out the principal upon default, rendering such payments consistent with a standard post-default arrangement rather than an actual oral extension (*Parker v Navarra*, 102 AD3d 935, 936 [2013]; see *Hannigan v Hannigan*, 104 AD3d 732, 736 [2013]). Accordingly, the Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment on the complaint and denied that branch of the defendants' cross-motion which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action. Genovesi, J.P., Dowling, Wan and Taylor, JJ., concur.

55 Debra Seltzer, Respondent, v Charles Altman, Appellant.
[248 NYS3d 327]—

Appeal—Matters Appealable—Judgment Entered

In an action for a divorce and ancillary relief, the defendant appeals from an order of the Supreme Court, Westchester County (Nancy Quinn Koba, J.), dated March 11, 2020. The order, insofar as appealed from, granted that branch of the plaintiff's cross-motion which was pursuant to CPLR 3126 for discovery sanctions to the extent of directing the defendant to pay the plaintiff's counsel the sum of \$2,500 and conditionally precluding the defendant from offering certain evidence at trial

unless he complied with certain discovery demands on or before March 24, 2020.

Ordered that the appeal is dismissed, without costs or disbursements.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment of divorce in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). Brathwaite Nelson, J.P., Voutsinas, Taylor and Golia, JJ., concur.

56 Debra Seltzer, Respondent, v Charles Altman, Appellant. Fredman, Baken & Novenster, LLP, Nonparty Appellant. [252 NYS3d 622]—

Appeal—Matters Reviewable—Issues of Equitable Distribution Made upon Default

Appeal—Matters Reviewable—Appeal from Judgment of Divorce—Summary Judgment

Appeal—Matters Reviewable—Appendix Does Not Contain Relevant Portions of Record

In an action for a divorce and ancillary relief, the defendant appeals, and nonparty Fredman, Baken & Novenster, LLP, separately appeals, from a judgment of divorce of the Supreme Court, Westchester County (Keri A. Fiore, J.), dated July 8, 2024. The judgment of divorce, insofar as appealed from by the defendant, upon the defendant's default in appearing at the trial on the issue of equitable distribution, and upon an inquest on that issue, awarded the plaintiff use and occupancy of the marital residence as her sole and separate property and equitably distributed the marital property. The appeal by nonparty Fredman, Baken & Novenster, LLP, was deemed dismissed pursuant to 22 NYCRR 1250.10 (a).

Ordered that the appeal by the defendant from the judgment of divorce is dismissed, except insofar as it brings up for review the Supreme Court's determination that the defendant defaulted in appearing for trial (*see* CPLR 5511); and it is further,

Ordered that the judgment of divorce is affirmed insofar as reviewed on the appeal by the defendant; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

No appeal lies from a judgment entered upon the default of the appealing party (*see* CPLR 5511; *Merlino v Merlino*, 171 AD3d 911, 912 [2019]). However, an appeal from such a judgment brings up for review "those matters which were the subject of contest before the Supreme Court" (*Merlino v Merlino*, 171 AD3d at 913 [internal quotation marks omitted]; *see Bottini v Bottini*, 164 AD3d 556, 558 [2018]).

Here, the Supreme Court properly found that the defendant's disruptive behavior in the courtroom was sufficient to constitute a default and proceeded to an inquest on the issue of equitable distribution in his absence (*see Matter of Bartosz B. [Andrzej B.]*, 187 AD3d 894, 896-897 [2020]; *Sarlo-Pinzur v Pinzur*, 59 AD3d 607 [2009]; *Matter of McConnell v Montagriff*, 233 AD2d 512, 513 [1996]). Since the issues of equitable distribution were made upon the defendant's default, they are not subject to direct appellate review (*see* CPLR 5511; *Matter of Bartosz B. [Andrzej B.]*, 187 AD3d at 897; *Merlino v Merlino*, 171 AD3d 911 [2019]; *Matter of McConnell v Montagriff*, 233 AD2d at 513).

The defendant seeks review of so much of an order dated July 17, 2023, as denied those branches of his motion which were for summary judgment on certain financial issues. That portion of that order cannot be reviewed on the appeal from the judgment of divorce, as the denial of those branches of the motion did not necessarily affect the judgment of divorce (*see* CPLR 5501 [a] [1]; *Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025-1026 [2022]).

The defendant's contentions regarding so much of an order dated March 11, 2020, as granted a certain branch of the plaintiff's cross-motion cannot be reviewed, as the appendix prepared by the defendant does not contain the relevant portions of the record to enable this Court to render an informed decision on the merits of that branch of the cross-motion (*see* CPLR 5528 [a] [5]; 22 NYCRR 1250.7 [d] [1]; *Connolly v Nina*, 239 AD3d 701 [2025]; *Ravasio v La Pata*, 216 AD3d 686, 686-687 [2023]). Brathwaite Nelson, J.P., Voutsinas, Taylor and Golia, JJ., concur.

57 Sahera Shah, Respondent, v Mubashar Shah, Appellant.
[250 NYS3d 644]—

Husband and Wife and Other Domestic Relationships—Support—Maintenance—Imputation of Income

Husband and Wife and Other Domestic Relationships—Equitable Distribution—Marital Debt—Loans Taken out during Marriage

In an action for a divorce and ancillary relief, the defendant appeals from a judgment of divorce of the Supreme Court, Nassau County (Jeffrey A. Goodstein, J.), entered September 30, 2022. The judgment of divorce, insofar as appealed from, upon a decision of the same court (Erica Prager, J.), dated November 23, 2021, made after a nonjury trial, (1) awarded the plaintiff maintenance in the sum of \$452.13 per month for a period of three years, and (2) failed to award the defendant a credit for certain loans allegedly made to the defendant during the marriage.

Ordered that the judgment of divorce is affirmed insofar as appealed from, with costs.

The parties were married in November 2002 and have four children together. In January 2019, the plaintiff commenced this action for a divorce and ancillary relief. After a nonjury trial, in a judgment of divorce entered September 30, 2022, upon a decision dated November 23, 2021, the Supreme Court, *inter alia*, awarded the plaintiff maintenance in the sum of \$452.13 per month for a period of three years and failed to award the defendant a credit for certain loans allegedly made to the defendant during the marriage. The defendant appeals.

“The overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become self-supporting” (*Diliberto v Diliberto*, 230 AD3d 637, 640 [2024], quoting *Sansone v Sansone*, 144 AD3d 885, 886 [2016]). “The amount and duration of spousal maintenance is an issue generally committed to the sound discretion of the trial court and each case is to be resolved upon its own unique facts and circumstances” (*Varnit v Varnit*, 233 AD3d 917, 921 [2024] [internal quotation marks omitted], quoting *Bari v Bari*, 200 AD3d 835, 837 [2021]). “As this action was commenced after January 23, 2016, it is governed by amendments to the calculation of postdivorce maintenance set forth in part B of section 236 of the Domestic Relations Law (see L 2015, ch 269, § 4)” (*Albano v Albano*, 230 AD3d 723, 725 [2024], quoting *Novick v Novick*, 214 AD3d 995, 997 [2023]).

Here, considering the relevant factors, the award of maintenance to the plaintiff in the sum of \$452.13 per month for a period of three years was a provident exercise of discretion (see Domestic Relations Law § 236 [B] [6] [c], [e] [1]; *Torkin v Susac*, 236 AD3d 1082 [2025]; *Novick v Novick*, 214 AD3d at 996). Contrary to the defendant’s contention, the Supreme Court providently exercised its discretion in imputing income to the plaintiff in the sum of only \$32,500 for purposes of calculating the defendant’s maintenance obligation, notwithstanding that the defendant had consented to imputing income to the plaintiff in that amount solely for purposes of calculating the defendant’s child support obligation (see *Bishop v Bishop*, 230 AD3d 1212, 1213 [2024]; *Tuchman v Tuchman*, 201 AD3d 986, 990 [2022]; *Sufia v Khalique*, 189 AD3d 1499, 1502 [2020]).

Moreover, the Supreme Court providently exercised its discretion in declining to treat certain loans totaling \$75,000 allegedly made to the defendant during the marriage as marital debt. “[E]xpenses incurred prior to the commencement of

an action for a divorce are marital debt to be equally shared by the parties upon an offer of proof that they represent marital expenses' ” (*Bari v Bari*, 200 AD3d at 839, quoting *Epstein v Messner*, 73 AD3d 843, 845 [2010]; see *Lubrano v Lubrano*, 122 AD3d 807, 808-809 [2014]). “ ‘However, the court has broad discretion in allocating the assets and debts of the parties to a matrimonial action, and liability for the payment of marital debts need not be equally apportioned but may be distributed in accordance with the [equitable distribution] factors set forth in Domestic Relations Law § 236 (B) (5) (d)’ ” (*Bari v Bari*, 200 AD3d at 839 [internal quotation marks omitted], quoting *Minervini v Minervini*, 152 AD3d 666, 668 [2017]). “ ‘[W]here, as here, a determination as to equitable distribution has been made after a nonjury trial, the trial court’s assessment of the credibility of witnesses and the proffered items of evidence is afforded great weight on appeal’ ” (*Mahoney v Mahoney*, 197 AD3d 638, 640 [2021] [internal quotation marks omitted], quoting *Sufia v Khalique*, 189 AD3d at 1500). Here, the court properly found that the defendant failed to provide sufficient evidence demonstrating that the subject loans constituted marital debt (see *Lubrano v Lubrano*, 122 AD3d at 808-809; *Milnes v Milnes*, 50 AD3d 750, 751 [2008]). Chambers, J.P., Wooten, Dowling and Landicino, JJ., concur.

58 John Shakir, Appellant, v City of New York et al., Respondents, et al., Defendant. [251 NYS3d 746]—

Motor Vehicles—Injuries to Bicyclist—Sole Proximate Cause—Entered Intersection without Yielding Right-of-Way

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Chereé A. Buggs, J.), entered May 13, 2024. The order, insofar as appealed from, granted those branches of the defendants’ motion which were for summary judgment dismissing the complaint insofar as asserted against the defendants City of New York and Timothy Hoehmann.

Ordered that the order is affirmed insofar as appealed from, with costs.

In September 2017, the plaintiff allegedly sustained injuries while crossing at an intersection on his bicycle when he collided with a marked police vehicle operated by the defendant Timothy Hoehmann. The plaintiff commenced this action against the defendant City of New York and Hoehmann, and another defendant, to recover damages for personal injuries. The defendants moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against the City

and Hoehmann. In an order entered May 13, 2024, the Supreme Court, among other things, granted those branches of the motion. The plaintiff appeals.

“‘A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident’ ” (*A.B. v Waring*, 219 AD3d 1291, 1292 [2023], quoting *Boulos v Lerner-Harrington*, 124 AD3d 709, 709 [2015]). Drivers with the right-of-way are entitled to assume that other drivers will obey the traffic laws, but bear a duty to avoid colliding with other vehicles (see *Nesbitt v Gallant*, 149 AD3d 763, 763-764 [2017]; *Twizer v Lavi*, 140 AD3d 736, 737 [2016]). However, “[a] driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision” (*A.B. v Waring*, 219 AD3d at 1292 [internal quotation marks omitted]; see *Jeong Sook Lee-Son v Doe*, 170 AD3d 973, 974 [2019]).

“Vehicle and Traffic Law § 1143 provides that the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed” (*Woodham v New York City Transp. Auth.*, 231 AD3d 1096, 1097 [2024] [internal quotation marks omitted]). Vehicle and Traffic Law § 1231 provides that every person riding a bicycle upon a roadway “shall be subject to all of the duties applicable to the driver of a vehicle by this title” (see *A.B. v Waring*, 219 AD3d at 1292).

Here, the defendants established, prima facie, that the plaintiff entered the intersection from a sidewalk without yielding the right-of-way to Hoehmann’s vehicle and that the plaintiff’s negligence was the sole proximate cause of the accident. The defendants’ submissions, which included, inter alia, a transcript of the plaintiff’s testimony at a hearing pursuant to General Municipal Law § 50-h and transcripts of the deposition testimony of Hoehmann and nonparty witnesses, established that Hoehmann was driving at a rate of 20 to 25 miles per hour, that Hoehmann entered the intersection with a green light, that Hoehmann maintained a proper lookout as he entered the intersection, and that Hoehmann had only seconds to react before the plaintiff collided with the driver’s side of Hoehmann’s vehicle. Thus, the defendants demonstrated that Hoehmann was not negligent for failing to avoid the collision with the plaintiff (see *A.B. v Waring*, 219 AD3d at 1292; *Dominguez v Algieri*, 208 AD3d 753, 755 [2022]). In opposition, the plaintiff failed to raise a triable issue of fact.

The plaintiff's remaining contentions are without merit. Brathwaite Nelson, J.P., Dowling, Taylor and Hom, JJ., concur.

59 Richard Shaw et al., Appellants, v Town of Brookhaven, Respondent. [251 NYS3d 309]—

Municipal Corporations—Tort Liability—Chain Across Entrance to Walkway—Open and Obvious Condition

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Suffolk County (James F. Quinn, J.), dated August 6, 2024. The order granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

In November 2020, the plaintiff Richard Shaw (hereinafter the injured plaintiff) allegedly was injured at a park owned by the defendant, Town of Brookhaven. The injured plaintiff was riding a "Onewheel," a motorized skateboard with a single wheel, when he struck a metal chain suspended between two wooden poles, which blocked vehicular access from a parking lot to a concrete walkway.

The injured plaintiff and his spouse, suing derivatively, commenced this action against the Town to recover damages for personal injuries. The Town moved for summary judgment dismissing the complaint on the ground, inter alia, that the chain's presence was open and obvious and not inherently dangerous. In an order dated August 6, 2024, the Supreme Court granted the Town's motion. The plaintiffs appeal.

"A landowner has a duty to maintain its premises in a reasonably safe condition" (*Marino v Shop-Rite Supermarkets, Inc.*, 230 AD3d 668, 668 [2024], quoting *Brett v AJ 1086 Assoc., LLC*, 189 AD3d 1153, 1154 [2020]; see *Torres v La Borinquena HDFC, Inc.*, 229 AD3d 830, 831 [2024]). "However, [a] property owner has no duty to protect or warn against conditions that are open and obvious and not inherently dangerous" (*Marino v Shop-Rite Supermarkets, Inc.*, 230 AD3d at 668 [internal quotation marks omitted]; see *Torres v La Borinquena HDFC, Inc.*, 229 AD3d at 831). "A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident" (*Butler v NYU Winthrop Hosp.*, 225 AD3d 658, 659 [2024] [internal quotation marks omitted]; see *Torres v La Borinquena HDFC, Inc.*, 229 AD3d at 831). "The determination of [w]hether an asserted hazard is open and obvious cannot be divorced from the

surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case” (*Brett v AJ 1086 Assoc., LLC*, 189 AD3d at 1154 [internal quotation marks omitted]; see *Marino v Shop-Rite Supermarkets, Inc.*, 230 AD3d at 668; *Torres v La Borinquena HDFC, Inc.*, 229 AD3d at 831).

Here, the Town submitted sufficient evidence to establish, *prima facie*, that the placement of the chain across the entrance to the concrete walkway was open and obvious and not inherently dangerous (see *Hallahan v City of New York*, 208 AD3d 459, 460 [2022]; *Morrisette v Kismat Indian Rest., Inc.*, 196 AD3d 476, 476 [2021]; *Sneed v Fulton Park Four Assoc., L.P.*, 192 AD3d 1058, 1059 [2021]). However, in opposition, the plaintiffs raised a triable issue of fact by proffering a report from an expert demonstrating that the chain was “visually inconspicuous” because it blended with the visual background and was obscured by “a prominent shadow pattern” (see *Cardillo v 3707, LLC*, 236 AD3d 730, 732 [2025]; *Masker v Smith*, 188 AD3d 867, 869 [2020]; *Roros v Oliva*, 54 AD3d 398 [2008]). The plaintiffs’ expert also cited the deposition testimony of the Town’s employees who conceded that although park employees had placed yellow caution tabs on the chain to make it more visible, they had to be replaced frequently because “kids pull[ed] them off.” Accordingly, the Supreme Court should have denied the Town’s motion for summary judgment dismissing the complaint. Brathwaite Nelson, J.P., Ford, Voutsinas and Love, JJ., concur.

60 Levern T. Steward, Plaintiff, v Brooklyn Pier 1 Residential Owner, LP, et al., Defendants/Third-Party Plaintiffs-Respondents, and Construction Realty Safety Group, Respondents. Gypsum New York Sale Corp., Doing Business as Poured Floors of NY & NJ, Third-Party Defendant-Respondent. Utica Mutual Assurance Company, Nonparty Appellant. (And Another Third-Party Action.) [252 NYS3d 201]—

Limitation of Actions—Three-Year Statute of Limitations—Relation-Back Doctrine—Same Occurrence and Same Questions of Liability

Parties—Intervention—Compliance with CPLR 1014—Ultimately Attached Proposed Complaint to Motion Papers

Insurance—Subrogation Rights of Insurer—Common Questions of Law and Fact—Proposed Complaint Mirrors Complaint within Suit

In an action to recover damages for personal injuries, nonparty Utica Mutual Assurance Company appeals from an order of the Supreme Court, Kings County (Carl J. Landicino, J.), dated August 1, 2023. The order denied the motion of

nonparty Utica Mutual Assurance Company for leave to intervene in the action.

Ordered that the order is reversed, on the law and in the exercise of discretion, with one bill of costs payable by the respondents, and the motion of nonparty Utica Mutual Assurance Company for leave to intervene in the action is granted.

The plaintiff was injured when he was hit by a vehicle at a construction site where he was working. In 2019, the plaintiff commenced the instant action for personal injuries against various defendants who owned the property or were involved in the construction project. In 2020, following an arbitration proceeding, the plaintiff was awarded \$775,000 in supplementary uninsured/underinsured motorists benefits from nonparty Utica Mutual Assurance Company (hereinafter Utica) based upon coverage from an insurance policy held by his employer. In April 2022, Utica moved for leave to intervene in the action for the purpose of asserting a cause of action for subrogation. The Supreme Court denied the motion. Utica appeals.

Contrary to the contentions of the defendants third-party plaintiffs and Gypsum New York Sales Corp., Utica's subrogation cause of action was timely under the relation-back doctrine. An action to recover damages for personal injuries is generally subject to a three-year statute of limitations (*see* CPLR 214 [5]; *Ruiz v Sanchez*, 219 AD3d 1363, 1363 [2023]). However, the relation-back doctrine, which is codified in CPLR 203 (c), permits a party to interpose a claim or cause of action that would otherwise be time-barred. "[A] party may be permitted to intervene and to relate its claim back if the proposed intervenor's claim and that of the original [plaintiff] are based on the same transaction or occurrence. Also, the proposed intervenor and the original [plaintiff] must be so closely related that the original [plaintiff's] claim would have given the [defendant] notice of the proposed intervenor's specific claim so that the imposition of the additional claim would not prejudice the [defendant]" (*Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono*, 91 NY2d 716, 721 [1998] ["we discern no distinction, for relation back purposes, between a proceeding commenced under (CPLR) article 78 and an action"]). Here, Utica's subrogation cause of action is not time-barred, as it merely seeks reimbursement for coverage tendered for the plaintiff's personal injuries. This cause of action arises out of the same occurrence that gave rise to the plaintiff's causes of action and includes the same questions of liability related to the accident. It is, therefore, similar enough to the plaintiff's causes of action that the defendants were thereby placed on

notice of the insurer's claim (*see McHale v Anthony*, 41 AD3d 265, 266 [2007]).

A person is permitted to intervene in an action as of right when, among other things, “the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment” (*Phoenix Life Ins. Co. v Jacob P Ilt A*, 177 AD3d 1008, 1008 [2019], quoting CPLR 1012 [a] [3]). A person is also permitted to intervene in an action as of right pursuant to CPLR 1012, among other circumstances, “when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment” (*Atlantic Ave. Capital, LLC v 980 Atl. Holdings, LLC*, 231 AD3d 692, 694 [2024] [internal quotation marks omitted]; *see* CPLR 1012 [a] [2]; *Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875, 875 [2015]). “[T]he court, in its discretion, may permit a person to intervene, among other things, ‘when the person's claim or defense and the main action have a common question of law or fact’” (*Al-Rowmeim v Alazwear*, 233 AD3d 640, 641-642 [2024] [internal quotation marks omitted], quoting *Matter of Sclafani Petroleum, Inc.*, 173 AD3d 1042, 1043 [2019]; *see* CPLR 1013). “Whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted ‘where the intervenor has a real and substantial interest in the outcome of the proceedings’” (*Global Team Vernon, LLC v Vernon Realty Holding, LLC*, 93 AD3d 819, 820 [2012], quoting *Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676, 677 [2010]; *see Al-Rowmeim v Alazwear*, 233 AD3d at 641-642).

“‘In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party’” (*Deutsche Bank Natl. Trust Co. v Sharrow*, 232 AD3d 767, 769 [2024], quoting CPLR 1013; *see Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d at 876). However, a motion to intervene “shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought” (CPLR 1014; *see Matter of Merestead*, 188 AD3d 690, 691 [2020]; *Phoenix Life Ins. Co. v Jacob P Ilt A*, 177 AD3d at 1008).

Here, under the circumstances of this case, the Supreme Court improvidently exercised its discretion by denying Utica's motion for leave to intervene in the action. As an initial matter, although Utica failed to annex a proposed complaint to its initial motion papers, it ultimately complied with CPLR 1014

by annexing the proposed complaint to its affirmation in reply (see generally *id.* § 2001; *Tenenbaum v Ziv*, 231 AD3d 1181, 1182 [2024]; cf. *Landa v Poloncarz*, 215 AD3d 739, 741 [2023]). Further, here, Utica seeks leave to intervene for the purpose of asserting a cause of action for subrogation.

“Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss’” (*Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 206 [2004], quoting *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995]). “Subrogation is an equitable doctrine that allows an insurer to ‘stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse’” (*Utica Mut. Ins. Co. v Brooklyn Navy Yard Dev. Corp.*, 52 AD3d 821, 822 [2008] [internal quotation marks omitted], quoting *North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]). “Thus, the insurer can only recover if the insured could have recovered and its claim as subrogee is subject to whatever defenses the third party might have asserted against its insured” (*Humbach v Goldstein*, 229 AD2d 64, 67 [1997] [internal quotation marks omitted]; *Federal Ins. Co. v Arthur Andersen & Co.*, 75 NY2d 366, 372 [1990]).

Here, Utica’s cause of action for subrogation has common questions of law and fact with the plaintiff’s causes of action, as Utica concedes that the proposed complaint “mirrors, in all respects, the complaint in the within suit.” By intervention, Utica stands in the shoes of the plaintiff. Utica would be bound by the judgment in this case and, without intervention, its interests are not represented. Further, there would be no prejudice to the defendants, as intervention would not cause delay, a need for additional discovery, or motion practice.

Accordingly, as the subrogation cause of action is timely pursuant to the relation-back doctrine, under the circumstances of this case, the Supreme Court should have granted Utica’s motion for leave to intervene in the action.

The parties’ remaining contentions either are without merit or need not be reached in light of our determination. Iannacci, J.P., Genovesi, Wooten and Love, JJ., concur.

61 Ann K. Troxler, Respondent, v Brian K. Hampton et al., Appellants. [252 NYS3d 634]—

**Disclosure—Demand for Admission—Request to Admit Truck was in Contact with Another Vehicle—Went to Heart of Parties’ Controversy
Motor Vehicles—Collision—Rear-End Collision—Struck Vehicle Stopped at**

Red Light**Motor Vehicles—Collision—Failure to Allege No Truck Owned by Party Contacted Another Vehicle**

In an action to recover damages for personal injuries, the defendants appeal from (1) an order of the Supreme Court, Nassau County (Diccia T. Pineda-Kirwan, J.), entered September 15, 2023, and (2) an order of the same court entered December 18, 2023. The order entered September 15, 2023, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the issue of liability and to deem the response of the defendant Winters Bros. Waste Systems of Long Island, LLC, to the plaintiff's notice to admit a nullity and the facts sought therein to be admitted. The order entered December 18, 2023, insofar as appealed from, denied that branch of the defendants' motion which was for leave to renew their opposition to that branch of the plaintiff's prior motion which was for summary judgment on the issue of liability.

Ordered that the order entered September 15, 2023, is modified, on the law, by deleting the provisions thereof granting those branches of the plaintiff's motion which were for summary judgment on the issue of liability against the defendant Brian K. Hampton and to deem the response of the defendant Winters Bros. Waste Systems of Long Island, LLC, to the third paragraph of the plaintiff's notice to admit a nullity and the facts sought therein to be admitted, and substituting therefor provisions denying those branches of the motion; as so modified, the order entered September 15, 2023, is affirmed insofar as appealed from, without costs or disbursements; and it is further,

Ordered that the appeal from so much of the order entered December 18, 2023, as denied that branch of the defendants' motion which was for leave to renew their opposition to that branch of the plaintiff's prior motion which was for summary judgment on the issue of liability against the defendant Brian K. Hampton is dismissed as academic, without costs or disbursements, in light of our determination on the appeal from the order entered September 15, 2023; and it is further,

Ordered that the order entered December 18, 2023, is affirmed insofar as reviewed, without costs or disbursements.

On June 1, 2022, a garbage truck owned by the defendant Winters Bros. Waste Systems of Long Island, LLC (hereinafter Winters Bros.), allegedly struck the plaintiff's vehicle in the rear at an intersection in Nassau County. The plaintiff thereafter commenced this action against Winters Bros. and John Doe

to recover damages for the injuries she allegedly sustained in the collision. The plaintiff served Winters Bros. a notice to admit, requesting, inter alia, an admission that Brian K. Hampton was operating Winters Bros.'s truck when it contacted another vehicle. Winters Bros. denied this. The plaintiff thereafter amended the complaint to substitute Hampton as a defendant for John Doe. One day after Hampton and Winters Bros. (hereinafter together the defendants) answered the amended complaint, the plaintiff moved, among other things, for summary judgment on the issue of liability and to deem Winters Bros.'s response to the plaintiff's notice to admit a nullity and the facts sought therein to be admitted. The defendants opposed this motion. In an order entered September 15, 2023, the Supreme Court granted those branches of the plaintiff's motion.

The defendants thereafter moved, inter alia, for leave to renew their opposition to that branch of the plaintiff's motion which was for summary judgment on the issue of liability. In an order entered December 18, 2023, the Supreme Court, among other things, denied that branch of the defendants' motion. The defendants appeal from both orders.

Pursuant to CPLR 3123 (a), a party may serve upon another party a written request that it admit to, inter alia, "the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him [or her] upon reasonable inquiry." "A notice to admit which goes to the heart of the matters at issue is improper" (*DeSilva v Rosenberg*, 236 AD2d 508, 508 [1997]; see *Alberto v Jackson*, 118 AD3d 733, 734 [2014]; *Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770, 772 [2011]).

Here, in paragraph three of the plaintiff's notice to admit, the plaintiff requested that Winters Bros. admit that the truck owned by Winters Bros. and operated by Hampton "was in contact with another vehicle" on the date of the accident. Since paragraph three went to the heart of the parties' controversy, it was improper (see *Williams v City of New York*, 125 AD3d 767, 768 [2015]; *Ramcharran v New York Airport Servs., LLC*, 108 AD3d 610, 610-611 [2013]; *DeSilva v Rosenberg*, 236 AD2d at 509). Therefore, the Supreme Court should have denied that branch of the plaintiff's motion which was to deem Winters Bros.'s response to that paragraph a nullity and the facts sought therein to be admitted (see *Williams v City of New York*, 125 AD3d at 768; *Alberto v Jackson*, 118 AD3d at 735).

“‘A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle’” (*Bruce v Takahata*, 219 AD3d 448, 449 [2023], quoting *Nsiah-Ababio v Hunter*, 78 AD3d 672, 672 [2010]; see Vehicle and Traffic Law § 1129 [a]). Thus, “‘a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision’” (*An v Abbate*, 213 AD3d 891, 892 [2023] [alteration omitted], quoting *Garcia v Cotzomi*, 206 AD3d 626, 626 [2022]; see *Newfeld v Midwood Ambulance & Oxygen Serv., Inc.*, 204 AD3d 813, 814 [2022]). However, “[a] motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’” (*Abdenbi v Walgreen Co.*, 197 AD3d 1140, 1140 [2021], quoting *Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010]; see *Schmitz v Pinto*, 220 AD3d 681, 681-682 [2023]).

Here, the plaintiff, through her affidavit and an eyewitness statement, established her prima facie entitlement to summary judgment on the issue of liability by demonstrating that the defendants’ truck struck her vehicle in the rear while her vehicle was stopped at a red light (see *Bruce v Takahata*, 219 AD3d at 449; *Mahmud v Feng Ouyang*, 208 AD3d 861, 862 [2022]; *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, 150 AD3d 754, 755 [2017]). In opposition, Hampton’s assertion that the truck he was operating did not contact any other vehicle directly contradicted the plaintiff’s affidavit and the eyewitness’s statement and raised a triable issue of fact as to Hampton’s liability (see *Schmitz v Pinto*, 220 AD3d at 681-682; *Baab v HP, Inc.*, 211 AD3d 783, 783 [2022]; *Gluck v New York City Tr. Auth.*, 118 AD3d 667, 669 [2014]). However, the defendants failed to raise a triable issue of fact as to Winters Bros.’s liability. Although Hampton asserted that the truck he was operating did not contact any other vehicle, he did not aver that no truck owned by Winters Bros. contacted another vehicle on the day of the alleged accident, and the defendants submitted no other evidence contradicting the plaintiff’s averment that a Winters Bros. truck struck her vehicle in the rear (see Vehicle and Traffic Law § 388 [1]; *Kashyap v Dasilva*, 230 AD3d 747, 749 [2024]; *Dejorge v Metropolitan Foods, Inc.*, 191 AD3d 500, 501 [2021]).

Accordingly, the Supreme Court erred in granting that

branch of the plaintiff's motion which was for summary judgment on the issue of liability against Hampton.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]).

Here, the defendants failed to proffer new facts that would change the Supreme Court's prior determination granting that branch of the plaintiff's motion which was for summary judgment on the issue of liability against Winters Bros. Accordingly, the court properly denied that branch of the defendants' motion which was for leave to renew their opposition to that branch of the plaintiff's prior motion which was for summary judgment on the issue of liability against Winters Bros.

The defendants' remaining contentions either are without merit or have been rendered academic in light of the foregoing. Brathwaite Nelson, J.P., Dowling, Taylor and Hom, JJ., concur.

62 U.S. Bank National Association, Appellant, v Pedro Nunez, Also Known as Pedro A. Nunez, et al., Respondents, et al., Defendants. [252 NYS3d 624]—

Motions and Orders—Timeliness of Motion—Supreme Court Declined to Consider Untimely Opposition Papers

Motions and Orders—Timeliness of Motion—Supreme Court Declined to Consider Untimely Cross-Motion

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Pam Jackman Brown, J.), dated August 30, 2023. The order (1) determined the plaintiff's motion, in effect, pursuant to CPLR 3217 (b) to discontinue the action without prejudice and to cancel and discharge the notice of pendency, (2) granted, as unopposed, the cross-motion of the defendants Pedro Nunez and Milagros Nunez pursuant to CPLR 306-b to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction, and (3) denied, as untimely, the plaintiff's cross-motion, inter alia, to confirm that personal jurisdiction was obtained over those defendants or, in the alternative, pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon those defendants and pursuant to CPLR 308 (5) to direct an alternative method for service of process.

Ordered that the order is modified, on the law and the facts, by deleting the provision thereof determining the plaintiff's motion, in effect, pursuant to CPLR 3217 (b) to discontinue the action without prejudice and to cancel and discharge the notice

of pendency, and substituting therefor a provision deeming the motion withdrawn; as so modified, the order is affirmed, without costs or disbursements.

On May 27, 2022, the plaintiff commenced this mortgage foreclosure action against the defendants Pedro Nunez and Milagros Nunez (hereinafter together the defendants), among others. On or about June 9, 2023, the plaintiff moved, in effect, pursuant to CPLR 3217 (b) to discontinue the action without prejudice and to cancel and discharge the notice of pendency. On or about July 3, 2023, the defendants opposed the plaintiff's motion and cross-moved pursuant to CPLR 306-b to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction. On or about July 17, 2023, the plaintiff filed and served a notice of withdrawal of its motion. Thereafter, by notice of cross-motion dated August 24, 2023, the plaintiff cross-moved, inter alia, to confirm that personal jurisdiction was obtained over the defendants or, in the alternative, pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendants and pursuant to CPLR 308 (5) to direct an alternative method for service of process.

In an order dated August 30, 2023, the Supreme Court (1) determined the plaintiff's motion, in effect, pursuant to CPLR 3217 (b) to discontinue the action without prejudice and to cancel and discharge the notice of pendency, (2) granted, as unopposed, the defendants' cross-motion pursuant to CPLR 306-b to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction, and (3) denied, as untimely, the plaintiff's cross-motion, inter alia, to confirm that personal jurisdiction was obtained over the defendants or, in the alternative, pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendants and pursuant to CPLR 308 (5) to direct an alternative method for service of process. The plaintiff appeals.

First, the Supreme Court erred in determining the plaintiff's motion, in effect, pursuant to CPLR 3217 (b) to discontinue the action without prejudice and to cancel and discharge the notice of pendency, since the plaintiff specifically withdrew its motion prior to the court's determination thereof (*see HSBC Bank USA, N.A. v Elianor*, 180 AD3d 655, 656-657 [2020]; *Howe v Jeremiah*, 62 AD3d 751, 751 [2009]).

Next, the Supreme Court properly granted, as unopposed, the defendants' cross-motion pursuant to CPLR 306-b to dismiss the complaint insofar as asserted against them for lack of personal jurisdiction. While the plaintiff contends that the

court gave oral permission for the plaintiff to file otherwise untimely opposition papers to the defendants' cross-motion, the order appealed from reflects otherwise. Thus, under the circumstances, the court providently exercised its discretion in declining to consider the plaintiff's opposition papers (*see generally Deutsche Bank Natl. Trust Co. v McEnery*, 197 AD3d 1238, 1240 [2021]).

Finally, the Supreme Court properly denied, as untimely, the plaintiff's cross-motion, *inter alia*, to confirm that personal jurisdiction was obtained over the defendants or, in the alternative, pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon the defendants and pursuant to CPLR 308 (5) to direct an alternative method for service of process. Even assuming that it was procedurally permissible for the plaintiff to file a cross-motion under the circumstances, the cross-motion was untimely absent leave of court (*see id.* § 2214 [b]; *see generally Torres v Westchester Dental Servs.*, 287 AD2d 710 [2001]), which was not granted. Brathwaite Nelson, J.P., Christopher, Wan and Golia, JJ., concur.

63 U.S. Bank Trust National Association, Respondent, v Parris Development Projects, LLC, et al., Appellants, et al., Defendants. [251 NYS3d 744]—

Mortgages—Foreclosure—Frustration of Purpose—Temporary Government Restrictions during COVID-19 Pandemic

In an action to foreclose a mortgage, the defendants Parris Development Projects, LLC, and Lester Parris appeal from (1) an order of the Supreme Court, Orange County (Elena Goldberg Velazquez, J.), dated March 13, 2023, (2) an order of the same court also dated March 13, 2023, and (3) an order and judgment of foreclosure and sale (one paper) of the same court dated June 20, 2023. The first order dated March 13, 2023, insofar as appealed from, granted those branches of the plaintiff's motion which were for summary judgment on the complaint insofar as asserted against those defendants, to strike their affirmative defense alleging frustration of purpose, and for an order of reference. The second order dated March 13, 2023, insofar as appealed from, granted the same relief to the plaintiff and appointed a referee to compute the amount due to the plaintiff. The order and judgment of foreclosure and sale, insofar as appealed from, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale, confirmed the referee's report, and directed the sale of the subject property.

Ordered that the appeals from the orders dated March 13, 2023, are dismissed; and it is further,

Ordered that the order and judgment of foreclosure and sale is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

In August 2019, the defendant Parris Development Projects, LLC (hereinafter PDP), by its principal, the defendant Lester Parris, executed a note in the principal sum of \$479,500, which was secured by a mortgage on certain real property located in Chester. Subsequently, the mortgage was assigned to the plaintiff.

The plaintiff commenced this action against PDP and Parris (hereinafter together the defendants), among others, to foreclose the mortgage. The defendants interposed an answer asserting several affirmative defenses, including the defense of frustration of purpose. The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendants, to strike their affirmative defense alleging frustration of purpose, and for an order of reference. In an order dated March 13, 2023, the Supreme Court, among other things, granted those branches of the plaintiff's motion. In a second order also dated March 13, 2023, the court, inter alia, granted the same relief to the plaintiff and appointed a referee to compute the amount due to the plaintiff. Thereafter, in an order and judgment of foreclosure and sale dated June 20, 2023, the court, among other things, granted those branches of the plaintiff's motion which were to confirm the referee's report and for a judgment of foreclosure and sale, confirmed the referee's report, and directed the sale of the property. The defendants appeal.

The appeals from the orders dated March 13, 2023, must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment of foreclosure and sale in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeals from those orders are brought up for review and have been considered on the appeal from the order and judgment of foreclosure and sale (*see* CPLR 5501 [a] [1]; *Matter of Aho*, 39 NY2d at 248).

In order to invoke the defense of frustration of purpose, "the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*Gulf LNG Energy, LLC v Eni S.p.A.*, 232 AD3d 183, 192 [2024] [internal quotation marks omitted]; *see Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d 480 [2022]; Restatement [Second] of Contracts § 265). "[T]he 'narrow' doctrine of frustration of purpose is inapplicable . . . where the purpose of the contract has not been

completely thwarted” (*Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d at 480; see *Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [2004]).

Here, in opposition to the plaintiff’s prima facie showing of its entitlement to judgment as a matter of law, the defendants failed to raise a triable issue of fact regarding their affirmative defense alleging frustration of purpose. Contrary to the defendants’ contention, their affirmative defense alleging frustration of purpose is inapplicable under these circumstances. Although the defendants alleged that temporary governmental restrictions instituted during the COVID-19 pandemic affected their ability to meet their obligations under the note, the purpose of the contract, that is, the disbursement of a loan that was secured by a mortgage on real property, was not frustrated (see *Valentino U.S.A., Inc. v 693 Fifth Owner LLC*, 203 AD3d at 480). Moreover, the defendants conceded that they defaulted on their obligations under the note in February 2020, which was before any governmental restrictions had gone into effect.

The defendants’ remaining contentions are without merit.

Accordingly, the Supreme Court properly granted those branches of the plaintiff’s motion which were for summary judgment on the complaint insofar as asserted against the defendants, to strike their affirmative defense alleging frustration of purpose, and for an order of reference. LaSalle, P.J., Dillon, Christopher and Landicino, JJ., concur.

64 Everette Weaver, Appellant, v Kimberly Ann Krakoviak et al., Respondents. [252 NYS3d 627]—

Limitation of Actions—Fraud—Seeking to Remove Cloud of Title—Continuing Right

Limitation of Actions—Six-Year Statute of Limitations—Declaratory Judgment—Accrued When Mortgage Recorded

Mortgages—Assignment—Claim of Fraud—Conclusory Allegations That Mortgage Backdated and Forged

In an action, inter alia, pursuant to Real Property Law § 329 to cancel of record an assignment of a mortgage, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Ingrid Joseph, J.), dated February 21, 2023, and (2) an order of the same court dated August 31, 2023. The order dated February 21, 2023, granted the motion of the defendant Brandon D. Lewis pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him. The order dated August 31, 2023, granted the motion of the defendants Kimberly Ann Krakoviak and CitiMortgage, Inc., pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them.

Ordered that the orders are affirmed, with one bill of costs.

On August 28, 2008, the plaintiff, Everette Weaver, among others, executed and delivered to All American Home Mortgage Corp. a note, which was secured by a mortgage on real property located in Brooklyn (hereinafter the subject mortgage). The subject mortgage was recorded on September 10, 2008. Thereafter, Mortgage Electronic Registration Systems, Inc. (hereinafter MERS), as nominee for All American Home Mortgage Corp., assigned the subject mortgage to the defendant CitiMortgage, Inc. (hereinafter CitiMortgage). The assignment of mortgage was signed on June 16, 2009, by the defendant Kimberly Ann Krakoviak, a Vice President for MERS, nominee for All American Home Mortgage Corp., and her signature on the assignment of mortgage was acknowledged before a notary, the defendant Brandon D. Lewis.

In July 2009, CitiMortgage commenced an action against Weaver, among others, to foreclose the subject mortgage. Thereafter, in an order dated September 26, 2016, the Supreme Court, inter alia, granted those branches of CitiMortgage's motion which were for leave to enter a default judgment against Weaver and for an order of reference. The order dated September 26, 2016, was affirmed by this Court by decision and order dated September 1, 2021 (*see Citimortgage, Inc. v Weaver*, 197 AD3d 1087 [2021]). In another decision and order dated September 1, 2021, this Court affirmed an order of the Supreme Court dated April 12, 2019, determining that "the record supports the Supreme Court's conclusion that [Weaver] had forfeited the right to free access to the courts by abusing the judicial process, and, therefore, properly enjoined him from filing any additional papers in [the foreclosure] action without prior court approval" (*Citimortgage, Inc. v Weaver*, 197 AD3d 1090, 1091 [2021]). In December 2019, CitiMortgage moved to confirm a referee's report and for a judgment of foreclosure and sale, and in June 2022, an order and judgment of foreclosure and sale was entered.

In or about February 2022, Weaver commenced this action against the defendants, asserting three causes of action. The first cause of action sought to cancel of record the assignment of mortgage pursuant to Real Property Law § 329. The second cause of action sought a judgment declaring that the assignment of mortgage is a void instrument. The third cause of action sought a judgment declaring that if a prior mortgage against the property previously given by a prior owner was not satisfied, the subject mortgage was junior to that prior mortgage.

CitiMortgage and Krakoviak moved, and Lewis separately

moved, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against each of them on the grounds, among others, that the action was time-barred and for failure to state a cause of action. In an order dated February 21, 2023, the Supreme Court granted Lewis's motion. In an order dated August 31, 2023, the court granted the motion of CitiMortgage and Krakoviak, concluding that the complaint was time-barred insofar as asserted against them. The plaintiff appeals.

"In resolving a motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint on the ground that the action is barred by the statute of limitations, the court must accept the facts as alleged in the complaint as true, and accord the plaintiff the benefit of every possible favorable inference" (*Covert Holdings, LLC v 1019 Irving Realty, LLC*, 206 AD3d 691, 692 [2022]; see *Sibrian v 244 Madison Realty Corp.*, 210 AD3d 1029, 1031 [2022]). On such a motion, "the defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2016]; see *Sibrian v 244 Madison Realty Corp.*, 210 AD3d at 1031). "The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable, or whether the action was actually commenced within the applicable limitations period" (*Griffin v Perrotti*, 121 AD3d 1041, 1042 [2014]; see *Van Der Velde v New York Prop. Underwriting Assn.*, 205 AD3d 970, 970-971 [2022]).

Here, the Supreme Court erred in granting those branches of the defendants' separate motions which were pursuant to CPLR 3211 (a) (5) to dismiss the first and second causes of action insofar as asserted against each of them as time-barred. The holder of legal title to the property, is "presumptively entitled to possession" (*Orange & Rockland Util. v Philwold Estates*, 52 NY2d 253, 261 [1981]; see RPAPL 311), and the first and second causes of action both seek to remove the cloud on title resulting from the allegedly fraudulent and/or invalid assignment of mortgage. "[W]here a plaintiff seeks to remove a cloud on title, the right to such relief 'is never barred by the Statute of Limitations. It is a continuing right which exists as long as there is an occasion for its exercise'" (*Panarese v Claudio*, 216 AD3d 660, 662 [2023], quoting *Faison v Lewis*, 25 NY3d 220, 229 [2015]; see *Mostafa v Pension Solutions, LLC*, 221 AD3d 997, 998 [2023]). Therefore, the defendants failed to establish, prima facie, that the first and second causes of action were time-barred insofar as asserted against each of them.

However, the Supreme Court properly granted those branches of the defendants' separate motions which were pur-

suant to CPLR 3211 (a) (5) to dismiss the third cause of action insofar as asserted against each of them as time-barred. “An action for a declaratory judgment is generally governed by a six-year statute of limitations and is time-barred if commenced more than six years after it accrues” (*Trump Vil. Section 4, Inc. v Young*, 217 AD3d 711, 714 [2023] [internal quotation marks omitted]; see CPLR 213 [1]). Here, the third cause of action accrued when the subject mortgage was recorded on September 10, 2008. Since this action was not commenced until 2022, the defendants demonstrated, prima facie, that the third cause of action was time-barred insofar as asserted against each of them (see generally *Wells Fargo Bank, N.A. v Green*, 227 AD3d 842, 843 [2024]; *HSBC Bank USA, N.A. v Parker*, 180 AD3d 1026, 1029 [2020]). In opposition, Weaver failed to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable or whether the action was actually commenced within the applicable limitations period (see *Wells Fargo Bank, N.A. v Green*, 227 AD3d at 843).

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction (see *id.* § 3026) and the court must give the plaintiff the benefit of every possible favorable inference, accept the facts alleged in the complaint as true, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration” (*Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999] [internal quotation marks omitted]; see *Myers v Schneiderman*, 30 NY3d 1, 11 [2017]). “When evidentiary material is considered, the criterion is whether the [plaintiff] has a cause of action, not whether [the plaintiff] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see *Leon v Martinez*, 84 NY2d at 88).

With respect to the first and second causes of action, Weaver failed to state a cause of action. Weaver’s conclusory allegations that the assignment of mortgage was fraudulent in that it was backdated and forged and that Krakoviak lacked the authority to execute the assignment of mortgage were insufficient to state a cause of action (see *Izmirligil v Steven J. Baum, P.C.*, 180 AD3d 767, 770 [2020]).

We do not reach Weaver’s contention regarding that branch

of his motion which was for leave to enter a default judgment against CitiMortgage, since that branch of the motion was not determined in the order dated August 31, 2023, and remains pending and undecided (*see Katz v Katz*, 68 AD2d 536, 542-543 [1979]).

The parties' remaining contentions either are without merit or need not be addressed in light of our determination. Connelly, J.P., Christopher, Voutsinas and Hom, JJ., concur.

65 Antonio D. Williams, Appellant, v City of New York et al., Respondents. [251 NYS3d 748]—

Labor—Safe Place to Work—Elevation-Related Risk—Hit in Head by Cart When Lifted

Labor—Safe Place to Work—Industrial Code Violation—Failure to Identify Specific Provision

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Kevin J. Kerrigan, J.), entered April 9, 2024. The order, insofar as appealed from, granted those branches of the defendants' motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6).

Ordered that the order is affirmed insofar as appealed from, with costs.

On August 28, 2020, the plaintiff allegedly was injured while working at a construction site located at the Queensbridge Housing Project in Queens. On the date of the accident, the plaintiff was working as a laborer for Venture Solar, which had been hired to install solar panels on the rooftops of the subject premises. According to the plaintiff, he and certain of his coworkers were instructed to move a "moon cart" from one rooftop to an adjacent rooftop that was approximately two feet higher and separated by a gate. The workers jointly decided to move the cart by lifting it above their heads and passing it over the gate. As the plaintiff lifted one corner of the cart while he stood with his feet planted on the ground, the cart allegedly hit the plaintiff in the head and he fell.

The plaintiff commenced this action against, among others, the owner of the premises, the defendant New York City Housing Authority, asserting, inter alia, causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). The defendants moved, among other things, for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). In an order entered April 9, 2024, the Supreme Court, inter alia, granted those branches of the motion. The plaintiff appeals.

“Labor Law § 240 (1) imposes a nondelegable duty . . . upon owners and general contractors and their agents to provide safety devices necessary to protect workers from risks inherent in elevated work sites” (*Verdi v SP Irving Owner, LLC*, 227 AD3d 932, 935 [2024] [internal quotation marks omitted]; see *Canales v Rye Neck Union Free Sch. Dist.*, 238 AD3d 836, 838 [2025]; *Reyes v Astoria 31st St. Devs., LLC*, 190 AD3d 872, 872 [2021]). “[I]t is settled that ‘the extraordinary protections of the statute in the first instance apply only to a narrow class of dangers’” (*Giraldo v Highmark Ind., LLC*, 226 AD3d 874, 875-876 [2024] [internal quotation marks omitted], quoting *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96-97 [2015]; see *Canales v Rye Neck Union Free Sch. Dist.*, 238 AD3d at 838). “More specifically, Labor Law § 240 (1) relates only to special hazards presenting elevation-related risk[s]. Liability may, therefore, be imposed under the statute only where the plaintiff’s injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d at 97 [citations and internal quotation marks omitted]; see *Canales v Rye Neck Union Free Sch. Dist.*, 238 AD3d at 838). “‘Consequently, the protections of Labor Law § 240 (1) do not encompass any and all perils that may be connected in some tangential way with the effects of gravity’” (*Giraldo v Highmark Ind., LLC*, 226 AD3d at 876 [emphasis and internal quotation marks omitted], quoting *Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d at 97; see *Canales v Rye Neck Union Free Sch. Dist.*, 238 AD3d at 838). “[C]ourts must take into account the practical differences between the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by Labor Law § 240 (1)” (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011] [internal quotation marks omitted]).

Here, the defendants established, *prima facie*, that the plaintiff’s alleged injuries were not caused by an elevation-related or gravity-related risk encompassed by Labor Law § 240 (1) (see *Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843-844 [1994]; *Christie v Live Nation Concerts, Inc.*, 192 AD3d 971, 973 [2021]; *Garcia v Edgewater Dev. Co.*, 61 AD3d 924, 925 [2009]). In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted that branch of the defendants’ motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240 (1).

“With respect to a claim pursuant to Labor Law § 241 (6),

the plaintiff must allege a violation of a specific and applicable provision of the Industrial Code’ ” (*Devoy v City of New York*, 192 AD3d 665, 669 [2021] [internal quotation marks omitted], quoting *Jara v New York Racing Assn., Inc.*, 85 AD3d 1121, 1123 [2011]). Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241 (6) by demonstrating that the complaint and bill of particulars “failed to identify a specific and applicable provision of [Industrial Code] rule 23 that the defendant allegedly violated” (*Warren v Stepanova*, 120 AD3d 662, 663 [2014]; see *Grabowski v Board of Mgrs. of Avonova Condominium*, 147 AD3d 913, 915 [2017]; *Canosa v Holy Name of Mary R.C. Church*, 83 AD3d 635, 637 [2011]). In opposition, the plaintiff failed to allege a specific and applicable provision of the Industrial Code (see *Grabowski v Board of Mgrs. of Avonova Condominium*, 147 AD3d at 915; *Warren v Stepanova*, 120 AD3d at 663). Accordingly, the Supreme Court properly granted that branch of the defendants’ motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6). Chambers, J.P., Wooten, Dowling and Love, JJ., concur.

66 Charles Williams, Individually and as Administrator of the Estate of Hazel Williams, Deceased, Claimant, v State of New York, Respondent. Winston Stanley Lewis, as Administrator of the Estate of Charles Williams, Deceased, Nonparty Appellant. [252 NYS3d 631]—

Parties—Death of Party—Substitution—Failure to Diligently Seek Substitution

Witnesses—Expert Witness—Conclusory Affidavit of Merit

In a claim, inter alia, to recover damages for medical malpractice, nonparty Winston Stanley Lewis, as administrator of the estate of Charles Williams, deceased, appeals from an order of the Court of Claims (Javier E. Vargas, J.), dated December 8, 2022. The order, insofar as appealed from, denied those branches of that nonparty’s motion which were to vacate an order of the same court (Faviola A. Soto, J.) dated September 9, 2019, directing dismissal of the claim and, in effect, pursuant to CPLR 1021 to lift a stay of the claim imposed due to the death of the claimant, Charles Williams, and substitute Winston Stanley Lewis, as executor of the estate of Hazel Williams, deceased, and individually, as the claimant in place of Charles Williams, and granted the defendant’s cross-motion pursuant to CPLR 1021 and Court of Claims Act § 15 to dismiss the claim.

Ordered that the on the Court’s own motion, the notice of ap-

peal is deemed to be a notice of appeal by nonparty Winston Stanley Lewis, as executor of the estate of Charles Williams, deceased (*see* CPLR 2001; *Matter of Tagliaferri v Weiler*, 1 NY3d 605 [2004]; *Hemmings v Rolling Frito-Lay Sales, LP*, 220 AD3d 754 [2023]); and it is further,

Ordered that the order is affirmed insofar as appealed from, with costs.

In March 2018, the claimant, individually and as administrator of the estate of Hazel Williams (hereinafter Hazel), commenced this claim, inter alia, to recover damages for medical malpractice against the defendant, State of New York, in connection with the care rendered to Hazel while she was a patient at SUNY Downstate Medical Center. The claimant died on July 10, 2018. On October 26, 2018, nonparty Winston Stanley Lewis (hereinafter the claimant's executor) was appointed as executor of the claimant's estate. After the claimant's counsel failed to appear at conferences scheduled for April 29, 2019, and September 9, 2019, the Court of Claims, in an order dated September 9, 2019, directed dismissal of the claim pursuant to Court of Claims Act § 19 (3) and 22 NYCRR 206.10.

In November 2020, the claimant's executor moved, inter alia, to vacate the order dated September 9, 2019, and, in effect, pursuant to CPLR 1021 to lift the stay of the claim imposed due to the death of the claimant and substitute the claimant's executor, as executor of Hazel's estate and individually, as the claimant. The State cross-moved pursuant to CPLR 1021 and Court of Claims Act § 15 to dismiss the claim. In an order dated December 8, 2022, the Court of Claims, among other things, denied those branches of the motion of the claimant's executor and granted the State's cross-motion. This appeal ensued.

The Court of Claims providently exercised its discretion in denying those branches of the motion of the claimant's executor which were to vacate the order dated September 9, 2019, and, in effect, pursuant to CPLR 1021 to lift the stay of the claim imposed due to the death of the claimant and substitute the claimant's executor as the claimant, and granting the State's cross-motion pursuant to CPLR 1021 and Court of Claims Act § 15 to dismiss the claim.

"A motion for substitution pursuant to CPLR 1021 is the method by which the court acquires jurisdiction" over a deceased party's successors in interest, and such motion "is not a mere technicality" (*Bossert v Ford Motor Co.*, 140 AD2d 480, 480 [1988]; *see Matter of Einstoss*, 26 NY2d 181, 189-190 [1970]; *Green v Maimonides Med. Ctr.*, 172 AD3d 824 [2019]). Court of Claims Act § 15 imposes a duty on the personal representative

of a deceased claimant to secure an order of substitution within six months of becoming the personal representative of the deceased claimant. CPLR 1021 provides, in pertinent part, that “[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made.” “The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or defense has potential merit” (*Hemmings v Rolling Frito-Lay Sales, LP*, 220 AD3d 754, 757 [2023] [internal quotation marks omitted]; *Green v Maimonides Med. Ctr.*, 172 AD3d at 826 [internal quotation marks omitted]).

Here, the record does not support a finding that the claimant’s former counsel or the claimant’s executor diligently sought to substitute a representative for the claimant as a representative of the claimant’s estate after the claimant’s death. Furthermore, the affidavit of merit of the claimant’s medical expert was conclusory, as the expert did not allege any deviation or departure from accepted community standards of practice committed by the State and failed to cite any evidence that any such departures were a proximate cause of Hazel’s injuries (see *Hiegel v Orange Regional Med. Ctr.*, 219 AD3d 910, 912 [2023]). In light of the foregoing, the Court of Claims providently exercised its discretion in granting the State’s motion pursuant to CPLR 1021 and Court of Claims Act § 15 to dismiss the claim (see *Byner v Murray-Taylor*, 208 AD3d 1214 [2022]; *Rose v Frankel*, 83 AD3d 607 [2011]). Chambers, J.P., Wooten, Warhit and Landicino, JJ., concur.

67 Eileen A. Wilson, Appellant, v 1025 II, LLC, Respondent, et al., Defendants. [248 NYS3d 682]—

Negligence—Sidewalks—Abutting Landowner—Damage Caused by Tree Roots

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Gary M. Carlton, J.), entered September 26, 2024. The order, insofar as appealed from, granted the cross-motion of the defendant 1025 II, LLC, for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff allegedly was injured when she tripped upon a raised portion of a sidewalk abutting property owned by the

defendant 1025 II, LLC (hereinafter the owner). The plaintiff commenced this action against, among others, the owner to recover damages for personal injuries. The owner cross-moved for summary judgment dismissing the complaint insofar as asserted against it. The Supreme Court granted the motion. The plaintiff appeals.

An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty (see *O'Brien v Village of Babylon*, 196 AD3d 494, 495 [2021]). Here, the owner established its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by demonstrating that it did not create the condition, cause the defect to occur by some special use of the sidewalk, or breach a specific ordinance or statute which obligated it to maintain the sidewalk (see *Brennan v Town of N. Hempstead*, 122 AD3d 892, 893 [2014]). In opposition, the plaintiff failed to raise a triable issue of fact. Although the plaintiff contends that the owner's failure to maintain a nearby tree on its property led the tree's roots to cause the alleged sidewalk defect, even if this is correct, "[a]n abutting landowner is not responsible for damage caused to a sidewalk by the roots of a tree" (*Simmons v Guthrie*, 304 AD2d 819, 820 [2003]; see *Romano v Leger*, 72 AD3d 1059, 1059-1060 [2010]).

Accordingly, the Supreme Court properly granted the owner's cross-motion for summary judgment dismissing the complaint insofar as asserted against it. Barros, J.P., Chambers, Warhit and Golia, JJ., concur.

(February 25, 2026)

1 Albertson Water District, Appellant, v Town of North Hempstead, Respondent. [252 NYS3d 657]—

Motions and Orders—Reargument or Renewal—New Facts—Failure to Demonstrate Would Have Changed Prior Determination

In an action for a judgment declaring, in effect, inter alia, that the proposed construction plans for the water treatment facilities at the plaintiff's three plant sites are immune from the defendant's zoning and building regulations, the plaintiff appeals from an order of the Supreme Court, Nassau County (Christopher G. Quinn, J.), entered January 23, 2024. The or-

der denied the plaintiff's motion for leave to renew its prior motion for summary judgment on the amended complaint, which had been denied in an order of the same court entered March 31, 2023.

Ordered that the order entered January 23, 2024, is affirmed, with costs.

The plaintiff, Albertson Water District (hereinafter the District), is an independent commissioner-elected water district responsible for delivering potable water to all consumers within its territory. The District owns three principal plant sites dedicated to the pumpage, storage, and treatment of potable water, all of which are located within the Town of North Hempstead. In 2020, the District obtained approval from the New York State Department of Health and the Nassau County Department of Health to install a granular activated carbon (hereinafter GAC) treatment system at plant No. 4 in order to remove emerging contaminants from the water supply. Not long after construction began, the Town issued a stop work order and demanded that the District file an application for a building permit. Thereafter, the District commenced this action for declaratory relief. The amended complaint alleged, *inter alia*, that, like the GAC installation project at plant No. 4, the District was preparing to provide treatment to plant No. 3A to remove additional emerging contaminants.

The District moved for summary judgment on the amended complaint. In opposition, the Town asserted that it was not seeking to enforce its zoning code against the District, but that the District was not exempt from the New York State Uniform Fire Prevention and Building Code (*see* Executive Law art 18; 19 NYCRR ch XXXIII). By order entered March 31, 2023, the Supreme Court denied the District's motion.

The District subsequently moved for leave to renew its prior motion for summary judgment on the amended complaint, which the Town opposed. In an order entered January 23, 2024, the Supreme Court denied the District's motion, finding that the District "failed to provide new facts that were not offered on the prior motion." The District appeals.

"A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (*id.* § 2221 [e] [3]). The Supreme Court has the discretion to grant renewal upon facts known to the movant at the time of the original motion, "provided that the movant offers a reasonable justification for the failure to submit

the additional facts on the original motion” (*Castor v Cuevas*, 137 AD3d 734, 734 [2016] [internal quotation marks omitted]).

Here, the majority of the evidence submitted by the District in support of its motion for leave to renew was dated prior to its original motion, and the District failed to present a reasonable justification for failing to present these alleged new facts on the prior motion (see *Seegopaul v MTA Bus Co.*, 210 AD3d 715, 716 [2022]). Furthermore, the District failed to demonstrate that any evidence submitted in support of its renewal motion that was dated after the prior motion would have changed the prior determination, as the plan approvals submitted note that any proposed works must be “constructed in accordance with all applicable Federal, State and local regulations,” and that “a separate approval from the local Building Department maybe [sic] required for this project” (see *id.*).

Accordingly, the District’s motion for leave to renew its prior motion for summary judgment on the amended complaint was properly denied.

The District’s remaining contentions need not be reached in light of our determination. Barros, J.P., Ford, Ventura and Golia, JJ., concur.

2 Mais Alnoukari et al., Respondents, v Daed Nokari, M.D., et al., Appellants. [252 NYS3d 643]—

Dismissal and Nonsuit—Restoring Action to Calendar—Failure to File Note of Issue by Deadline—No 90-Day Notice Nor Order Directing Dismissal

In an action, inter alia, to recover damages for assault, battery, and defamation, the defendants appeal from an order of the Supreme Court, Kings County (Leon Ruchelsman, J.), dated November 28, 2023. The order, insofar as appealed from, granted the plaintiffs’ motion to restore the action to the calendar.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiffs commenced this action, inter alia, to recover damages for assault, battery, and defamation. According to the plaintiffs, in November 2020, the case was marked “Disposed” after they were unable to file a note of issue by a court-imposed deadline.

In November 2023, the plaintiffs moved to restore the action to the calendar. The defendants cross-moved to sever the causes of action asserted against each of them. By order dated November 28, 2023, the Supreme Court granted the motion and referred the cross-motion to be determined by a different justice. The defendants appeal.

“When a plaintiff has failed to file a note of issue by a court-ordered deadline, restoration of the action to the active calendar is automatic, unless either a 90-day notice has been served pursuant to CPLR 3216 or there has been an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27” (*Adams v Frankel*, 235 AD3d 816, 817 [2025] [internal quotation marks omitted]; see *Rosario v Cummins*, 222 AD3d 897, 897 [2023]). “In the absence of those two circumstances, the court need not consider whether the plaintiff had a reasonable excuse for failing to timely file a note of issue” (*Adams v Frankel*, 235 AD3d at 817 [internal quotation marks omitted]; see *Wells Fargo Bank, NA v Oziel*, 196 AD3d 618, 620 [2021]).

Here, “the defendants do not dispute . . . that there was no 90-day notice pursuant to CPLR 3216” and have not “assert[ed] that an order was issued directing dismissal of the complaint pursuant to 22 NYCRR 202.27” (*Adams v Frankel*, 235 AD3d at 817). Therefore, the plaintiffs were entitled to have the action restored to the active calendar, without regard to whether they had a reasonable excuse for the delay or engaged in dilatory conduct (see *id.*; *Wells Fargo Bank, N.A. v Drago*, 170 AD3d 1083, 1084 [2019]). Contrary to the defendants’ contention, CPLR 3404 does not apply to this pre-note of issue action (see *Adams v Frankel*, 235 AD3d at 817; *Santiago v City of New York*, 206 AD3d 948, 950 [2022]). Accordingly, under the circumstances, the Supreme Court properly granted the plaintiffs’ motion.

The Supreme Court did not decide the defendants’ cross-motion to sever the causes of action asserted against each of them. Since the cross-motion remains pending and undecided, any arguments raised with respect thereto are not properly before this Court (see *Hernandez-Panell v City of New York*, 232 AD3d 859, 861 [2024]; *Katz v Katz*, 68 AD2d 536, 543 [1979]).

The defendants’ remaining contention is without merit. Brathwaite Nelson, J.P., Taylor, Ventura and McCormack, JJ., concur.

3 Cynthia A. Becvar, as Administrator of the Estate of Niel Vincelette, Deceased, Appellant, v Our Lady of Consolation Nursing and Rehabilitation Center, Respondent. [252 NYS3d 648]—

Pleading—Amendment—Timeliness of New Allegations—More than Four Months after Decedent’s Death

In an action, inter alia, to recover damages for medical malpractice, the plaintiff appeals from an order of the Supreme

Court, Suffolk County (George Nolan, J.), dated April 2, 2024. The order denied the plaintiff's motion pursuant to CPLR 3025 (b) for leave to amend the complaint.

Ordered that the order is affirmed, with costs.

In May 2018, Neil D. Vincelette (hereinafter the decedent) commenced this action against the defendant, Our Lady of Consolation Nursing and Rehabilitation Center, alleging, *inter alia*, medical malpractice relating to care he received while residing at the defendant's facility. The decedent died in June 2018, and the plaintiff was substituted for him in this action as the administrator of his estate.

In May 2023, the plaintiff moved pursuant to CPLR 3025 (b) for leave to amend the complaint. The proposed amended complaint included new causes of action against the defendant alleging false imprisonment and wrongful death, new allegations of medical malpractice against the defendant, and causes of action against a proposed new defendant, Good Samaritan Hospital Medical Center (hereinafter Good Samaritan), alleging negligence and wrongful death. In an order dated April 2, 2024, the Supreme Court denied the plaintiff's motion. The plaintiff appeals.

"Applications to amend pleadings are within the sound discretion of the court" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *see Dominge v Dannenberg*, 228 AD3d 729, 731 [2024]). Such applications "should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Deutsche Bank Natl. Trust Co. v Nissan*, 230 AD3d 1105, 1108 [2024] [internal quotation marks omitted]; *see CPLR 3025 [b]*; *Dray v Staten Is. Univ. Hosp.*, 227 AD3d 664, 666 [2024]). "[A] proposed amendment generally is considered patently devoid of merit if it is time-barred under the applicable statute of limitations" (*Great Neck Lib. v Kaeyer, Garment & Davidson Architects, P.C.*, 236 AD3d 873, 875-876 [2025] [internal quotation marks omitted]; *see Bhatara v Kolaj*, 222 AD3d 926, 929 [2023]).

Here, all of the new allegations and causes of action included in the proposed amended complaint were untimely, since the motion for leave to amend was filed more than four years after the decedent's death, after discovery of his allegedly undiagnosed conditions, and after he was last treated by either the defendant or Good Samaritan (*see EPTL 5-4.1 [1]*; *CPLR 214-a*, 215 [3]). Moreover, the plaintiff failed to satisfy her burden of establishing the applicability of the relation-back doctrine to any of the proposed amendments (*see Buran v Coupal*, 87 NY2d

173, 177-178 [1995]; *Cedarwood Assoc., LLC v County of Nassau*, 211 AD3d 799, 800 [2022]).

Accordingly, the Supreme Court properly denied the plaintiff's motion pursuant to CPLR 3025 (b) for leave to amend the complaint. Brathwaite Nelson, J.P., Christopher, Taylor and McCormack, JJ., concur.

4 Terrance Burke, Respondent, v Xiufei Chen, Appellant.
[249 NYS3d 615]—

Negligence—Maintenance of Premises—Notice of Defective Condition—Complaints About Unrelated Problem

Negligence—Maintenance of Premises—Notice of Defective Condition—Condition of Soap Dish Not Visible and Apparent

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Wavny Toussaint, J.), dated August 21, 2024. The order denied the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is granted.

In December 2016, the plaintiff, who rented an apartment from the defendant, allegedly was injured when, while cleaning his bathtub and holding a ceramic soap dish affixed to the wall for balance, a portion of the soap dish's tray broke. However, the remainder of the soap dish remained affixed to the wall.

The plaintiff commenced this action against the defendant to recover damages for personal injuries. After discovery, the defendant moved for summary judgment dismissing the complaint, contending, inter alia, that she did not create or have actual or constructive notice of the allegedly defective or dangerous condition. In an order dated August 21, 2024, the Supreme Court denied the defendant's motion. The defendant appeals.

In the context of premises liability, a landowner “has a duty to maintain his or her premises in a reasonably safe condition” (*Walsh v Super Value, Inc.*, 76 AD3d 371, 375 [2010]; see *Basso v Miller*, 40 NY2d 233, 241 [1976]; *Vantroba v Zodiaco*, 193 AD3d 1014, 1015 [2021]). In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective or dangerous condition upon property, it must be established that “the landowner affirmatively created the condition or had actual or constructive notice of its existence” (*Lezama v 34-15 Parsons Blvd, LLC*, 16 AD3d 560, 560 [2005];

see *Vantroba v Zodiaco*, 193 AD3d at 1015; *Walsh v Super Value, Inc.*, 76 AD3d at 375). A defendant has constructive notice of a defective or dangerous condition when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

Here, the defendant established, prima facie, that she did not create or have actual notice of the allegedly defective or dangerous condition of the soap dish (see *Vantroba v Zodiaco*, 193 AD3d at 1015; *Soto v New Frontiers 2 Hope Hous. Dev. Fund Co., Inc.*, 118 AD3d 471 [2014]). The defendant testified at her deposition that she did not receive any complaints regarding the apartment. Although the plaintiff testified that he complained to the defendant about mold and cracks in the bathroom tile and ceiling, “[m]ere notice of a general or unrelated problem is not enough” (*Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 500 [2007]; see *Wienges v Newburgh Mall, LLC*, 94 AD3d 1110, 1110-1111 [2012]; *Giaccio v 179 Tenants Corp.*, 45 AD3d 454, 455 [2007]). Moreover, the defendant established, prima facie, that she did not have constructive notice of the allegedly defective or dangerous condition of the soap dish because it was not “visible and apparent,” and the existence of the alleged condition within the soap dish would not have been discoverable upon a reasonable inspection (see *Gordon v American Museum of Natural History*, 67 NY2d at 837; *Arevalo v Abitabile*, 148 AD3d 658, 660 [2017]; *Williams v Wal-Mart Stores, Inc.*, 10 AD3d 653 [2004]; *Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2003]). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff’s contention that the alleged defect in the soap dish was caused by mold or cracks in the tile surrounding it was no more than speculation (see *Quinn v Holiday Health & Fitness Ctrs. of N.Y., Inc.*, 15 AD3d 857, 857 [2005]).

Accordingly, the Supreme Court should have granted the defendant’s motion for summary judgment dismissing the complaint.

The defendant’s remaining contentions need not be reached in light of our determination. Connolly, J.P., Genovesi, Taylor and McCormack, JJ., concur.

5 Denise Casares, Appellant, v Village of Westbury et al., Respondents. [251 NYS3d 751]—

Pleading—Sufficiency of Pleading—Negligent Infliction of Emotional Distress—Alleged Intentional Conduct

In an action to recover damages for mental anguish, the plaintiff appeals from an order of the Supreme Court, Nassau County (Diccia T. Pineda-Kirwan, J.), dated February 24, 2023. The order granted the defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action to recover damages for "mental anguish" stemming from the defendants' removal of a tree from the street in front of her property before she could mount a legal challenge to the tree's removal. The defendants moved pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint. In an order dated February 24, 2023, the Supreme Court granted the motion. The plaintiff appeals.

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Weinstein v Levitin*, 208 AD3d 531, 532 [2022], quoting *Gruber v Donaldsons, Inc.*, 201 AD3d 887, 888 [2022]; see *Clevenger v Yuzek*, 222 AD3d 931, 934 [2023]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]; see *Wedgewood Care Ctr., Inc. v Kravitz*, 198 AD3d 124, 130 [2021]).

Here, contrary to the plaintiff's contention, the amended complaint does not assert a cause of action predicated upon negligent infliction of emotional distress. "A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him [or her] which unreasonably endangered his [or her] physical safety, or caused him [or her] to fear for his [or her] own safety" (*Borrerro v Haks Group, Inc.*, 165 AD3d 1216, 1219 [2018] [internal quotation marks omitted]; see *Sacino v Warwick Val. Cent. Sch. Dist.*, 138 AD3d 717, 719 [2016]). "[A]llegations of intentional conduct . . . 'cannot form the basis of a cause of action sounding in negligence'" (*Davydov v Youssefi*, 205 AD3d 881, 884 [2022], quoting *Trayvilla v Japan Airlines*, 178 AD3d 746, 747 [2019]; see *Gruber v Donaldsons, Inc.*, 201 AD3d at 889). Here, the Supreme Court properly granted the defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint for failure to state a cause of action, as the amended complaint failed to allege negligence (see *Whitfield*

v Law Enforcement Empls. Benevolent Assn., 237 AD3d 1139 [2025]; *Gruber v Donaldsons, Inc.*, 201 AD3d at 889).

The defendants' remaining contentions are academic in light of the foregoing. Chambers, J.P., Wooten, Dowling and Love, JJ., concur.

6 Edgar Catalogne, Appellant, v Class Action Recovery, LLC, Doing Business as Class Action Refund, et al., Respondents. [253 NYS3d 194]—

Frauds, Statute of—Agreement to Pay for Services in Negotiating Contract—Required to be in Writing—Verbal Agreement

Pleading—Amendment—Complaint—Additional Causes of Action Premised on Void Oral Agreement

Injunctions—Preliminary Injunction—Likelihood of Success of Merits—Verbal Agreement Unenforceable

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Westchester County (Hal B. Greenwald, J.), dated August 25, 2023. The order granted the defendants' motion for summary judgment dismissing the complaint and denied the plaintiff's motion for leave to amend the complaint and for a preliminary injunction.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action asserting causes of action alleging breach of contract, unjust enrichment, and promissory estoppel. The complaint alleged that the defendant Richard G. Delgatto, the owner of the defendant Class Action Recovery, LLC (hereinafter Class Action), entered into a verbal agreement in which the plaintiff agreed to work for Class Action as Class Action's chief operating officer for a salary, in addition to equity in Class Action, as well as contingency and commission fees, essentially in consideration for the plaintiff's assistance in procuring and securing clients for Class Action. The defendants joined issue, asserting affirmative defenses, including the statute of frauds.

In January 2023, the plaintiff moved for leave to amend the complaint and for a preliminary injunction. The proposed amended complaint contained additional causes of action sounding in quantum meruit and breach of fiduciary duty and further sought the imposition of a constructive trust, an accounting, declaratory relief, and the appointment of a temporary receiver. The defendants opposed the plaintiff's motion. In March 2023, the defendants moved for summary judgment dismissing the complaint on the grounds that the causes of action were barred by the statute of frauds and the promissory estoppel cause of action lacked any allegations of an unconscio-

nable injury. In an order dated August 25, 2023, the Supreme Court granted the defendants' motion and denied the plaintiff's motion. The plaintiff appeals.

"Pursuant to General Obligations Law § 5-701 (a) (10), an agreement 'or some note or memorandum thereof' must be in writing and 'subscribed by the party to be charged therewith,' where the agreement is 'to pay compensation for services rendered in . . . negotiating the purchase, sale, exchange, renting or leasing of . . . a business opportunity, business, its good will, inventory, fixtures or an interest therein.' The statute defines 'negotiating' to include the act of 'procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction'" (*Best Global Alternative, Ltd. v FCIC Constr. Servs., Inc.*, 170 AD3d 1101, 1102 [2019], quoting General Obligations Law § 5-701 [a] [10]; see *Hopwood v Infinity Contr. Servs. Corp.*, 230 AD3d 570, 570-571 [2024]).

Here, the defendants established, prima facie, that the purported verbal agreement was for the negotiation of business opportunities. Accordingly, the agreement was required to be in writing and subscribed by the parties to be charged (see General Obligations Law § 5-701 [a] [10]; *Hopwood v Infinity Contr. Servs. Corp.*, 230 AD3d at 571; *Best Global Alternative, Ltd. v FCIC Constr. Servs., Inc.*, 170 AD3d at 1102). The agreement herein failed to comply with these requirements (see General Obligations Law § 5-701 [a] [10]; *Landa v McGuire*, 223 AD3d 795, 797 [2024]). In opposition, the plaintiff failed to raise a triable issue of fact (see *Best Global Alternative, Ltd. v FCIC Constr. Servs., Inc.*, 170 AD3d at 1103). Accordingly, the Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging breach of contract.

Similarly, the Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging unjust enrichment, as "[a] plaintiff may not assert [this] cause of action[] to circumvent the Statute of Frauds" (*Strauss v Fleet Mtge. Corp.*, 282 AD2d 736, 737 [2001]; see *Matter of Zelouf*, 183 AD3d 900, 902 [2020]).

Further, the Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the promissory estoppel cause of action. Insofar as this cause of action was asserted to circumvent the statute of frauds, the plaintiff was required, but failed, to allege that he suffered unconscionable injury in reliance on the defendants'

alleged promise (see *Bent v St. John's Univ., N.Y.*, 189 AD3d 973, 975-976 [2020]; *Martin Greenfield Clothiers, Ltd. v Brooks Bros. Group, Inc.*, 175 AD3d 636, 638 [2019]).

The Supreme Court also properly denied that branch of the plaintiff's motion which was for leave to amend the complaint. "Leave to amend a pleading shall be freely given absent prejudice or surprise resulting directly from the delay unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Kyung Hee Moon v Owadeyah*, 223 AD3d 793, 794 [2024], quoting *Ruland v Leibowitz*, 209 AD3d 1051, 1052 [2022]; see CPLR 3025 [b]). The additional causes of action in the proposed amended complaint were all premised, in effect, on the purported verbal agreement, which is void pursuant to the statute of frauds; therefore, the court properly determined that those causes of action were patently devoid of merit.

In addition, the Supreme Court properly denied that branch of the plaintiff's motion which was for a preliminary injunction. "To establish the right to a preliminary injunction, a movant must demonstrate (1) the likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in the movant's favor" (*Miller v 6 Sterling Dr. Trust*, 231 AD3d 1020, 1021 [2024]; see *Cushing v Sanford Equities Corp.*, 223 AD3d 870, 871 [2024]). Here, the purported verbal agreement was unenforceable, and thus, the plaintiff failed to show a likelihood of success on the merits. Further, the plaintiff has only alleged economic loss, which is compensable by money damages and does not constitute irreparable harm (see *Matter of Rice*, 105 AD3d 962, 964 [2013]; *Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 637 [2009]). Accordingly, the court properly denied that branch of the plaintiff's motion which was for a preliminary injunction (see *Matter of Rice*, 105 AD3d at 963). Dillon, J.P., Brathwaite Nelson, Warhit and Love, JJ., concur.

7 CIT Bank, N.A., Appellant, v Charles Bruno et al., Defendants, and Kathryn-Ann Gentile, Respondent. [253 NYS3d 190]—

Dismissal and Nonsuit—Failure to Enter Default Judgment within One Year—Reasonable Excuse—Absence of Necessary Party

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Aletha V. Fields, J.), dated February 20, 2024, and an order of the same court dated April 29, 2024. The order dated February 20, 2024, insofar as appealed from, upon reargument, in effect, adhered to a prior determination in an order of the same court dated

October 4, 2023, granting the motion of the defendant Kathryn-Ann Gentile pursuant to CPLR 3215 (c) to dismiss the amended complaint insofar as asserted against her as abandoned and denying those branches of the plaintiff's cross-motion which were for leave to enter a default judgment against the defendants Kathryn-Ann Gentile, Secretary of Housing and Urban Development, Advantage Funding Commercial Capital Corp., Allstate Indemnity Company, Frontier Leasing Corp., and "John Doe #1" through "John Doe #25," and for an order of reference, and, sua sponte, directed dismissal of the amended complaint insofar as asserted against the defendants Secretary of Housing and Urban Development, Advantage Funding Commercial Capital Corp., Allstate Indemnity Company, Frontier Leasing Corp., and "John Doe #1" through "John Doe #25." The order dated April 29, 2024, insofar as appealed from, denied that branch of the plaintiff's motion which was for leave to reargue that branch of its cross-motion which was for leave to enter a default judgment against the defendant Charles Bruno.

Ordered that the appeal from the order dated April 29, 2024, is dismissed, as no appeal lies from an order denying reargument; and it is further,

Ordered that on the Court's own motion, the notice of appeal from so much of the order dated February 20, 2024, as, sua sponte, directed dismissal of the amended complaint insofar as asserted against the defendants Secretary of Housing and Urban Development, Advantage Funding Commercial Capital Corp., Allstate Indemnity Company, Frontier Leasing Corp., and "John Doe #1" through "John Doe #25" is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order dated February 20, 2024, is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the defendant Kathryn-Ann Gentile.

On February 27, 2007, Elizabeth Bruno (hereinafter the borrower) executed a note in favor of Continental Home Loans, Inc. (hereinafter Continental), which was secured by a home equity conversion mortgage on certain real property located in Suffolk County. The mortgage was signed by the borrower, as well as the defendants Kathryn-Ann Gentile and Charles Bruno.

On March 27, 2015, the plaintiff, then known as OneWest Bank N.A., Continental's successor in interest, commenced this action to foreclose the mortgage against, among others, Gentile.

The complaint alleged that Gentile was a record owner and mortgagor of the subject property. The defendants named in the original complaint failed to answer the original complaint.

In an order dated April 22, 2022, the Supreme Court granted the plaintiff's motion, *inter alia*, to amend the complaint to add Charles Bruno as a defendant.

On August 8, 2022, Gentile moved pursuant to CPLR 3215 (c) to dismiss the amended complaint insofar as asserted against her as abandoned, arguing that the plaintiff failed to take proceedings toward the entry of judgment within one year of her default in answering the original complaint. The plaintiff cross-moved, *inter alia*, for leave to enter a default judgment against the defendants and for an order of reference. In support of the cross-motion, the plaintiff asserted, among other things, that it had "duly served all defendants" with the summons and complaint, including Jeannette Walker, sued herein as "John Doe #1" through "John Doe #25," and that "[n]o defendant timely answered or responded to the Complaint or otherwise appeared in this action." In an order dated October 4, 2023, the Supreme Court, *inter alia*, granted Gentile's motion pursuant to CPLR 3215 (c) to dismiss the amended complaint insofar as asserted against her as abandoned and denied those branches of the plaintiff's cross-motion which were for leave to enter a default judgment against the defendants and for an order of reference.

In November 2023, the plaintiff moved, *inter alia*, for leave to reargue its opposition to Gentile's motion and those branches of its cross-motion which were for leave to enter a default judgment against the defendants and for an order of reference. In an order dated February 20, 2024, the Supreme Court, (1) upon reargument, in effect, adhered to the determination in the order dated October 4, 2023, granting Gentile's motion to dismiss the amended complaint insofar as asserted against her and denying those branches of the plaintiff's cross-motion which were for leave to enter a default judgment against Gentile and the defendants Secretary of Housing and Urban Development, Advantage Funding Commercial Capital Corp., Allstate Indemnity Company, Frontier Leasing Corp., and "John Doe #1" through "John Doe #25" (hereinafter collectively the nonmoving defendants), and for an order of reference, and, (2) *sua sponte*, directed dismissal of the amended complaint insofar as asserted against the nonmoving defendants. The plaintiff appeals.

Pursuant to CPLR 3215 (c), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the

default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed.” “The language of CPLR 3215 (c) is not, in the first instance, discretionary, but mandatory, inasmuch as [the] courts “shall” dismiss claims (CPLR 3215 [c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned’ ” (*Noteworthy Foreclosure, LLC v Rodney-Ross*, 220 AD3d 676, 677 [2023], quoting *Giglio v NTIMP, Inc.*, 86 AD3d 301, 307-308 [2011]). “The one exception to the otherwise mandatory language of CPLR 3215 (c) is that the failure to timely seek a default on an unanswered complaint . . . may be excused if sufficient cause is shown why the complaint should not be dismissed’ ” (*id.* [internal quotation marks omitted], quoting *1200 Bedford Ave., LLC v Grace Baptist Church*, 199 AD3d 971, 972 [2021]), which “requires the plaintiff to proffer a reasonable excuse for the delay in timely moving for a default judgment and to demonstrate that the cause of action is potentially meritorious” (*HSBC Bank USA, N.A. v Grella*, 145 AD3d 669, 671 [2016]; see *Deutsche Bank Natl. Trust Co. v O’Connor*, 223 AD3d 872, 874 [2024]).

Here, the plaintiff does not dispute that it failed to take proceedings toward the entry of judgment within one year of the defaults of Gentile and the nonmoving defendants in answering the original complaint. Contrary to the plaintiff’s contention, its filing of the amended complaint did not reset its time to take proceedings toward the entry of judgment (see *MTGLQ Invs., L.P. v Shay*, 190 AD3d 527, 528-529 [2021]). Moreover, the Supreme Court providently exercised its discretion in determining that the plaintiff failed to demonstrate a reasonable excuse for its failure to timely take proceedings toward the entry of judgment (see *Shields v Cohen*, 222 AD3d 1019, 1021 [2023]). The plaintiff failed to adequately explain why it could not have moved for leave to enter a default judgment against Gentile and the nonmoving defendants within one year of their default in answering the original complaint merely because Charles Bruno had not yet been joined as a necessary party, as “[t]he absence of a necessary party in a mortgage foreclosure action simply leaves that party’s rights unaffected by the judgment of foreclosure and sale” (*Glass v Estate of Gold*, 48 AD3d 746, 747 [2008]; see *Liberty Dabar Assoc. v Mohammed*, 183 AD3d 880, 882 [2020]). Since the plaintiff failed to proffer a reasonable excuse, we need not consider whether the plaintiff had a potentially meritorious cause of action (see *U.S. Bank N.A. v Kerendian*, 232 AD3d 691, 693 [2024]).

Accordingly, the Supreme Court properly, upon reargument, in effect, adhered to the determination in the order dated October 4, 2023, granting Gentile's motion pursuant to CPLR 3215 (c) to dismiss the amended complaint insofar as asserted against her as abandoned and denying those branches of the plaintiff's cross-motion which were for leave to enter a default judgment against Gentile and the nonmoving defendants and for an order of reference and, sua sponte, directed dismissal of the amended complaint insofar as asserted against the nonmoving defendants. Connolly, J.P., Wooten, Voutsinas and McCormack, JJ., concur.

8 Michael Coughlin et al., Appellants, v Zahtae Mouzone et al., Defendants, and Amazon.com, Inc., Respondent. [249 NYS3d 613]—

Employment Relationships—Respondeat Superior—Vicarious Liability—Scope of Employment
Negligence—Negligent Entrustment—Negligent Hiring and Supervision

In a consolidated action, inter alia, to recover damages for personal injuries, the plaintiffs appeal from an order of the Supreme Court, Richmond County (Orlando Marrazzo, Jr., J.), dated October 4, 2021. The order, insofar as appealed from, granted the motion of the defendant Amazon.com, Inc., for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiffs commenced separate actions, which were subsequently consolidated, against the defendants, inter alia, to recover damages for personal injuries the plaintiffs alleged they sustained when they were assaulted by the defendant Zahtae Mouzone in front of their home. The plaintiffs alleged that the defendant Amazon.com, Inc. (hereinafter Amazon), had contracted with the defendant Same Day Delivery, Inc. (hereinafter Same Day), Mouzone's employer, to perform certain deliveries and that Same Day and Amazon were liable for Mouzone's conduct, among other things, under the doctrine of respondeat superior. Following discovery, Amazon moved for summary judgment dismissing the complaint insofar as asserted against it. In an order dated October 4, 2021, the Supreme Court, inter alia, granted Amazon's motion. The plaintiffs appeal.

An employer is vicariously liable for its employees' torts, even where an offender employee's conduct was intentional, if the acts were committed while the employee was acting within

the scope of his or her employment (*see Rivera v State of New York*, 34 NY3d 383, 389 [2019]; *Yildiz v PJ Food Serv., Inc.*, 82 AD3d 971, 972 [2011]; *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 [2006]). “However, the employer bears no vicarious liability where the employee committed the tort for personal motives unrelated to the furtherance of the employer’s business” (*Yildiz v PJ Food Serv., Inc.*, 82 AD3d at 972; *see Rivera v State of New York*, 34 NY3d at 389-390). “Similarly, the employer is not vicariously liable where the employee’s tortious conduct could not have been reasonably expected by the employer” (*Yildiz v PJ Food Serv., Inc.*, 82 AD3d at 972).

Here, Amazon established, *prima facie*, that it was not vicariously liable for Mouzone’s alleged conduct by demonstrating that such conduct was not within the scope of her employment, nor was it reasonably foreseeable by Amazon (*see id.*; *see also Maldonado v Allum*, 208 AD3d 470, 471 [2022]; *Carnegie v J.P. Phillips, Inc.*, 28 AD3d at 600). In opposition, the plaintiffs failed to raise a triable issue of fact.

Similarly, Amazon demonstrated, *prima facie*, that it was not liable for Mouzone’s alleged conduct under theories of negligent hiring or negligent supervision by presenting evidence that it did not know, nor should it have known, of Mouzone’s propensity for the conduct resulting in the plaintiffs’ injuries (*see Shah v Runway Towing Corp.*, 235 AD3d 794, 796 [2025]; *Yildiz v PJ Food Serv., Inc.*, 82 AD3d at 972; *Carnegie v J.P. Phillips, Inc.*, 28 AD3d at 600). In opposition, the plaintiffs failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted Amazon’s motion for summary judgment dismissing the complaint insofar as asserted against it.

In light of our determination, the parties’ remaining contentions need not be addressed. Chambers, J.P., Wooten, Dowling and Love, JJ., concur.

9 Dagro Associates, LLC, Appellant, v City of Yonkers, Respondent. [252 NYS3d 638]—

Municipal Corporations—Zoning—Vested Property Interest—Construction Had Not Yet Begun

Constitutional Law—Taking of Property—Rezoning—No Significant Investment Based on Commercial Zoning

Motions and Orders—Reargument or Renewal—Reasonable Justification for Failure to Present New Facts

In an action, *inter alia*, to recover damages for a regulatory taking of property without just compensation, the plaintiff appeals from (1) an order of the Supreme Court, Westchester County (Nancy Quinn Koba, J.), dated November 3, 2023, and

(2) an order of the same court dated April 19, 2024. The order dated November 3, 2023, insofar as appealed from, granted those branches of the defendant's motion which were for summary judgment dismissing the first through fourth causes of action. The order dated April 19, 2024, insofar as appealed from, denied that branch of the plaintiff's motion which was for leave to renew its opposition to those branches of the defendant's prior motion which were for summary judgment dismissing the first through fourth causes of action.

Ordered that the orders are affirmed insofar as appealed from, with one bill of costs.

In 1994, Antonio Milio and Guiseppe Milio (hereinafter together the Milios) purchased a parcel of undeveloped property located in the defendant, City of Yonkers. At the time of the purchase, the property was zoned for commercial use. In 2011, the Milios transferred title to the property to the plaintiff. In February 2013, the plaintiff entered into a contract to sell the property to MJM Travel Group, Inc. (hereinafter MJM), for the sum of \$1,275,000. MJM intended to use the property for a transportation service business. The contract contained a governmental approvals contingency clause, which conditioned MJM's duty to purchase the property on its ability to obtain the necessary permits and approvals. In March 2013, MJM submitted an application for site plan approval to the Planning Board of the City of Yonkers (hereinafter the Planning Board). On December 11, 2013, the Planning Board denied the application. In June 2014, the defendant changed the zoning of the plaintiff's property from commercial to residential. MJM then exercised its right to cancel the contract.

In August 2020, the plaintiff commenced this action, alleging, *inter alia*, violations of its substantive and procedural due process rights, inverse condemnation, and the unconstitutional taking of its property in violation of both the state and federal constitutions. The defendant moved, among other things, for summary judgment dismissing the first through fourth causes of action. In an order dated November 3, 2023, the Supreme Court, *inter alia*, granted those branches of the defendant's motion. Thereafter, the plaintiff moved, among other things, for leave to renew its opposition to those branches of the defendant's prior motion which were for summary judgment dismissing the first through fourth causes of action. In an order dated April 19, 2024, the court, *inter alia*, denied that branch of the plaintiff's motion. The plaintiff appeals.

The Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing

the cause of action alleging a violation of the plaintiff's substantive due process rights. In order to establish a substantive due process violation in the land-use context, the plaintiff must establish: (1) "deprivation of a vested property interest"; and (2) "that the challenged governmental action was wholly without legal justification" (*Glacial Aggregates LLC v Town of Yorkshire*, 14 NY3d 127, 136 [2010]; see *Nicolakis v Rotella*, 24 AD3d 739, 740 [2005]). A property owner acquires vested rights to the existing zoning status of his or her land when he or she "has undertaken substantial construction and made substantial expenditures prior to the effective date of the amendment" (*Matter of Lombardi v Habicht*, 293 AD2d 474, 475-476 [2002] [internal quotation marks omitted]; see *Town of Orangetown v Magee*, 88 NY2d 41, 47 [1996]). Here, the defendant established, prima facie, that the plaintiff did not have a vested property interest in the commercial use of its property, as no construction had begun prior to the effective date of the ordinance (see *Greenport Group, LLC v Town Bd. of the Town of Southold*, 167 AD3d 575, 578 [2018]; *Matter of Berman v Warshavsky*, 256 AD2d 334, 335-336 [1998]). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff did not provide evidence of substantial expenditures that had been made beyond the normal costs of maintaining the property or evidence of any construction that had begun. Contrary to the plaintiff's contention, the plaintiff's property interest in the commercial use of its property did not vest under the doctrine of equitable estoppel, since there was no evidence that the defendant engaged in misconduct or extraordinary delay in an attempt to prevent the vesting of that property interest (see *Cymbidium Dev. Corp. v Smith*, 133 AD2d 605, 608 [1987]; *Matter of Mascony Transp. & Ferry Serv. v Richmond*, 71 AD2d 896 [1979], *affd* 49 NY2d 969 [1980]). The plaintiff did not provide any indication that the Planning Board's delay in acting on the application for site plan approval was undertaken in bad faith to prevent the plaintiff's property rights from vesting.

The Supreme Court also properly granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging a violation of the plaintiff's procedural due process rights. A procedural due process analysis addresses two questions: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient" (*Kentucky Dept. of Corrections v Thompson*, 490 US 454, 460 [1989] [citation omitted]; see *Shakur v Selsky*, 391 F3d 106, 118 [2004]). Here, because the plaintiff did not have a

vested property interest in the commercial zoning classification of its property, its cause of action alleging a violation of its procedural due process rights fails (see *Azizi v Thornburgh*, 908 F2d 1130, 1134 [1990]; *Orange Lake Assoc., Inc. v Kirkpatrick*, 825 F Supp 1169, 1178 [1993], *affd* 21 F3d 1214 [1994]).

The Supreme Court properly granted those branches of the defendant's motion which were for summary judgment dismissing the causes of action alleging inverse condemnation and an unconstitutional taking of the plaintiff's property in violation of both the state and federal constitutions. "In a modern inverse condemnation action, an owner whose property has been taken de facto may sue the entity that took it to obtain just compensation" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 786 [2012]). "To succeed on an inverse condemnation claim, a property owner must show that the government has intruded onto the owner's property and interfered with the owner's property rights to such a degree that the conduct amounts to a constitutional taking" (*Matter of Willis Ave. Bridge Replacement*, 177 AD3d 453, 455 [2019] [brackets and internal quotation marks omitted]). In determining whether a zoning ordinance effects a taking, courts consider: "(1) [t]he economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action" (*Blue Is. Dev., LLC v Town of Hempstead*, 131 AD3d 497, 502 [2015] [internal quotation marks omitted]; see *Penn Central Transp. Co. v New York City*, 438 US 104, 124 [1978]). "[T]he mere diminution in the value of property, however serious, is insufficient to demonstrate a taking" (*Greenport Group, LLC v Town Bd. of the Town of Southold*, 167 AD3d at 578 [internal quotation marks omitted]; see *de St. Aubin v Flacke*, 68 NY2d 66, 76-77 [1986]). The extent of monetary diminution necessary to support a conclusion that there was a taking requires a loss in value "one step short of complete" (*Noghrey v Town of Brookhaven*, 48 AD3d 529, 532 [2008] [internal quotation marks omitted]). Here, upon consideration of the relevant factors, the defendant established, prima facie, that the rezoning of the plaintiff's property was not an unconstitutional taking. The rezoning did not interfere with investment-backed expectations insofar as the MJM sale had not yet closed and there was no indication that any significant investment had been made in the property based on its commercial zoning. The character of the governmental action in this case was not a physical intrusion but was regulatory in nature (see *Penn Central Transp. Co. v New York City*, 438 US at 124). Moreover, although the rezoning allegedly had the impact of diminishing the value of the plaintiff's

property, it did not deprive the property of economic value to such a degree that a taking was effected (*see Greenport Group, LLC v Town Bd. of the Town of Southold*, 167 AD3d at 578; *Matter of New Cr. Bluebelt, Phase 4*, 122 AD3d 859, 862 [2014]). In opposition, the plaintiff failed to raise a triable issue of fact.

Finally, the Supreme Court properly denied that branch of the plaintiff's motion which was for leave to renew its opposition to those branches of the defendant's prior motion which were for summary judgment dismissing the first through fourth causes of action. A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221 [e] [2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). "Where the party seeking renewal fails to provide a reasonable justification for not presenting the new facts on the prior motion, the court lacks discretion to grant renewal" (*Caronia v Peluso*, 170 AD3d 649, 651 [2019]). Here, the plaintiff failed to provide a reasonable justification for failing to present the allegedly new facts in its original opposition to those branches of the defendant's motion which were for summary judgment dismissing the first through fourth causes of action (*see Bockstruck v Town of Islip*, 219 AD3d 439, 442-443 [2023]; *Caronia v Peluso*, 170 AD3d at 651).

Accordingly, the Supreme Court properly granted those branches of the defendant's motion which were for summary judgment dismissing the first through fourth causes of action and denied that branch of the plaintiff's motion which was for leave to renew its opposition to those branches of the defendant's prior motion which were for summary judgment dismissing the first through fourth causes of action. LaSalle, P.J., Dillon, Christopher and Landicino, JJ., concur.

10 Donna D'Antonio, Appellant, v James A. Brady, M.D., et al., Respondents, et al., Defendants. [250 NYS3d 648]—

Trial—Verdict—Sufficiency of Evidence—Medical Malpractice

Trial—Harmless and Prejudicial Error—Preclusion from Inquiring into Prior Charges of Misconduct

In an action, inter alia, to recover damages for medical malpractice, the plaintiff appeals from a judgment of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), entered May 11, 2022. The judgment, upon a jury verdict in favor of the defendants James A. Brady and James A. Brady, M.D., P.C., on the issue of liability, is in favor of those defendants and against the plaintiff dismissing the complaint insofar as asserted against those defendants.

Ordered that the judgment is affirmed, with costs.

On November 29, 2012, the plaintiff saw James A. Brady with complaints of redness, swelling, and discomfort in her left breast implant. Brady diagnosed the plaintiff with an infection and concluded that surgery was necessary. With the plaintiff's consent, Brady scheduled surgery the next day to remove the infected implant. After the surgery, Brady and the plaintiff scheduled a follow-up surgery for January 29, 2013, during which Brady operated on both the plaintiff's left and right breasts.

The plaintiff, who alleged that the surgeries were unnecessary, thereafter commenced this action against, among others, Brady and his professional corporation (hereinafter together the defendants), among other things, to recover damages for medical malpractice. Following a trial, the jury returned a verdict in the defendants' favor on the issue of liability. On May 11, 2022, the Supreme Court entered judgment in favor of the defendants and against the plaintiff dismissing the complaint insofar as asserted against the defendants. The plaintiff appeals.

"In order to find that a jury verdict is not supported by sufficient evidence as a matter of law, there must be no valid line of reasoning and permissible inferences which could possibly lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Yankovitch v Fessel*, 170 AD3d 784, 785-786 [2019] [alterations and internal quotation marks omitted]; see *Nikollbibaj v City of New York*, 106 AD3d 789, 790 [2013]). "Moreover, a jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence" (*Schuster v Sourour*, 207 AD3d 491, 493 [2022] [internal quotation marks omitted]; see *Angeles v County of Suffolk*, 222 AD3d 923, 925 [2023]). Here, there was legally sufficient evidence to support the jury's findings that the defendants were not liable for medical malpractice (see *Berger v Shen*, 185 AD3d 539, 542 [2020]; *Larkin v Wagner*, 170 AD3d 1145, 1148 [2019]; *Mazzella v Capobianco*, 27 AD3d 532, 532 [2006]). Further, those findings were based on a fair interpretation of the evidence and, thus, were not contrary to the weight of the evidence (see *Larkin v Wagner*, 170 AD3d at 1148; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]).

The Supreme Court erred in precluding the plaintiff from inquiring into prior charges lodged against Brady by the New York Office of Professional Medical Conduct, which arose from intentional conduct dissimilar to the alleged malpractice at is-

sue, for the limited purpose of impeachment. That evidence reflected “a willingness or disposition . . . to place the advancement of [his] individual self-interest ahead of principle or of the interests of society” (*People v Weinstein*, 42 NY3d 439, 467 [2024] [internal quotation marks omitted]; see *Castillo v 62-25 30th Ave. Realty, LLC*, 74 AD3d 1116, 1117 [2010]; *McNeill v LaSalle Partners*, 52 AD3d 407, 409-410 [2008]). However, this error was harmless, as there is no indication that the inquiry would have had a substantial influence on the result of the trial (see CPLR 2002; *Geary v Church of St. Thomas Aquinas*, 98 AD3d 646, 647 [2012]; *Division Seven, Inc. v HP Bldrs. Corp.*, 58 AD3d 796, 797 [2009]). Iannacci, J.P., Christopher, Wan and McCormack, JJ., concur.

11 Deutsche Bank National Trust Company, Respondent, v Carrie Clark et al., Defendants, and Peter Strugatz, Appellant. [252 NYS3d 650]—

Mortgages—Foreclosure—RPAPL 1304 Notice Requirement—Notice Contained Additional Information

Mortgages—Foreclosure—Tolling of Accrual of Interest on Loan—Delays Not Solely Attributable to Mortgagee

Mortgages—Foreclosure—Referee’s Report—No Hearing to Compute Amount Due without Application to Court

In an action to foreclose a mortgage, the defendant Peter Strugatz appeals from an order and judgment of foreclosure and sale (one paper) of the Supreme Court, Suffolk County (S. Betsy Heckman Torres, J.), entered November 1, 2022. The order and judgment of foreclosure and sale, after a nonjury trial on the issue of the plaintiff’s compliance with RPAPL 1304, and upon an order of the same court dated October 24, 2022, inter alia, granting those branches of the plaintiff’s motion which were to confirm a referee’s report and for a judgment of foreclosure and sale and denying those branches of that defendant’s cross-motion which were to dismiss the complaint insofar as asserted against him and to toll the accrual of interest on the subject mortgage loan, among other things, directed the sale of the subject property.

Ordered that the order and judgment of foreclosure and sale is affirmed, with costs.

In May 2005, the defendants Peter Strugatz and Carrie Clark executed a note in the amount of \$742,500 in favor of New Century Mortgage Corporation (hereinafter New Century). The note was secured by a mortgage on certain real property located in East Hampton. In June 2011, the plaintiff, the successor in interest to New Century, commenced this action to foreclose the mortgage. In an order dated June 27, 2017, the

Supreme Court, among other things, granted those branches of the plaintiff's motion which were to restore the action to the active calendar and for summary judgment dismissing Strugatz's affirmative defenses except for the eleventh affirmative defense, alleging the plaintiff's failure to comply with RPAPL 1304, and denied that branch of Strugatz's motion which was to dismiss the complaint insofar as asserted against him for lack of prosecution and abandonment.

In an order dated May 3, 2018 (hereinafter the May 2018 order), the Supreme Court, inter alia, denied those branches of the plaintiff's renewed motion which were for summary judgment on the complaint insofar as asserted against Strugatz and dismissing Strugatz's eleventh affirmative defense and for an order of reference and denied Strugatz's cross-motion to dismiss the complaint insofar as asserted against him based upon the plaintiff's failure to comply with RPAPL 1304. Strugatz appealed from so much of the May 2018 order as denied his cross-motion. In a decision and order dated October 28, 2020, this Court affirmed the May 2018 order insofar as appealed from (*see Deutsche Bank Natl. Trust Co. v Clark*, 187 AD3d 1142, 1143 [2020]).

Following a nonjury trial on the issue of the plaintiff's compliance with RPAPL 1304, the Supreme Court found that the plaintiff complied with RPAPL 1304, and in an order dated September 3, 2019 (hereinafter the September 2019 order), the court appointed a referee to compute the amount due.

On March 2, 2022, a referee issued his oath and a report. In March 2022, the plaintiff moved, among other things, to confirm the referee's report and for a judgment of foreclosure and sale. Strugatz opposed the motion and cross-moved, inter alia, to dismiss the complaint insofar as asserted against him based upon the plaintiff's failure to comply with RPAPL 1304 (2) and to toll the accrual of interest on the subject mortgage loan. The plaintiff opposed Strugatz's cross-motion. In an order dated October 24, 2022 (hereinafter the October 2022 order), the Supreme Court, among other things, granted those branches of the plaintiff's motion and denied those branches of the defendant's cross-motion. In an order and judgment of foreclosure and sale entered November 1, 2022, the court, upon the October 2022 order, inter alia, directed the sale of the property. Strugatz appeals.

Strict compliance with RPAPL 1304 notice to the borrower or borrowers is a condition precedent to the commencement of a foreclosure action (*see U.S. Bank Trust, N.A. v Longo*, 227 AD3d 1122, 1123 [2024]). Here, after the nonjury trial, the Supreme

Court found that the plaintiff established its compliance with RPAPL 1304 and appointed a referee to compute the amount due. The doctrine of law of the case precluded the court from reconsidering that issue in opposition to the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale (see *U.S. Bank Trust, N.A. v Longo*, 227 AD3d at 1123; *U.S. Bank N.A. v Ramanababu*, 202 AD3d 1139, 1142 [2022]).

This Court is not bound by the law of the case doctrine and may consider Strugatz's contention, since the Supreme Court's determination after the nonjury trial is brought up for review on the appeal from the order and judgment of foreclosure and sale (see CPLR 5501 [a] [1], [c]; *U.S. Bank Trust, N.A. v Longo*, 227 AD3d at 1123). However, Strugatz's contention is without merit. In *Bank of Am., N.A. v Kessler* (39 NY3d 317 [2023]), the Court of Appeals held that accurate statements that further the underlying statutory purpose of providing information to borrowers that is or may become relevant to avoiding foreclosure do not constitute an "other notice" that must be sent in a separate envelope (see *id.* at 326-328; *Wells Fargo Bank, N.A. v Smart*, 234 AD3d 1016, 1018 [2025]). The Court of Appeals held that RPAPL 1304 does not prohibit the inclusion of additional information in the envelope that may help borrowers to avoid foreclosure and is not obfuscatory, false, misleading, or unrelated (see *Bank of Am., N.A. v Kessler*, 39 NY3d at 326-328).

Here, the RPAPL 1304 notice contained additional information on a separate page. The page contained short paragraphs on each of the following topics: "Credit Reporting," "Mini Miranda," "HUD Statement," and "Equal Credit Opportunity Act Notice." "The additional notices included with the RPAPL 1304 mailing 'further the statutory purpose by informing certain borrowers of additional protections they may have beyond those identified in the statutory notice language' " (*Bank of Am., N.A. v Gonzalez*, 219 AD3d 433, 435 [2023], quoting *Bank of Am., N.A. v Kessler*, 39 NY3d at 326-327; see *Deutsche Bank Natl. Trust Co. v Pirozzi*, 230 AD3d 736, 740 [2024]). In addition, Strugatz does not explain how the additional information is "false, misleading, obfuscatory, or unrelated" (see *Bank of Am., N.A. v Kessler*, 39 NY3d at 328; *Bank of Am., N.A. v Gonzalez*, 219 AD3d at 435). Accordingly, we agree with the Supreme Court's finding, after the nonjury trial, that the plaintiff complied with RPAPL 1304.

" 'A foreclosure action is equitable in nature and triggers the equitable powers of the court' " (*Wells Fargo Bank, N.A. v*

O'Brien, 234 AD3d 730, 731 [2025], quoting *Onewest Bank, FSB v Kaur*, 172 AD3d 1392, 1393-1394 [2019]). “‘Once equity is invoked, the court’s power is as broad as equity and justice require’” (*Wells Fargo Bank, N.A. v O’Brien*, 234 AD3d at 731, quoting *Onewest Bank, FSB v Kaur*, 172 AD3d at 1394). “‘In an action of an equitable nature, the recovery of interest is within the court’s discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party’” (*id.*; see CPLR 5001 [a]). “‘Further, a tolling and cancellation of interest may also be warranted where there is an unexplained delay in prosecution of a mortgage foreclosure action’” (*Deutsche Bank Trust Co. Ams. v Knights*, 231 AD3d 1016, 1018 [2024], quoting *GMAC Mtge., LLC v Yun*, 206 AD3d 798, 798-799 [2022]). Based on the circumstances of this case, the Supreme Court correctly denied that branch of Strugatz’s cross-motion which was to toll the accrual of interest on the mortgage loan based upon a purported improper delay by the plaintiff in prosecuting this action. The record reflects that the delays in this action were not solely attributable to the plaintiff and that the delays that were attributable to the plaintiff were not so egregious as to warrant the tolling of the accrual of interest on the mortgage loan (see *U.S. Bank N.A. v Mahram*, 230 AD3d 1265, 1266 [2024]).

“A referee’s report should be confirmed whenever the findings are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility” (*Wells Fargo Bank, N.A. v O’Brien*, 234 AD3d 730, 731 [2025]). Here, the referee’s report relied on an affidavit of merit and amounts due by Elizabeth Corral, the Default Fulfillment Manager of Carrington Mortgage Services, LLC (hereinafter Carrington), the plaintiff’s loan servicer. Contrary to Strugatz’s contention, Corral averred that a copy of Carrington’s business records showing the delinquency date and amount due was attached to her affidavit as Exhibit A. Contrary to Strugatz’s further contention, in her affidavit, Corral properly averred that to the extent the business records relied on were created by prior holders or servicers of the loan, those records had been integrated into Carrington’s business records and kept and relied upon as part of a routine and regular business practice and in the ordinary course of Carrington’s business (see *U.S. Bank N.A. v Haber*, 230 AD3d 530, 533 [2024]). Finally, Strugatz’s contention that the business records attached to Corral’s affidavit are illegible is improperly raised for the first time on appeal (see *Deutsche Bank Natl. Trust Co. v Fresh*, 224 AD3d 405, 406 [2024]).

The Supreme Court has the authority to appoint a referee to compute and report the amount due under a mortgage loan (*see* RPAPL 1321 [1]; *U.S. Bank N.A. v Mahram*, 230 AD3d 1265 [2024]). “An order of reference ‘may specify or limit the powers of the referee and the time for the filing of his [or her] report and may fix a time and place for the hearing’” (*U.S. Bank N.A. v Mahram*, 230 AD3d at 1266, quoting CPLR 4311). In cases involving orders of reference to report, the court is the ultimate arbiter of the dispute and has the power to reject the referee’s report and to make new findings (*see* CPLR 4403; *U.S. Bank N.A. v Mahram*, 230 AD3d 1265 [2024]). Here, the September 2019 order appointing a referee to compute the amount due specifically directed that there shall be no hearing to compute the amounts due to the plaintiff without further application to the court (*see* CPLR 4313; *U.S. Bank Trust, N.A. v Aulder*, 219 AD3d 666, 668 [2023]; *cf. Wells Fargo Bank, N.A. v Yesmin*, 186 AD3d 1761, 1763 [2020]). Strugatz was not prejudiced by the referee’s failure to hold a hearing since, in opposing the plaintiff’s motion, *inter alia*, to confirm the referee’s report and for a judgment of foreclosure and sale, Strugatz had an opportunity to raise questions and to submit evidence directly to the court, which could be considered by the court in determining whether to confirm the referee’s report (*see U.S. Bank Trust, N.A. v Aulder*, 219 AD3d at 668). Accordingly, the court properly granted that branch of the plaintiff’s motion which was to confirm the referee’s report. Brathwaite Nelson, J.P., Ford, Voutsinas and Love, JJ., concur.

12 Deutsche Bank National Trust Company, Appellant, v Donna Porter, Also Known as Donna E. Porter, et al., Defendants. [253 NYS3d 198]—

**Dismissal and Nonsuit—Failure to Enter Default Judgment within One Year—
Intent Toward Entry of Judgment—Moved for Order of Reference within One Year**

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Nassau County (David P. Sullivan, J.), dated January 20, 2023. The order denied the plaintiff’s unopposed motion, in effect, pursuant to CPLR 2221 (a) to vacate an order of the same court (Kathryn D. Hopkins, Ct. Atty. Ref.) dated September 10, 2012, *sua sponte*, directing dismissal of the complaint as abandoned pursuant to CPLR 3215 (c), and to restore the action to the active calendar.

Ordered that the order dated January 20, 2023, is reversed, on the law, without costs or disbursements, and the plaintiff’s unopposed motion, in effect, pursuant to CPLR 2221 (a) to vacate the order dated September 10, 2012, and to restore the action to the active calendar is granted.

In October 2009, the plaintiff commenced this action to foreclose a mortgage against, among others, the defendant Donna Porter (hereinafter the defendant). After the defendant failed to appear or answer the complaint, the plaintiff moved for an order of reference. In an order entered August 25, 2010, the Supreme Court denied the motion. The plaintiff subsequently moved for the same relief, which was denied in an order entered March 11, 2011. In an order dated September 10, 2012, the court, sua sponte, directed dismissal of the complaint as abandoned pursuant to CPLR 3215 (c) (hereinafter the dismissal order). In September 2022, the plaintiff moved, in effect, pursuant to CPLR 2221 (a) to vacate the dismissal order and to restore the action to the active calendar. The motion was unopposed. In an order dated January 20, 2023, the court denied the motion. The plaintiff appeals.

The Supreme Court erred in denying the plaintiff's motion, in effect, pursuant to CPLR 2221 (a) to vacate the dismissal order and to restore the action to the active calendar. CPLR 3215 (c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed" (see *Deutsche Bank Natl. Trust Co. v Campbell*, 219 AD3d 701, 703 [2023]; *Bank of Am., N.A. v Rice*, 155 AD3d 593, 593 [2017]). A plaintiff has not abandoned an action if, within one year after the defendant's default, the plaintiff has manifested an intent not to abandon the action, but to take steps to seek a judgment (see *MidFirst Bank v Morris*, 221 AD3d 889, 890 [2023]; *Citimortgage, Inc. v Kimmerling*, 220 AD3d 838, 840 [2023]). Here, the plaintiff moved for an order of reference within the one-year statutory period. The fact that the court denied the motion is beside the point, as the mere presentation of the motion established the plaintiff's intent to proceed toward the entry of judgment and not to abandon the action (see *Wells Fargo Bank, N.A. v Wint*, 235 AD3d 701, 703 [2025]; *MidFirst Bank v Morris*, 221 AD3d at 890; *Deutsche Bank Natl. Trust Co. v Attard*, 197 AD3d 619, 621 [2021]). Because the plaintiff did not fail to take timely proceedings for the entry of a judgment against the defendant within the meaning of CPLR 3215 (c), the plaintiff was not required to demonstrate an excuse for its purported delay in moving to vacate the dismissal order (see *Wells Fargo Bank, N.A. v Wint*, 235 AD3d at 703; *U.S. Bank N.A. v Cadoo*, 197 AD3d 586, 588 [2021]). Moreover, the plaintiff's motion, in effect, pursuant to CPLR 2221 (a) to vacate the dismissal order and to restore the action to the active calendar was not subject

to any specific time limitation (see *Wells Fargo Bank, N.A. v Wint*, 235 AD3d at 703; *Deutsche Bank Natl. Trust Co. v Campbell*, 219 AD3d at 702).

Since dismissal of the action under CPLR 3215 (c) was unwarranted, the Supreme Court should have granted the plaintiff's unopposed motion, in effect, pursuant to CPLR 2221 (a) to vacate the dismissal order and to restore the action to the active calendar (see *Wells Fargo Bank, N.A. v Lopez*, 214 AD3d 844, 845 [2023]; *U.S. Bank, N.A. v Stiene*, 203 AD3d 985, 987 [2022]; *US Bank, N.A. v Picone*, 170 AD3d 1070, 1072 [2019]). Barros, J.P., Warhit, Taylor and Golia, JJ., concur.

13 Deutsche Bank Trust Company Americas, Appellant, v Reinaldo Suriel et al., Defendants, and Israel Grossman, as Trustee of the YYSB Trust, Respondent. [252 NYS3d 205]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Commenced More than Six Years after Debt Accelerated

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated October 17, 2023. The order, insofar as appealed from, upon renewal, in effect, vacated an order of the same court dated January 10, 2023, denying the prior motion of the defendant Israel Grossman for summary judgment dismissing the complaint insofar as asserted against him and on his counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the subject mortgage, and thereupon granted that defendant's prior motion.

Ordered that the order dated October 17, 2023, is affirmed insofar as appealed from, with costs.

On April 21, 2006, Reinaldo Suriel executed a note in the sum of \$404,400 in favor of People's Choice Home Loan, Inc. The note was secured by a mortgage on certain residential property located in Brooklyn (hereinafter the premises). Suriel allegedly defaulted on his obligations under the note and mortgage by failing to make the monthly payment due on March 1, 2007.

In June 2007, the plaintiff commenced an action against Suriel, among others, to foreclose the mortgage (hereinafter the 2007 action).

In June 2009, the plaintiff moved, inter alia, for an order of reference. By order dated February 23, 2011, the Supreme Court directed dismissal of the complaint in the 2007 action with prejudice unless the plaintiff submitted, within 60 days, an affirmation in compliance with a court rule promulgated by the Chief Administrative Judge of the Courts on October 20,

2010. In an order dated August 29, 2011, the court directed dismissal of the 2007 action upon the plaintiff's failure to comply with the order dated February 23, 2011. By deed dated May 24, 2013, the premises was conveyed to YYSB Trust.

In July 2022, the plaintiff commenced this action against, among others, Israel Grossman (hereinafter the defendant). The defendant interposed an answer in which he asserted various affirmative defenses, including that the action was barred by the statute of limitations, and a counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage.

In September 2022, the defendant moved for summary judgment dismissing the complaint insofar as asserted against him as barred by the statute of limitations and on his counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage. The plaintiff opposed the motion, arguing, among other things, that the action was timely pursuant to CPLR 205 (a). In an order dated January 10, 2023, the Supreme Court denied the defendant's motion.

Thereafter, the defendant moved for leave to renew his prior motion, *inter alia*, for summary judgment dismissing the complaint insofar as asserted against him, arguing that the action was untimely and the plaintiff could not rely on the savings provision contained in CPLR 205 (a) insofar as that provision had been replaced with CPLR 205-a by the Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]). In opposition, the plaintiff argued that FAPA did not apply retroactively and that retroactive application of FAPA was unconstitutional.

In an order dated October 17, 2023, the Supreme Court granted leave to renew and, upon renewal, in effect, vacated the order dated January 10, 2023, and thereupon granted the defendant's prior motion for summary judgment dismissing the complaint insofar as asserted against him as barred by the statute of limitations and on his counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage. The plaintiff appeals.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 261 [2019]). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" (*BHMPW Funding, LLC v Lloyd-Lewis*, 194 AD3d 780, 782 [2021] [internal quotation marks omitted]; *see Citimortgage, Inc. v Gunn*, 234 AD3d 922, 923 [2025]). "Acceleration occurs, *inter alia*, by the commencement of a foreclo-

sure action wherein the holder of the note elects in the complaint to call due the entire amount secured by the mortgage’ ” (*U.S. Bank N.A. v Medianik*, 223 AD3d 935, 937 [2024], quoting *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2023]).

“Pursuant to RPAPL 1501 (4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge of record that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge of record the mortgage was commenced” (*SYCP, LLC v Evans*, 217 AD3d 707, 708 [2023] [internal quotation marks omitted]).

FAPA, which became effective December 30, 2022, replaced the savings provision of CPLR 205 (a) with CPLR 205-a in actions upon instruments described in CPLR 213 (4) (*see Pryce v U.S. Bank, N.A.*, 226 AD3d 711, 713 [2024]). Under CPLR 205-a, a plaintiff is no longer entitled to the six-month savings provision set forth in CPLR 205 (a), where the action was timely commenced but terminated by, inter alia, “a dismissal of the complaint for any form of neglect, including . . . for violation of any court rules or individual part rules” (*id.* § 205-a [a]).

Here, the Supreme Court, upon renewal, properly granted the defendant’s prior motion for summary judgment dismissing the complaint insofar as asserted against him and on his counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage. The defendant established that the six-year statute of limitations began to run on the entire debt in 2007, when the plaintiff commenced the 2007 action (*see SYCP, LLC v Evans*, 217 AD3d at 708). Since the plaintiff did not commence this action until July 2022, more than 10 years after the debt was accelerated, the defendant demonstrated, prima facie, that this action was untimely (*see id.*). The plaintiff’s arguments challenging FAPA’s retroactive application and constitutionality under the United States and New York Constitutions also are without merit (*see FV-1, Inc. v Palaguachi*, 234 AD3d 818, 822 [2025]; *Deutsche Bank Natl. Trust Co. v Dagrin*, 233 AD3d 1065, 1069-1071 [2024]; *97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038, 1043 [2024]).

Moreover, the plaintiff was not entitled to the benefit of CPLR 205-a because the 2007 action was dismissed for a form of neglect, namely the plaintiff’s failure to comply with the or-

der dated February 23, 2011, directing the plaintiff to comply with a court rule within 60 days (*see U.S. Bank N.A. v Jarrett*, 233 AD3d 731, 732 [2024]).

Accordingly, the Supreme Court, upon renewal, properly granted the defendant's prior motion for summary judgment dismissing the complaint insofar as asserted against him as time-barred and on his counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage.

In light of the foregoing, we need not consider the parties' remaining contentions. Genovesi, J.P., Dowling, Wan and Taylor, JJ., concur.

14 Jane Doe, Appellant, v Grant Wilfley Casting, Inc., et al., Respondents, et al., Defendant. [249 NYS3d 610]—

**Employment Relationships—Respondeat Superior—Scope of Employment
Employment Relationships—Respondeat Superior—Negligent Hiring, Retention, and Supervision—Knowledge of Propensity to Commit Wrongful Acts**

In an action, inter alia, to recover damages for negligence, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Robert F. Quinlan, J.), dated May 9, 2024. The order granted the separate motions of the defendants Grant Wilfley Casting, Inc., and Paramount Pictures Corporation pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against each of them.

Ordered that the order is affirmed, with one bill of costs.

The plaintiff commenced this action pursuant to the Adult Survivors Act (*see* CPLR 214-j) against the defendants Grant Wilfley Casting, Inc., Paramount Pictures Corporation (hereinafter together the defendants), and John Doe, inter alia, to recover damages for negligence. While working as an extra on the set of a film, the plaintiff allegedly was sexually assaulted by John Doe, another extra working on the set of the film. The defendants separately moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against each of them. In an order dated May 9, 2024, the Supreme Court granted the defendants' separate motions. The plaintiff appeals.

“On a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Mohammad v Rehman*, 236 AD3d 892, 893 [2025], quoting *Weinstein v Levitin*, 208 AD3d 531, 532 [2022]). “Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the

factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery’” (*Laine v Empire HealthChoice Assur., Inc.*, 234 AD3d 833, 835 [2025], quoting *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

“‘Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer’s business and within the scope of employment’” (*Browne v Lyft, Inc.*, 219 AD3d 445, 446 [2023], quoting *N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; see *Riviello v Waldron*, 47 NY2d 297, 302 [1979]). “‘Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment’” (*Browne v Lyft, Inc.*, 219 AD3d at 446, quoting *Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; see *Riviello v Waldron*, 47 NY2d at 304). “An employee’s actions fall within the scope of employment where the purpose in performing such actions is to further the employer’s interest, or to carry out duties incumbent upon the employee in furthering the employer’s business” (*Montalvo v Episcopal Health Servs., Inc.*, 172 AD3d 1357, 1359 [2019] [internal quotation marks omitted]; see *Beauchamp v City of New York*, 3 AD3d 465, 466 [2004]; *Stavitz v City of New York*, 98 AD2d 529, 531 [1984]).

“[W]here an employee’s actions are taken for wholly personal reasons, which are not job related, the challenged conduct cannot be said to fall within the scope of employment” (*Montalvo v Episcopal Health Servs., Inc.*, 172 AD3d at 1360). “A sexual assault perpetrated by an employee is not in furtherance of an employer’s business and is a clear departure from the scope of employment, having been committed for wholly personal motives” (*id.*; see *N.X. v Cabrini Med. Ctr.*, 97 NY2d at 251; *Judith M. v Sisters of Charity Hosp.*, 93 NY2d at 933). Here, John Doe’s alleged conduct was a departure from his duties as an extra and was committed solely for personal motives and, as such, cannot be said to have been committed within the scope of employment (see *Browne v Lyft, Inc.*, 219 AD3d at 447).

“[T]o establish a cause of action based on negligent hiring, negligent retention, or negligent supervision [of an employee], it must be shown that the employer knew or should have known of the employee’s propensity for the conduct which caused the injury” (*Fuller v Family Servs. of Westchester, Inc.*, 209 AD3d 983, 984 [2022] [internal quotation marks omitted];

see *Kessler v Yeshiva of Cent. Queens*, 231 AD3d 1140, 1141 [2024]).

Here, the complaint failed to state causes of action for negligent hiring, negligent retention, and negligent supervision since it failed to sufficiently allege that the defendants knew, or should have known, of a propensity on the part of John Doe to commit the alleged wrongful acts (see *Kessler v Yeshiva of Cent. Queens*, 231 AD3d at 1141-1142; *Abbas v Richmond Univ. Med. Ctr.*, 229 AD3d 743, 744 [2024]; *Fuller v Family Servs. of Westchester, Inc.*, 209 AD3d at 984). Accordingly, the Supreme Court properly granted the defendants' separate motions pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against each of them.

The parties' remaining contentions need not be reached in light of our determination. Chambers, J.P., Wooten, Dowling and Love, JJ., concur.

15 Joseph Guzman, Appellant, v Robert L. Howe et al., Appellants, and Steger Restaurant, Inc., Respondent. [249 NYS3d 605]—

Negligence—Sidewalks—Liability of Tenant—Lease Provisions Regarding Maintenance of Sidewalk
Indemnity—Contractual Indemnification—Ambiguous Lease

In an action to recover damages for personal injuries, the plaintiff and the defendants Robert L. Howe and Diana T. Howe separately appeal from (1) an order of the Supreme Court, Kings County (Sharon A. Bourne-Clarke, J.), dated October 5, 2023, and (2) a judgment of the same court dated March 6, 2024. The order, insofar as appealed from, granted the motion of the defendant Steger Restaurant, Inc., for summary judgment dismissing the amended complaint and all cross-claims insofar as asserted against it. The judgment, insofar as appealed from, upon the order, is in favor of the defendant Steger Restaurant, Inc., and against the plaintiff and the defendants Robert L. Howe and Diana T. Howe dismissing the amended complaint and all cross-claims insofar as asserted against it. The notice of appeal of the defendants Robert L. Howe and Diana T. Howe from the order is deemed also to be a notice of appeal from the judgment (see CPLR 5501 [c]).

Ordered that the appeals from the order are dismissed; and it is further,

Ordered that the appeal by the plaintiff from so much of the judgment as dismissed the cross-claims asserted by the defendants Robert L. Howe and Diana T. Howe against the defendant Steger Restaurant, Inc., is dismissed, as the plaintiff is not ag-

grieved by that portion of the judgment (*see id.* § 5511; *Mixon v TBV, Inc.*, 76 AD3d 144 [2010]); and it is further,

Ordered that the appeal by the defendants Robert L. Howe and Diana T. Howe from so much of the judgment as dismissed the amended complaint insofar as asserted against the defendant Steger Restaurant, Inc., is dismissed, as the defendants Robert L. Howe and Diana T. Howe are not aggrieved by that portion of the judgment (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144 [2010]); and it is further,

Ordered that the judgment is reversed insofar as reviewed, on the law, with one bill of costs payable by the defendant Steger Restaurant, Inc., to the plaintiff and the defendants Robert L. Howe and Diana T. Howe appearing separately and filing separate briefs, the amended complaint and all cross-claims insofar as asserted against the defendant Steger Restaurant, Inc., are reinstated, the motion of the defendant Steger Restaurant, Inc., for summary judgment dismissing the amended complaint and all cross-claims insofar as asserted against it is denied, and the order is modified accordingly.

The appeals from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241 [1976]). The issues raised on the appeals from the order are brought up for review and have been considered on the appeals from the judgment (*see* CPLR 5501 [a] [1]).

The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained after tripping on an unlevel portion of a sidewalk located adjacent to a restaurant in Brooklyn. The premises were owned by the defendants Robert L. Howe and Diana T. Howe (hereinafter together the Howe defendants) and leased by the defendant Steger Restaurant, Inc. (hereinafter Steger). In their answer, the Howe defendants asserted cross-claims against Steger for contractual and common-law indemnification.

Steger moved for summary judgment dismissing the amended complaint and all cross-claims insofar as asserted against it. In an order dated October 5, 2023, the Supreme Court granted Steger's motion. Thereafter, the court, upon the order, issued a judgment dated March 6, 2024, in favor of Steger and against the plaintiff and the Howe defendants dismissing the amended complaint and all cross-claims insofar as asserted against Steger. The plaintiff and the Howe defendants separately appeal.

The "Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain

and repair the sidewalk abutting its property” (*Errazuri v E Food Supermarket, Inc.*, 228 AD3d 732, 734 [2024] [internal quotation marks omitted]; *Paperman v 2281 86th St. Corp.*, 142 AD3d 540, 541 [2016]). However, where a lease is so comprehensive regarding sidewalk maintenance as to entirely displace the landowner’s duty to maintain the sidewalk, the tenant may be liable to a third party (see *Hsu v City of New York*, 145 AD3d 759, 760 [2016]; *Paperman v 2281 86th St. Corp.*, 142 AD3d at 541).

Here, Steger failed to establish, *prima facie*, that it did not have an obligation to repair or replace the sidewalk abutting the premises. Although paragraph 4 of the lease stated that Steger was responsible for nonstructural repairs, as distinguished from structural repairs, of the sidewalk, under another provision of the lease Steger was obligated to “make all repairs and replacements to the sidewalks and curbs adjacent thereto,” and section 65 (B) of the lease required Steger to “repair that portion of the concrete adjacent to and surrounding the Demised Premises which is deemed by the City of New York to be the responsibility of the property holders.” These provisions raise an issue of fact as to whether the lease is so comprehensive regarding sidewalk maintenance as to entirely displace the landowner’s duty to maintain the sidewalk. Indeed, Steger’s principal acknowledged that the lease was ambiguous with respect to such issues. Accordingly, the Supreme Court improperly granted that branch of Steger’s motion which was for summary judgment dismissing the amended complaint insofar as asserted against it.

“The right to contractual indemnification depends upon the specific language of the contract” (*Alayev v Juster Assoc., LLC*, 122 AD3d 886, 887 [2014] [internal quotation marks omitted]; see *Sheinman-Hardes v Main 15 Lee Ltd. Partnership*, 235 AD3d 683, 684 [2025]). “The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*Alayev v Juster Assoc., LLC*, 122 AD3d at 887). Here, Steger failed to establish its *prima facie* entitlement to judgment as a matter of law dismissing the Howe defendants’ cross-claims for indemnification. The ambiguity of the lease failed to eliminate issues of fact as to whether Steger was responsible for repairing the sidewalk, and therefore, whether the Howe defendants were entitled to indemnification from Steger (see *Sheinman-Hardes v Main 15 Lee Ltd. Partnership*, 235 AD3d at 685; *Campisi v Gambar Food Corp.*, 130 AD3d 854, 855-856 [2015]; *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 556 [2014]).

Accordingly, that branch of Steger's motion which was for summary judgment dismissing the Howe defendants' cross-claims for indemnification should have been denied. Barros, J.P., Ford, Ventura and Golia, JJ., concur.

16 HSBC Bank USA, N.A., Appellant, v Stephen Decker, Respondent, et al., Defendants. [252 NYS3d 209]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Debt Accelerated by Commencement of Prior Action
Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Voluntary Discontinuance of Prior Action

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Robert F. Quinlan, J.), dated November 21, 2023. The order denied the plaintiff's motion, inter alia, for summary judgment on the complaint insofar as asserted against the defendant Stephen Decker and for an order of reference, and granted that branch of the cross-motion of that defendant which was to dismiss the complaint as time-barred.

Ordered that the order is affirmed, with costs.

In 2007, the plaintiff commenced an action against the defendant Stephen Decker (hereinafter the defendant), among others, to foreclose a mortgage encumbering certain real property located in Cutchogue (hereinafter the 2007 action). The 2007 action was voluntarily discontinued by stipulation dated March 21, 2012.

In June 2022, the plaintiff commenced this action, the fourth action against the defendant, among others, to foreclose the same mortgage. The defendant interposed an answer, asserting several affirmative defenses, including that the instant action is time-barred.

The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. The defendant opposed the motion and cross-moved, among other things, for summary judgment dismissing the complaint as time-barred. In an order dated November 21, 2023, the Supreme Court denied the plaintiff's motion and granted that branch of the defendant's cross-motion. The plaintiff appeals.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 261 [2019]; *U.S. Bank N.A. v Medianik*, 223 AD3d 935, 937 [2024]). “‘[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on

the entire debt’ ” (*Deutsche Bank Natl. Trust Co. v DiGiorgio*, 237 AD3d 899, 900 [2025], quoting *BHMPW Funding, LLC v Lloyd-Lewis*, 194 AD3d 780, 782 [2021]; see *U.S. Bank N.A. v Medianik*, 223 AD3d at 937). “Acceleration occurs, inter alia, by the commencement of a foreclosure action wherein the [holder of the note] elects in the complaint to call due the entire amount secured by the mortgage” (*GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2023]; see *U.S. Bank N.A. v Medianik*, 223 AD3d at 937).

Here, it is undisputed that the six-year statute of limitations began to run in 2007 when the plaintiff commenced the 2007 action (see *HSBC Bank USA, N.A. v Corrales*, 224 AD3d 816, 818 [2024]). In support of his cross-motion, the defendant demonstrated that this action was commenced in June 2022, more than six years later (see CPLR 213 [4]; *Deutsche Bank Natl. Trust Co. v DiGiorgio*, 237 AD3d at 900; *U.S. Bank N.A. v Simon*, 216 AD3d 1041, 1042-1043 [2023]). The defendant thus established, prima facie, that this action was untimely (see *Deutsche Bank Natl. Trust Co. v DiGiorgio*, 237 AD3d at 900-901; *US Bank Trust, N.A. v Reizes*, 222 AD3d 907, 910 [2023]).

The plaintiff’s contention that even if the subject mortgage debt was accelerated by the commencement of the 2007 action, the plaintiff’s voluntary discontinuance of that action served to revoke that acceleration and reset the statute of limitations is without merit. The Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821 [eff Dec. 30, 2022]) “ ‘amended CPLR 3217, governing the voluntary discontinuance of an action, by adding a new paragraph (e), which provides that “[i]n any action on an instrument described under [CPLR 213 (4)], the voluntary discontinuance of such action, whether on motion, order, stipulation or by notice, shall not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute” ’ ” (*Deutsche Bank Natl. Trust Co. v DiGiorgio*, 237 AD3d at 901, quoting *GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d at 917).

Further, the plaintiff’s servicer’s April 2021 letter to the defendant purporting to revoke the plaintiff’s prior acceleration of the mortgage debt and restore the subject loan to installment status, even prior to the enactment of FAPA, would not have been effective to reset the statute of limitations because the purported revocation did not occur during the six-year limitations period (see *id.*).

The plaintiff’s arguments challenging FAPA’s retroactive application and constitutionality under the United States Consti-

tution are also without merit (*see Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065 [2024]; *97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038 [2024]).

The plaintiff's remaining contentions either are without merit or need not be reached in light of our determination. Genovesi, J.P., Ford, Wan and Love, JJ., concur.

17 HSBC Bank USA, National Association, Respondent, v Barry Schneps, Appellant. [252 NYS3d 645]—

Parties—Necessary Parties—Mortgage Foreclosure—Ability to Direct Joinder

In an action to foreclose a mortgage, the defendant appeals from an order of the Supreme Court, Nassau County (Jeffrey A. Goodstein, J.), dated January 16, 2024. The order denied the defendant's motion pursuant to CPLR 3211 (a) to dismiss the complaint, and, sua sponte, directed the plaintiff to join Chaya Schneps as a party in this action.

Ordered that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, directed the plaintiff to join Chaya Schneps as a party in this action is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order is affirmed, with costs.

In February 2005, the defendant, Barry Schneps, and Chaya Schneps (hereinafter together the Schneps) executed a note in favor of GreenPoint Mortgage Funding, Inc. (hereinafter GreenPoint), in the principal sum of \$387,000, secured by a mortgage on certain property in West Hempstead.

On July 22, 2011, the plaintiff, HSBC Bank USA, National Association (hereinafter HSBC), GreenPoint's successor in interest, commenced an action to foreclose the mortgage against, among others, the Schneps (hereinafter the 2011 action). On May 6, 2016, HSBC commenced another action to foreclose the mortgage against, among others, the Schneps (hereinafter the 2016 action). The complaint in the 2016 action called due the entire amount secured by the mortgage. The 2011 action was discontinued by order dated June 8, 2016. In 2022, the complaint in the 2016 action was dismissed insofar as asserted against Barry (*see HSBC Bank USA, N.A. v Schneps*, 210 AD3d 748 [2022]).

In May 2023, while the 2016 action was still pending insofar as asserted against Chaya and without leave of court, HSBC commenced this action solely against Barry to foreclose the mortgage. In June 2023, Barry moved pursuant to CPLR 3211

(a) to dismiss the complaint, inter alia, on the grounds that the action was barred by the statute of limitations and that HSBC failed to join Chaya, a necessary party. HSBC opposed the motion. By order dated January 16, 2024, the Supreme Court denied Barry's motion and, sua sponte, directed HSBC to join Chaya as a party in this action. Barry appeals.

Pursuant to RPAPL 1311 (1), the plaintiff in a mortgage foreclosure action is required to join, as a party defendant, "[e]very person having an estate or interest in possession, or otherwise, in the property as tenant in fee, for life, by the curtesy, or for years, and every person entitled to the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof." Here, Chaya is a necessary party to the instant mortgage foreclosure action (*see* CPLR 1001 [a]; RPAPL 1311 [1]; *Bancplus Mtge. Corp. v Galloway*, 203 AD2d 222 [1994]). However, Barry failed to demonstrate that HSBC's failure to join Chaya as a defendant warranted dismissal of the complaint (*see U.S. Bank Trust N.A. v Germoso*, 216 AD3d 1046, 1048 [2023]). When a necessary party has not been made a party and is "subject to the jurisdiction" of the court, the proper remedy is not dismissal of the complaint but, rather, for the court to order that the necessary party be summoned (CPLR 1001 [b]; *see BAC Home Loans Servicing, L.P. v Williams*, 194 AD3d 681, 682 [2021]; *U.S. Bank Trust, N.A. v Gedeon*, 181 AD3d 745, 747-748 [2020]). Contrary to Barry's contention, the Supreme Court's ability to direct joinder of Chaya at this juncture is not affected by the purported running of the statute of limitations, because the expiration of a statute of limitations is not a jurisdictional defect (*see Windy Ridge Farm v Assessor of Town of Shandaken*, 11 NY3d 725, 726-727 [2008]; *U.S. Bank Trust, N.A. v Germoso*, 216 AD3d at 1047-1048; *Matter of Romeo v New York State Dept. of Educ.*, 41 AD3d 1102, 1104 [2007]). Moreover, Barry lacked standing to assert a statute of limitations defense on behalf of Chaya (*see U.S. Bank Trust, N.A. v Germoso*, 216 AD3d at 1047-1048; *BHMPW Funding, LLC v Lloyd-Lewis*, 194 AD3d 780, 784 [2021]).

Accordingly, the Supreme Court properly denied Barry's motion pursuant to CPLR 3211 (a) to dismiss the complaint and, sua sponte, directed HSBC to join Chaya as a party in this action. Genovesi, J.P., Ford, Wan and Love, JJ., concur.

18 J.P. Morgan Chase Bank, N.A., Plaintiff, v Ashley N. Herschmann, Also Known as Ashley Herschmann, et al., Appellants, and Garnerville Holding Company, Inc., Respondent, et al., Defendants. [252 NYS3d 662]—

Disclosure—Protective Order—Striking of Demand for Discovery and Inspection—Sought Materially Unnecessary Information**Disclosure—Discovery and Inspection—Material and Necessary Requirement—Related Solely to Damages in Prior Action**

In an action to foreclose a mortgage, the defendants Ashley N. Herschmann and Liora D. Herschmann appeal from an order of the Supreme Court, Rockland County (Rolf M. Thorsen, J.), dated July 5, 2023. The order granted the motion of the defendant Garnerville Holding Company, Inc., for a protective order striking certain discovery demands of the defendants Ashley N. Herschmann and Liora D. Herschmann and to quash a subpoena ad testificandum.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action to foreclose a residential mortgage against, among others, the defendants Ashley N. Herschmann (hereinafter Ashley Herschmann) and Liora D. Herschmann (hereinafter together the Herschmanns), as borrowers, and the defendant Garnerville Holding Company, Inc. (hereinafter Garnerville), as a judgment creditor of Ashley Herschmann. In a prior, unrelated action, a judgment was issued in favor of Garnerville and against Ashley Herschmann in the principal sum of \$3,780,000, representing damages in relation to certain real property owned by Garnerville. Garnerville interposed an answer in this action asserting cross-claims against the Herschmanns, among others, alleging that the Herschmanns fraudulently conveyed certain property that they owned to circumvent the judgment entered against Ashley Herschmann in the prior action. Ashley Herschmann interposed an answer in this action alleging, inter alia, that Garnerville was not a legitimate creditor at the time that the conveyances were made.

Thereafter, in this action, the Herschmanns served a first notice for discovery and inspection upon Garnerville for the production of documents to establish whether the judgment in the prior action had been satisfied and, thus, whether Garnerville remained a judgment creditor of Ashley Herschmann. The Herschmanns subsequently moved to compel discovery. In July 2022, the Supreme Court granted the Herschmanns' motion on the ground that the requested discovery was material and necessary to the Herschmanns' defense against Garnerville's cross-claims.

In October 2022, the Herschmanns served a second notice for discovery and inspection upon Garnerville for the production of, among other things, insurance claims, communications, and payments stemming from the damage sustained by Garnerville

in the prior action. The Herschmanns also served a subpoena ad testificandum upon Garnerville's expert witness in the prior action, Salvatore J. Triano (hereinafter the Triano subpoena), alleging that Triano's testimony was necessary for their defense against Garnerville's cross-claims in this action—that Garnerville was not a legitimate creditor of Ashley Herschmann.

Garnerville moved for a protective order striking the Herschmanns' discovery demands and to quash the Triano subpoena. In an order dated July 5, 2023, the Supreme Court granted Garnerville's motion. The Herschmanns appeal.

Pursuant to CPLR 3101 (a), parties are entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." However, "[a] party is not entitled to unlimited, uncontrolled, unfettered disclosure, and the supervision of discovery is generally left to the trial court's broad discretion" (*Geffner v Mercy Med. Ctr.*, 83 AD3d 998, 998 [2011]; see *Lombardi v Lombardi*, 190 AD3d 964, 966 [2021]). "Pursuant to CPLR 3103 (a), the Supreme Court may issue a protective order striking a notice for discovery and inspection that is palpably improper" (*Lombardi v Lombardi*, 190 AD3d at 966). "A notice for discovery and inspection is palpably improper if it is overbroad, burdensome, fails to specify with reasonable particularity many of the documents demanded, or seeks irrelevant or confidential information" (*Ferrara v Longwood Cent. Sch. Dist.*, 225 AD3d 671, 673 [2024]).

Here, the Supreme Court providently exercised its discretion in granting that branch of Garnerville's motion which was for a protective order striking the Herschmanns' second notice for discovery and inspection. The Herschmanns' discovery demands were palpably improper in that they were overbroad, irrelevant, and sought information that was not material or necessary to their defense against Garnerville's cross-claims in this action (see *Lombardi v Lombardi*, 190 AD3d at 966; *Pascual v Rustic Woods Homeowners Assn., Inc.*, 173 AD3d 757, 758 [2019]). Rather, the Herschmanns' discovery demands constituted an improper attempt to collaterally attack the award of damages in the prior action (see *Urias v Daniel P. Buttafuoco & Assoc., PLLC*, 41 NY3d 560, 568 [2024]).

The Supreme Court also providently exercised its discretion in granting that branch of Garnerville's motion which was to quash the Triano subpoena. "A party or nonparty moving to quash a subpoena has the initial burden of establishing either that the requested disclosure is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" (*Islip Theaters, LLC v Landmark*

Plaza Props. Corp., 183 AD3d 875, 876 [2020] [internal quotation marks omitted]; see CPLR 2304; *Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]). “Should the [movant] meet this burden, the subpoenaing party must then establish that the discovery sought is ‘material and necessary’ to the prosecution or defense of [the] action” (*Matter of Kapon v Koch*, 23 NY3d at 34).

Here, Garnerville established that the requested discovery related solely to the award of damages in the prior action and, therefore, was utterly irrelevant to any proper inquiry in this action (see *Lurie v Lurie*, 226 AD3d 992, 996 [2024]; *Islip Theaters, LLC v Landmark Plaza Props. Corp.*, 183 AD3d at 876). In opposition, the Herschmanns failed to establish that the requested discovery was material and necessary to their defense against Garnerville’s cross-claims in this action (see *Matter of Kapon v Koch*, 23 NY3d at 34; *Lurie v Lurie*, 226 AD3d at 996).

The Herschmanns’ remaining contentions are without merit. Brathwaite Nelson, J.P., Taylor, Ventura and McCormack, JJ., concur.

19 Brendan Kehoe, Appellant, v Jon J. Aiello et al., Respondents, et al., Defendants. [250 NYS3d 646]—

Negligence—Duty—Landowners’ Liability for Fight Occurring on Property—Sudden and Unforeseeable Event

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Christopher Modelewski, J.), dated September 4, 2024. The order, insofar as appealed from, granted that branch of the motion of the defendants Jon J. Aiello and Joy Marie Aiello which was for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff was attending a party held at the home of the defendants Jon J. Aiello and Joy Marie Aiello (hereinafter together the Aiello defendants) when a fight broke out between two guests—the defendant Matthew Yablon, who was 22 years old, and 19-year-old Brian Minogue. During the course of that fight, the plaintiff allegedly was injured when he was punched in the face by Yablon. The plaintiff commenced this action against, among others, the Aiello defendants, inter alia, to recover damages for personal injuries. After the completion of discovery, the Aiello defendants moved, among other things, for summary judgment dismissing the complaint insofar as asserted against them. By order dated September 4, 2024, the

Supreme Court, *inter alia*, granted that branch of the Aiello defendants' motion. The plaintiff appeals.

"Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property," including "to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *see Covelli v Silver Fist, Ltd.*, 167 AD3d 980 [2018]). However, "a landowner is not an insurer of a visitor's safety, and has no duty to protect visitors against unforeseeable and unexpected assaults" (*Covelli v Silver Fist, Ltd.*, 167 AD3d at 981).

Here, the Aiello defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them. The Aiello defendants demonstrated, *prima facie*, that the altercation during which the plaintiff was injured was a sudden and unforeseeable event, that they had no opportunity to control Yablon's conduct at the time he struck the plaintiff, and that they were not aware of the need for such control (*see id.*; *Salgado v Paccio*, 150 AD3d 1293, 1294 [2017]; *Daly v Finley*, 101 AD3d 931, 932 [2012]). The Aiello defendants additionally demonstrated that they did not violate General Obligations Law § 11-100, as Yablon, the person who allegedly injured the plaintiff by punching him, was over the age of 21 years (*see id.* § 11-100 [1]). In opposition, the plaintiff failed to raise a triable issue of fact.

The plaintiff's remaining contentions are without merit.

Accordingly, the Supreme Court properly granted that branch of the Aiello defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them. Iannacci, J.P., Chambers, Taylor and McCormack, JJ., concur.

20 Kopelevich & Feldsherova, P.C., Appellant, v Art of Healing Medicine, P.C., et al., Respondents. [250 NYS3d 218]—

Accounts and Accounting—Account Stated—Law Firm Sent Invoices for Unpaid Fees—Alleged That Counsel Removed for Wrongful Action

In an action to recover unpaid legal fees, the plaintiff appeals from an order of the Supreme Court, Kings County (Caroline Piela Cohen, J.), dated March 28, 2024. The order denied the plaintiff's motion for summary judgment on the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action to recover unpaid legal

fees allegedly earned for work performed on behalf of the defendants. The plaintiff moved for summary judgment on the complaint, which sought, inter alia, to recover fees on an account stated. The defendants opposed the motion. The Supreme Court denied the plaintiff's motion in an order dated March 28, 2024. The plaintiff appeals.

"An account stated is an agreement between parties, based upon their prior transactions, with respect to the correctness of the account items and the specific balance due" (*Michael B. Shulman & Assoc., P.C. v Canzona*, 201 AD3d 716, 717 [2022] [internal quotation marks omitted]). "Although an account stated may be based on an express agreement between the parties as to the amount due, an agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*Citibank [South Dakota], N.A. v Abraham*, 138 AD3d 1053, 1056 [2016]). "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Legum v Ruthen*, 211 AD2d 701, 703 [1995]).

Here, the plaintiff met its prima facie burden of establishing its entitlement to judgment as a matter of law based upon an account stated by demonstrating that its invoices had been received by the defendant Alexander Pinkusovich and by submitting evidence that the defendants did not object to the invoices. However, the defendants' submissions in opposition, including the affidavit of Alexander Pinkusovich, alleging that the plaintiff had been removed as the defendants' counsel for "wrongful action" and that the only invoices sent to the defendants were dated one day prior to the plaintiff's removal as counsel, as well as evidence that the defendants stopped payment on a check that was drafted to the plaintiff and that the defendants paid a partial amount of one invoice "in settlement," raised a triable issue of fact as to whether the defendants objected to the plaintiff's invoices in a reasonable period of time. Accordingly, the Supreme Court properly denied the plaintiff's motion for summary judgment on the complaint.

The plaintiff's remaining contentions are without merit. Barros, J.P., Ford, Ventura and Golia, JJ., concur.

21 Sardor Kurbonov et al., Appellants, v Marlene E. Cohen et al., Defendants/Third-Party Plaintiffs-Respondents. Dilshod K. Isakov, Third-Party Defendant-Respondent. [252 NYS3d 655]—

Dismissal and Nonsuit—Want of Prosecution—90-Day Demand—Demands Not

Received

In an action to recover damages for personal injuries, the plaintiffs appeal from an order of the Supreme Court, Kings County (Richard Velasquez, J.), dated May 8, 2024. The order, insofar as appealed from, granted those branches of the separate motions of the defendants third-party plaintiffs and the third-party defendant which were pursuant to CPLR 3216 to dismiss the complaint.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, and those branches of the separate motions of the defendants third-party plaintiffs and the third-party defendant which were pursuant to CPLR 3216 to dismiss the complaint are denied.

The plaintiffs allegedly were injured as passengers in a vehicle owned and operated by the third-party defendant, Dilshod K. Isakov, when it collided with a vehicle operated by the defendant third-party plaintiff Marlene E. Cohen and owned by the defendant third-party plaintiff N. Ikey Cohen (hereinafter together the Cohens). In July 2019, the plaintiffs commenced this action against the Cohens to recover damages for personal injuries. The Cohens joined issue and commenced a third-party action against Isakov for contribution and indemnification.

In March 2022, the Supreme Court granted the plaintiffs' counsel's motion to be relieved as counsel for the plaintiffs, and stayed the action for a period of time in order to afford the plaintiffs an opportunity to retain new counsel.

In August 2023, more than a year after the expiration of the stay, the Cohens moved, inter alia, pursuant to CPLR 3216 to dismiss the complaint for failure to prosecute. In support of the motion, the Cohens submitted evidence that in August 2022 they mailed 90-day demands pursuant to CPLR 3216 (b) (3) to the plaintiffs, who were then pro se, by certified mail. The Cohens also submitted evidence, however, that the mailings were returned to them. The United States Postal Service tracking history submitted by the Cohens indicated that one delivery was attempted and that five days later a reminder was sent to schedule redelivery before the mailings were returned to the sender.

In October 2023, Isakov also moved, among other things, pursuant to CPLR 3216 to dismiss the complaint for failure to prosecute. In support of the motion, Isakov relied upon the evidence submitted by the Cohens and also submitted, inter alia, an attorney's affirmation stating that "a similar demand" to the 90-day notices sent by the Cohens had been made by Isakov.

The plaintiffs obtained new counsel and opposed the motions, contending, among other things, that dismissal pursuant to CPLR 3216 was unavailable because the 90-day notices were never delivered to the plaintiffs. In an order dated May 8, 2024, the Supreme Court, inter alia, granted those branches of the separate motions of the Cohens and Isakov which were pursuant to CPLR 3216 to dismiss the complaint. The plaintiffs appeal.

CPLR 3216 permits a court to dismiss an action for want of prosecution only after the court or the defendant has served the plaintiff with a written demand requiring the plaintiff “to resume prosecution of the action and to serve and file a note of issue within [90] days after receipt of such demand” (CPLR 3216 [b] [3]). “Notably, the time within which the plaintiff must act runs from the receipt, and not the service of the demand” (*Bank of Am. v Guillaume*, 169 AD3d 625, 626 [2019]; see *Vasquez v City of New York*, 5 AD3d 672, 672 [2004]; *Kun Tiam Seow v Yu Dan Li*, 1 AD3d 570, 571 [2003]). Here, in support of their motion, the Cohens submitted proof that the 90-day demands were not received by the plaintiffs. Accordingly, the Supreme Court should not have granted that branch of the Cohens’ motion which was pursuant to CPLR 3216 to dismiss the complaint (see *Bank of Am. v Guillaume*, 169 AD3d at 627; *Vasquez v City of New York*, 5 AD3d at 672; *Kun Tiam Seow v Yu Dan Li*, 1 AD3d at 571). Moreover, since Isakov relied upon the same evidence and failed to submit evidence establishing that subsequent 90-day notices were served on the plaintiffs (see *Bank of Am. v Guillaume*, 169 AD3d at 627), the court should have denied that branch of his motion which was pursuant to CPLR 3216 to dismiss the complaint.

In light of our determination we need not reach the plaintiffs’ remaining contentions. The remaining contentions of the Cohens and Isakov are not properly before this Court. Brathwaite Nelson, J.P., Christopher, Taylor and McCormack, JJ., concur.

22 Rafael Lopez, Plaintiff, v Ridgewood Bushwick Homesteading Assistance Housing Development Fund Corporation, Appellant, and Hector E. Monegro, Doing Business as Los Primos Grocery, Respondent. [249 NYS3d 234]—

**Appeal—Parties Aggrieved—Dismissal of Complaint against Codefendant
Appeal—Records and Briefs on Appeal—Failure to Provide What Cross-Claims
it Asserted**

In an action to recover damages for personal injuries, the defendant Ridgewood Bushwick Homesteading Assistance Hous-

ing Development Fund Corporation appeals from an order of the Supreme Court, Kings County (Heela D. Capell, J.), dated June 20, 2024. The order granted the motion of the defendant Hector E. Monegro for summary judgment dismissing the complaint and all cross-claims insofar as asserted against him.

Ordered that the appeal is dismissed, with costs.

In January 2021, the plaintiff allegedly was injured when he tripped on a sidewalk in front of a commercial premises located in Brooklyn that was owned by the defendant Ridgewood Bushwick Homesteading Assistance Housing Development Fund Corporation (hereinafter Ridgewood) and leased by the defendant Hector E. Monegro. The plaintiff commenced this action against the defendants to recover damages for personal injuries. In March 2024, Monegro moved for summary judgment dismissing the complaint and all cross-claims insofar as asserted against him. Ridgewood opposed the motion. In an order dated June 20, 2024, the Supreme Court granted Monegro's motion. Ridgewood appeals.

A party is aggrieved within the meaning of CPLR 5511 “when he or she asks for relief but that relief is denied in whole or in part” or “when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part” (*Mixon v TBV, Inc.*, 76 AD3d 144, 156-157 [2010] [emphasis and footnote omitted]; see *Estella v Val Auto, LLC*, 221 AD3d 967, 967-968 [2023]). “[A] defendant is not aggrieved by the dismissal of the plaintiff’s complaint against a codefendant, but, rather, only by the dismissal of that defendant’s cross claim or third-party claim against a codefendant” (*Mixon v TBV, Inc.*, 76 AD3d at 152; see *Abbott v Johnson*, 152 AD3d 730, 731 [2017]). Accordingly, the appeal from so much of the order as granted that branch of Monegro’s motion which was for summary judgment dismissing the complaint insofar as asserted against him must be dismissed, as Ridgewood is not aggrieved by that portion of the order (see CPLR 5511; *Nugra v Aramalla*, 191 AD3d 683, 685 [2021]; *Nunez v Travelers Ins. Co.*, 139 AD2d 712, 712 [1988]).

The appeal from so much of the order as granted that branch of Monegro’s motion which was for summary judgment dismissing all cross-claims insofar as asserted against him must also be dismissed. “CPLR 5526 requires that a record on appeal contain the papers and exhibits upon which the order appealed from was founded. It is the obligation of the appellant to assemble a proper record on appeal” (*Bruzzese v Bruzzese*, 203 AD3d 1007, 1010 [2022]; see *Emco Tech Constr. Corp. v Pilavas*, 68 AD3d 918, 918 [2009]). “The record on appeal must contain

all of the relevant papers that were before the Supreme Court” (*Bruzzese v Bruzzese*, 203 AD3d at 1010; *see Gaffney v Gaffney*, 29 AD3d 857, 857 [2006]). Here, Ridgewood did not provide its answer establishing what cross-claims, if any, it asserted against Monegro. Since Ridgewood failed to submit a record that would enable this Court to render an informed decision on the merits insofar as it relates to any cross-claims asserted against Monegro, the appeal from so much of the order as granted that branch of Monegro’s motion which was for summary judgment dismissing all cross-claims insofar as asserted against him must be dismissed (*see Bing v Myrtle 6, LLC*, 227 AD3d 769, 770 [2024]; *126 Henry St., Inc. v Cater*, 197 AD3d 598, 601 [2021]). Ford, J.P., Ventura, Love and Golia, JJ., concur.

23 Lisa Lubarsky, Respondent, v City of New York et al., Defendants, and FJC Security Services, Inc., et al., Appellants. [253 NYS3d 200]—

Motor Vehicles—Injuries to Bicyclist—Assignment of Fault—Distance from Which Vehicle was Visible

In an action to recover damages for personal injuries, the defendants FJC Security Services, Inc., Universal Protection Service, LLC, and AlliedBarton Security Services, LLC, appeal from (1) a judgment of the Supreme Court, Richmond County (Orlando Marrazzo, Jr., J.), dated August 3, 2023, and (2) an order of the same court dated October 20, 2023. The judgment, upon a decision of the same court dated May 9, 2023, made after a nonjury trial, finding those defendants 80% at fault and the plaintiff 20% at fault in the happening of the subject accident, and upon a decision of the same court dated July 13, 2023, finding that the plaintiff sustained damages in the sum of \$600,000, is in favor of the plaintiff and against the defendant FJC Security Services, Inc., in the principal sum of \$480,000. The order denied the motion of the defendants FJC Security Services, Inc., Universal Protection Service, LLC, and AlliedBarton Security Services, LLC, pursuant to CPLR 4404 (b) to set aside the decision dated May 9, 2023, or, in the alternative, to set aside so much of that decision as apportioned 80% of the fault to those defendants and only 20% to the plaintiff.

Ordered that the appeal from the judgment is dismissed as academic, without costs or disbursements, except to the extent it brings up for review the finding that the plaintiff sustained damages in the sum of \$600,000, in light of our determination on the appeal from the order; and it is further,

Ordered that the judgment is affirmed insofar as reviewed, without costs or disbursements; and it is further,

Ordered that the order is modified, on the facts, by deleting the provision thereof denying that branch of the motion of the defendants FJC Security Services, Inc., Universal Protection Service, LLC, and AlliedBarton Security Services, LLC, which was pursuant to CPLR 4404 (b) to set aside so much of the decision dated May 9, 2023, as apportioned 80% of the fault to those defendants and only 20% to the plaintiff, and substituting therefor a provision granting that branch of the motion to the extent of apportioning 60% of the fault to those defendants and 40% of the fault to the plaintiff; as so modified, the order is affirmed, without costs or disbursements, the judgment is vacated except to the extent it brings up for review the finding that the plaintiff sustained damages in the sum of \$600,000, and the matter is remitted to the Supreme Court, Richmond County, for a recalculation of damages based upon an apportionment of 60% of the fault to those defendants and 40% of the fault to the plaintiff and the entry of an appropriate amended judgment thereafter.

The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when she fell from a bicycle in Brookfield Park after swerving to avoid a motor vehicle that was owned and operated by the defendants FJC Security Services, Inc., Universal Protection Service, LLC, and AlliedBarton Security Services, LLC (hereinafter collectively the defendants). The defendants provided security services, including vehicle patrols, at the park pursuant to a contract with the defendant City of New York. At a nonjury trial on the issue of liability, the plaintiff testified that, on the date of the accident, she was cycling down a straightway portion of a path in the park, approaching a curve, when she observed the defendants' SUV on the path approximately 25 feet in front of her. The plaintiff testified that the SUV appeared to be stopped and was obstructing the path. The plaintiff testified that she veered to the right to avoid striking the SUV but collided with a guard-rail and flipped over.

Following the trial on the issue of liability, the Supreme Court issued a decision dated May 9, 2023, finding the defendants 80% at fault and the plaintiff 20% at fault in the happening of the accident. The defendants subsequently moved pursuant to CPLR 4404 (b) to set aside that decision or, in the alternative, to set aside so much of the decision as apportioned 80% of the fault to the defendants and only 20% to the plaintiff. While the motion was pending, the court issued a decision

dated July 13, 2023, finding that the plaintiff sustained damages in the sum of \$600,000, which it reduced by 20% based on the liability verdict. On August 3, 2023, the court issued a judgment in favor of the plaintiff and against FJC Security Services, Inc., in the principal sum of \$480,000. By order dated October 20, 2023, the court denied the defendants' motion pursuant to CPLR 4404 (b). The defendants appeal.

"Pursuant to CPLR 4404 (b), after a nonjury trial, a court may, on the motion of a party or its own motion, set aside its decision and make new findings of fact or conclusions of law" (*BNG Props., LLC v Sanborn*, 153 AD3d 1221, 1221 [2017]; see *Carney v Carney*, 236 AD2d 574, 575 [1997]). "In reviewing a determination made after a nonjury trial, this Court's power is as broad as that of the trial court, and it may render the judgment it finds warranted by the facts, taking into account that in a close case the trial court had the advantage of seeing and hearing the witnesses" (*BRK Props., Inc. v Wagner Ziv Plumbing & Heating Corp.*, 89 AD3d 883, 884 [2011]; see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). "[W]here the court's findings of fact rest in large measure on considerations relating to the credibility of witnesses, deference is owed to the trial court's credibility determinations" (*Neiss v Fried*, 127 AD3d 1044, 1046 [2015] [internal quotation marks omitted]; see *BNG Props., LLC v Sanborn*, 153 AD3d at 1222).

Here, in light of the evidence presented at trial, including, inter alia, evidence that the defendants' SUV created a dangerous condition by obstructing the pathway, and giving due deference to the Supreme Court's credibility determinations, we find no basis to disturb the court's determination finding that the defendants' negligence was a substantial factor in the happening of the accident. However, the court's determination that the defendants were 80% at fault in the happening of the accident was not warranted by the facts. The evidence at trial, including testimony from the parties' respective expert witnesses, indicated that the SUV would have been visible to the plaintiff at a greater distance than 25 feet. Under the circumstances, and considering the negligence of both the plaintiff and the defendants, we determine that the record warrants an apportionment of 60% of the fault to the defendants and 40% of the fault to the plaintiff (see *Finney v Morton*, 170 AD3d 811, 813 [2019]).

We find no basis, however, to disturb the Supreme Court's determination with respect to the amount of damages sustained. Considering the evidence regarding the nature and

extent of the plaintiff's injuries and a review of comparable precedent, the damages award did not deviate materially from what would be reasonable compensation (*see generally Fuentes v Ingram*, 235 AD3d 850, 852 [2025]).

Accordingly, we remit the matter to the Supreme Court, Richmond County, for a recalculation of damages based upon an apportionment of 60% of the fault in the happening of the accident to the defendants and 40% of the fault to the plaintiff and the entry of an appropriate amended judgment thereafter.

The defendants' remaining contentions are without merit. Barros, J.P., Chambers, Warhit and Golia, JJ., concur.

24 Lindsay McGann, Appellant, v Arnold W. Amthor, Respondent. [249 NYS3d 621]—

Libel and Slander—Privilege—Common-Interest Privilege—Statements Made in Compliance with Disclosure Mandates

In an action to recover damages for defamation, the plaintiff appeals from an order of the Supreme Court, Orange County (David J. Squirrell, J.), dated March 8, 2024. The order granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

In May 2020, the plaintiff, a police officer with the Town of Montgomery, by her attorney, submitted a letter to the Town Supervisor alleging that the defendant, the then chief of police, engaged in misconduct that created a hostile work environment. In response, the defendant provided a letter dated May 13, 2020, to the Town Supervisor wherein he alleged, *inter alia*, various problems regarding the plaintiff's conduct and performance as an officer. In 2021, in response to requests from the Orange County District Attorney's office that were made to police chiefs for any *Giglio* material (*see Giglio v United States*, 405 US 150 [1972]) concerning police officers, the defendant submitted information concerning two incidents involving the plaintiff. Thereafter, the plaintiff commenced this action against the defendant to recover damages for defamation. The defendant moved for summary judgment dismissing the complaint. The plaintiff opposed the motion. In an order dated March 8, 2024, the Supreme Court granted the motion. The plaintiff appeals.

"The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard,

and (d) either causing special harm or constituting defamation per se” (*Riggio v County of Nassau*, 218 AD3d 502, 502 [2023] [internal quotation marks omitted]; see *Bowen v Van Bramer*, 205 AD3d 674, 674-675 [2022]). “A statement is defamatory per se if it (1) charges the plaintiff with a serious crime; (2) tends to injure the plaintiff in her or his trade, business or profession; (3) imputes to the plaintiff a loathsome disease; or (4) imputes unchastity to a woman” (*Kasavana v Vela*, 172 AD3d 1042, 1044 [2019]; see *Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]).

A “conditional, or qualified, privilege extends to a ‘communication made by one person to another upon a subject in which both have an interest’ ” (*Lieberman v Gelstein*, 80 NY2d at 437, quoting *Stillman v Ford*, 22 NY2d 48, 53 [1968]; see *Bernacchi v County of Suffolk*, 118 AD3d 931, 932 [2014]). “The rationale for applying the privilege in these circumstances is that so long as the privilege is not abused, the flow of information between persons sharing a common interest should not be impeded” (*Lieberman v Gelstein*, 80 NY2d at 437). “However, ‘the common-interest privilege can be overcome by a showing of malice’ ” (*Laguerre v Maurice*, 192 AD3d 44, 49 [2020], quoting *Colantonio v Mercy Med. Ctr.*, 115 AD3d 902, 903 [2014]; see *Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 211 [1983]). “To establish the malice necessary to defeat the privilege, the plaintiff may show either common-law malice, i.e., spite or ill will, or may show actual malice, i.e., knowledge of falsehood of the statement or reckless disregard for the truth” (*Laguerre v Maurice*, 192 AD3d at 49 [internal quotation marks omitted]; see *Franco Belli Plumbing & Heating & Sons, Inc. v Dimino*, 164 AD3d 1309, 1311 [2018]). “Mere conclusory allegations, or charges based upon surmise, conjecture, and suspicion are insufficient to defeat the claim of qualified privilege” (*Franco Belli Plumbing & Heating & Sons, Inc. v Dimino*, 164 AD3d at 1312 [internal quotation marks omitted]; see *Golden v Stiso*, 279 AD2d 607, 608 [2001]).

Here, the defendant made a prima facie showing that the challenged statements were protected by the qualified common-interest privilege (see *Franco Belli Plumbing & Heating & Sons, Inc. v Dimino*, 164 AD3d at 1311). The statements made by the defendant in the May 13, 2020 letter were provided to the Town Supervisor in response to the letter that had been received by the Town Supervisor, which contained the plaintiff’s allegations that the defendant created a hostile work environment, and as such were made to potentially contribute to a corrective action process (see *Colantonio v Mercy Med. Ctr.*, 135

AD3d at 691). The statements made by the defendant to the District Attorney were made in response to a request for *Giglio* material, in furtherance of compliance with the disclosure mandates of Criminal Procedure Law article 245 (see *New York Horse Rescue Corp. v Suffolk County Socy. for the Prevention of Cruelty to Animals*, 164 AD3d 909, 911 [2018]; *Colantonio v Mercy Med. Ctr.*, 135 AD3d at 691).

In opposition, the plaintiff failed to raise a triable issue of fact as to whether the challenged statements were motivated solely by malice (see *Franco Belli Plumbing & Heating & Sons, Inc. v Dimino*, 164 AD3d at 1312; *New York Horse Rescue Corp. v Suffolk County Socy. for the Prevention of Cruelty to Animals*, 164 AD3d at 911).

In light of our determination, the parties' remaining contentions have been rendered academic.

Accordingly, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint. LaSalle, P.J., Dillon, Christopher and Landicino, JJ., concur.

25 Nizia Florencia Silva Mendes, Appellant, v State of New York, Respondent. [249 NYS3d 624]—

Labor—Safe Place to Work—Injured while Unsecured in Moving Truck—Affidavit of Individual Who Did Not Witness Accident

In a claim to recover damages for personal injuries, the claimant appeals from an order of the Court of Claims (Gina M. Lopez-Summa, J.), dated April 1, 2024. The order, insofar as appealed from, granted that branch of the defendant's motion which was for summary judgment dismissing so much of the cause of action alleging a violation of Labor Law § 241 (6) as was predicated on a violation of Industrial Code (12 NYCRR) § 23-9.7 (e).

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the defendant's motion which was for summary judgment dismissing so much of the cause of action alleging a violation of Labor Law § 241 (6) as was predicated on a violation of Industrial Code (12 NYCRR) § 23.9.7 (e) is denied.

The claimant allegedly was injured while mixing paint inside the back of a box truck when the truck began to move. The claimant alleged that she tried to exit through the back of the truck, but at the same time, a coworker began to raise the lift gate of the truck. The claimant alleged that she ran towards the back of the truck, lost her balance, fell, and caught her leg in the lift gate, causing injury.

The claimant commenced this claim against the defendant to

recover damages for personal injuries, alleging, among other things, a violation of Labor Law § 241 (6) predicated on, inter alia, a violation of Industrial Code (12 NYCRR) § 23-9.7 (e). The defendant moved, among other things, for summary judgment dismissing that portion of that cause of action on the ground that Industrial Code § 23-9.7 (e) was inapplicable to the facts of this case because, among other reasons, the truck was not moving at the time of the accident. In an order dated April 1, 2024, the Court of Claims, inter alia, granted that branch of the defendant's motion. The claimant appeals.

Labor Law § 241 (6) “imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Ochoa v JEM Real Estate Co., LLC*, 223 AD3d 747, 749 [2024]; see *Guoxing Song v CA Plaza, LLC*, 208 AD3d 760, 761 [2022]). “To establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision that is applicable under the circumstances of the case” (*Cadena v Kupferstein*, 238 AD3d 973, 975 [2025]; see *Bayron Chay Mo v Ultra Dimension Place, LLC*, 236 AD3d 721 [2025]).

Industrial Code § 23-9.7 (e), titled, “Riding,” provides: “[n]o person shall be suffered or permitted to ride on running boards, fenders or elsewhere on a truck or similar vehicle except where a properly constructed and installed seat or platform is provided.”

Contrary to the defendant's contention, it failed to establish its prima facie entitlement to judgment as a matter of law dismissing so much of the cause of action alleging a violation of Labor Law § 241 (6) as was predicated on a violation of Industrial Code § 23-9.7 (e), as the defendant failed to demonstrate that Industrial Code § 23-9.7 (e) does not apply to the facts of this case. “‘A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden on a motion for summary judgment’ ” (*Valerio v City of New York*, 238 AD3d 945, 947 [2025] [internal quotation marks omitted], quoting *Zeldin v Larose*, 223 AD3d 858, 858 [2024]). Here, in support of its motion, the defendant submitted a conclusory affidavit from a quality control officer who did not personally witness the accident but stated that the truck was not moving. The defendant also submitted a transcript of the claimant's deposition testimony in which she testified that the truck was moving and

a transcript of the deposition testimony of her co-worker, who also testified that the truck was moving at the time of the accident. The defendant did not establish, *prima facie*, that the truck was stationary at the time of the accident and that therefore Industrial Code § 23-9.7 (e) did not apply (*see generally Wetter v Northville Indus. Corp.*, 185 AD3d 874, 875 [2020]). Nor did the defendant otherwise establish the inapplicability of Industrial Code § 23-9.7 (e).

Accordingly, the Court of Claims should have denied that branch of the defendant's motion which was for summary judgment dismissing so much of the cause of action alleging a violation of Labor Law § 241 (6) as was predicated on a violation of Industrial Code § 23-9.7 (e). Brathwaite Nelson, J.P., Ford, Voutsinas and Love, JJ., concur.

26 Michael Moccasin, Appellant, v Suffolk County et al., Respondents. [249 NYS3d 617]—

Motor Vehicles—Emergency Vehicles—Reckless Disregard Standard—Struck by Police Vehicle Responding to Radio Call

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Kathy G. Bergmann, J.), dated December 30, 2022. The order granted the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is denied.

In January 2019, at approximately 5:00 p.m., the plaintiff allegedly was injured while riding a skateboard when he was struck by a vehicle operated by the defendant Peter Degere, a police officer employed by the defendant Suffolk County Police Department (hereinafter SCPD). Prior to the collision, Degere was traveling in the left southbound lane of Straight Path responding to a radio call of a woman going into labor with complications. Between the left northbound lane and the left southbound lane of Straight Path, there was a center turn lane used by vehicles in both directions of traffic. The collision occurred when Degere maneuvered his vehicle into the center turn lane to pass another vehicle and struck the plaintiff, who was traveling northbound in the center turn lane on the skateboard.

The plaintiff commenced this action against Suffolk County, SCPD, and Degere (hereinafter collectively the defendants) to recover damages for personal injuries he allegedly sustained in the accident. The defendants moved for summary judgment

dismissing the complaint. In an order dated December 30, 2022, the Supreme Court granted the defendants' motion. The plaintiff appeals. We reverse.

"Vehicle and Traffic Law § 1104 qualifiedly exempts drivers of emergency vehicles from certain traffic laws when they are involved in an emergency operation, and precludes the imposition of liability for otherwise privileged conduct except where the driver acted in reckless disregard for the safety of others" (*Thomas v City of New York*, 172 AD3d 1132, 1133 [2019]; see *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; *Pena v County of Suffolk*, 219 AD3d 946, 947 [2023]). Vehicle and Traffic Law § 1104 (b) allows an officer engaged in an emergency operation, inter alia, to "[e]xceed the maximum speed limit so long as [the officer] does not endanger life or property" and "[d]isregard regulations governing directions of movement or turning in specified directions" (*id.* § 1104 [b] [3], [4]; see *Fuchs v City of New York*, 186 AD3d 459, 460 [2020]). "The reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)" (*Alonso v Crest Transp. Serv., Inc.*, 226 AD3d 634, 635 [2024] [alteration and internal quotation marks omitted]; see *Kabir v County of Monroe*, 16 NY3d at 220). "Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence" (*Kabir v County of Monroe*, 16 NY3d at 220; see *De Corona v Village of Val. Stream*, 209 AD3d 837, 838 [2022]).

The "reckless disregard" standard demands more than a showing of a lack of "due care under the circumstances" (*Saari-nen v Kerr*, 84 NY2d 494, 501 [1994] [internal quotation marks omitted]). "It requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*id.* [internal quotation marks omitted]; see *Wonderly v City of Poughkeepsie*, 185 AD3d 632, 633 [2020]). "This standard requires a showing of more than a momentary lapse in judgment" (*Beverly v County of Suffolk*, 227 AD3d 652, 654 [2024] [internal quotation marks omitted]; see *Puntarich v County of Suffolk*, 47 AD3d 785, 786 [2008]).

Here, the defendants established that the reckless disregard standard of Vehicle and Traffic Law § 1104 was applicable to Degere's conduct because he was responding to a radio call of a

woman going into labor with complications (*see id.* §§ 114-b, 1104 [c]). However, the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint because their moving papers failed to eliminate all issues of material fact regarding whether Degere acted recklessly by either traveling at a high speed in the center turn lane in a school zone with poor lighting conditions or abruptly merging into the center turn lane without first looking to his left or activating his turn signal (*see Kolvenbach v Cunningham*, 224 AD3d 826, 828 [2024]; *Bourdierd v City of Yonkers*, 213 AD3d 899, 901 [2023]; *Rodriguez-Garcia v Southampton Police Dept.*, 185 AD3d 744, 745 [2020]).

Since the defendants failed to establish their prima facie entitlement to judgment as a matter of law, the burden never shifted to the plaintiff to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint.

In light of the foregoing, we need not reach the plaintiff's remaining contentions. Barros, J.P., Warhit, Voutsinas and Wan, JJ., concur.

27 Cindy L. Montgomery, Doing Business as Stage By Design, LLC, et al., Respondents, v Emanon South Corp. et al., Appellants. [252 NYS3d 668]—

Sales—Goods Sold and Delivered—Statute of Frauds—Agreement to Stage House Predominantly Service-Oriented

In an action, inter alia, to recover damages for breach of contract, the defendants appeal from an order of the Supreme Court, Suffolk County (Joseph Farneti, J.), dated September 18, 2024. The order, insofar as appealed from, denied that branch of the defendants' motion which was pursuant to CPLR 3211 (a) to dismiss the cause of action to recover damages for breach of contract.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiffs allege that in June 2020, they entered into an oral agreement with the defendants to provide staging services for a property owned by the defendants in Southampton in exchange for a design fee of one percent of the gross sale amount when the property was sold. As part of the service, the plaintiffs allegedly provided all the home furnishings to be placed in the property, which the eventual purchaser of the

property had the option to purchase. Pursuant to the alleged oral agreement, if the purchaser of the property elected that option, the defendants were to pay the plaintiffs an additional agreed-upon price for the home furnishings. The plaintiffs further allege that the property sold on February 23, 2022, for \$4,925,000 with the purchaser electing to buy the property with the home furnishings. The defendants allegedly failed to pay the plaintiffs either the design fee or for the home furnishings.

The plaintiffs commenced this action, inter alia, to recover damages for breach of contract based on the alleged oral agreement. Thereafter, the defendants moved, pre-answer, pursuant to CPLR 3211 (a) to dismiss the complaint, contending, among other things, that the purported oral agreement violated the statute of frauds under UCC 2-201. In an order dated September 18, 2024, the Supreme Court, inter alia, denied that branch of the defendants' motion which was pursuant to CPLR 3211 (a) to dismiss the cause of action to recover damages for breach of contract. The defendants appeal.

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (5) based on the statute of frauds, the court is required to accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference” (374-76 *Prospect Place Tenants Assn., Inc. v City of New York*, 231 AD3d 911, 913 [2024], quoting *Olden Group, LLC v 2890 Review Equity, LLC*, 209 AD3d 748, 750 [2022]).

Contrary to the defendants' contention, they failed to establish that the cause of action to recover damages for breach of contract is barred by the statute of frauds. Article 2 of the UCC only applies to agreements that are predominantly for the sale of goods, as opposed to the furnishing of services (see *Dreamco Dev. Corp. v Cranesville Block Co., Inc.*, 229 AD3d 1187, 1188 [2024]; *Vitolo v Dow Corning Corp.*, 234 AD2d 361, 362 [1996]). “If service dominates the transaction and the transfer of personal property is merely incidental to that transaction, then it is deemed to be predominantly service oriented” (*Vitolo v Dow Corning Corp.*, 234 AD2d at 362).

Accepting the allegations in the complaint as true and according the plaintiffs the benefit of every favorable inference, the complaint sufficiently alleged that the defendants breached the oral agreement and that the agreement was predominantly service oriented (see *Newport E. Inc. v Sviba Floral Decorators, Inc.*, 202 AD3d 482, 483 [2022]; see also *Golisano v Vitoch Interiors Ltd.*, 150 AD3d 1629, 1630 [2017]).

Accordingly, the Supreme Court properly denied that branch

of the defendants' motion which was pursuant to CPLR 3211 (a) to dismiss the cause of action to recover damages for breach of contract.

In view of the foregoing, we do not address the remaining contentions. Brathwaite Nelson, J.P., Ford, Voutsinas and Love, JJ., concur.

28 In the Matter of 1876 Bleecker St, Inc., Respondent, v New York City Department of Finance et al., Appellants. [252 NYS3d 671]—

Administrative Law—Judicial Review—CPLR Article 78 Proceeding—Final and Binding Determination

In a proceeding pursuant to CPLR article 78 to review an alleged determination of the New York City Department of Finance dated May 17, 2022, the New York City Department of Finance, Preston Niblack, and the City of New York appeal from an order of the Supreme Court, Queens County (Tracy Catapano-Fox, J.), entered June 15, 2023. The order, in effect, remitted the matter to the New York City Department of Finance for an administrative hearing.

Ordered that on the Court's own motion, the notice of appeal is deemed to be an application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order is reversed, on the law, with costs, the petition is denied, and the proceeding is dismissed.

On June 3, 2022, the petitioner commenced this proceeding pursuant to CPLR article 78, seeking to cancel all taxes imposed on certain real property for the period of July 1, 2015, through June 30, 2022. The petition alleged, *inter alia*, that the respondent New York City Department of Finance (hereinafter DOF) mischaracterized the property for real property tax purposes "as Tax Class 2A, 4 - 6 Units," when in reality the property "contained no dwelling units" during the relevant time period due to an order issued in 2017 by the New York City Department of Buildings (hereinafter DOB) that prohibited any person from occupying the property. The petition alleged that the petitioner submitted a request for a redetermination of taxes pursuant to Administrative Code of the City of New York § 11-206, which purportedly challenged DOF's classification of the property in light of DOB's directive. The petition further alleged that DOF issued a written determination on or about May 17, 2022, denying the petitioner's request. The evidence submitted in support of the petition did not include either a copy of the DOF determination that was allegedly issued on May 17, 2022, or the petitioner's request that was allegedly denied.

The respondents interposed an answer in which they denied the allegations in the petition regarding the existence of a determination allegedly issued on May 17, 2022, or the request that it allegedly denied. The evidence submitted with the respondent's answer reflected that DOF issued a written determination on June 6, 2022, three days *after* this proceeding was commenced, wherein DOF denied an application by the petitioner relating to issues entirely different from those raised in this proceeding. The respondents contended, among other things, that the petitioner was improperly seeking judicial review of a claim that the petitioner never asked DOF to review.

In an order entered June 15, 2023, the Supreme Court, in effect, remitted the matter to DOF for an administrative hearing. The respondents appeal.

Generally speaking, only a final administrative determination is reviewable in a CPLR article 78 proceeding (*see* CPLR 7801 [1]; *Matter of Rosado-Ciriello v Board of Educ. of the Yonkers City Sch. Dist.*, 219 AD3d 839, 840-841 [2023]; *Matter of Schaefer v Legislature of Rockland County*, 112 AD3d 642, 643 [2013]). “‘An administrative determination becomes “final and binding” when two requirements are met: completeness (finality) of the determination and exhaustion of administrative remedies’” (*Matter of Village of Kiryas Joel v County of Orange*, 181 AD3d 681, 685 [2020], quoting *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). Here, the petitioner failed to demonstrate that it was seeking review of a final administrative determination. Accordingly, the Supreme Court should have denied the petition and dismissed the proceeding (*see Matter of Rosado-Ciriello v Board of Educ. of the Yonkers City Sch. Dist.*, 219 AD3d at 840-841; *Matter of 999 Hempstead Turnpike, LLC v Board of Appeals of the Town of Hempstead*, 207 AD3d 716, 718-719 [2022]).

The parties' remaining contentions either are without merit or need not be reached in light of our determination. Chambers, J.P., Wooten, Warhit and Landicino, JJ., concur.

29 In the Matter of American Transit Insurance Company, Respondent, v Lenox Hill Hospital (NSUH), Appellant. [252 NYS3d 659]—

Disclosure—Scope of Disclosure—Information Subpoena—Information Irrelevant and Served to Harass Opposing Party

Attorney and Client—Compensation—Attorneys' Fees Pursuant to Insurance Law § 5106 (a)—Services Performed to Secure Payment of Overdue Postjudgment Interest

In a proceeding pursuant to CPLR article 75 to vacate a

master arbitration award, Lenox Hill Hospital (NSUH) appeals from an order of the Supreme Court, Kings County (Heela D. Capell, J.), dated February 15, 2024. The order, insofar as appealed from, denied those branches of the motion of Lenox Hill Hospital (NSUH) which were to compel the petitioner to comply with an information subpoena, to impose a \$50 fine upon the petitioner, and pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees, and granted that branch of the petitioner's cross-motion which was pursuant to CPLR 2304 to quash the information subpoena.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the motion of Lenox Hill Hospital (NSUH) which was pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the petitioner, and the matter is remitted to the Supreme Court, Kings County, for further proceedings consistent herewith.

In 2022, the petitioner, American Transit Insurance Company (hereinafter American Transit), commenced this proceeding pursuant to CPLR article 75 to vacate a master arbitration award entered in favor of Lenox Hill Hospital (NSUH) (hereinafter Lenox Hill). Lenox Hill cross-petitioned, *inter alia*, to confirm the master arbitration award. In a judgment dated May 24, 2023, the Supreme Court, among other things, confirmed the master arbitration award and awarded Lenox Hill attorneys' fees in the sum of \$500. In August and September 2023, American Transit paid the sums owed to Lenox Hill, except for postjudgment interest in the sum of \$192.

Lenox Hill served American Transit with an information subpoena. Thereafter, Lenox Hill moved, *inter alia*, to compel American Transit to comply with the information subpoena, to impose a \$50 fine upon American Transit, and pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees. American Transit cross-moved, among other things, pursuant to CPLR 2304 to quash the information subpoena. In an order dated February 15, 2024, the Supreme Court, *inter alia*, denied those branches of Lenox Hill's motion and granted that branch of American Transit's cross-motion. Lenox Hill appeals.

The Supreme Court did not improvidently exercise its discretion in granting that branch of American Transit's cross-motion which was pursuant to CPLR 2304 to quash the information subpoena. "An application to quash a subpoena should be granted only where the futility of the process to uncover

anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry” (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014] [alterations and internal quotation marks omitted]; see *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988]; *8206 N. Blvd, LLC v Ai Qiu Qu*, 232 AD3d 833, 834 [2024]). Here, American Transit established that the requested information in the information subpoena was irrelevant and that Lenox Hill served the information subpoena to harass American Transit.

However, the Supreme Court should have granted that branch of Lenox Hill’s motion which was pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys’ fees. The general rule is that in proceedings involving arbitration, as in other litigation, attorneys’ fees are not recoverable unless provided for by agreement or statute (see *Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703, 705 [2017]; *Myron Assoc. v Obstfeld*, 224 AD2d 504 [1996]). “Pursuant to Insurance Law § 5106 (a), if a valid claim or portion of a claim for no-fault benefits is overdue, the claimant shall also be entitled to recover his [or her] attorney’s reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to [the] limitations promulgated by the superintendent in regulations” (*Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d at 705 [internal quotation marks omitted]; see *American Tr. Ins. Co. v Comfort Choice Chiropractic, P.C.*, 239 AD3d 1, 15 [2025]). As Lenox Hill sought payment of postjudgment interest in the sum of \$192 that was overdue, Lenox Hill was entitled to an award of additional attorneys’ fees for the services necessarily performed in connection with securing payment of the overdue postjudgment interest. However, Lenox Hill was not entitled to an award of additional attorneys’ fees for the remainder of the services performed by its attorneys in connection with preparing and serving the information subpoena and prosecuting this appeal, which were not part of a legitimate attempt to collect payment of an overdue claim or portion of a claim.

Accordingly, the matter must be remitted to the Supreme Court, Kings County, for a determination of the amount of the additional attorneys’ fees pursuant to 11 NYCRR 65-4.10 (j) (4) to which Lenox Hill is entitled.

Lenox Hill’s remaining contentions are without merit. Genovesi, J.P., Wooten, Ventura and Golia, JJ., concur.

30 In the Matter of American Transit Insurance Company, Respondent, v MTS Acupuncture, P.C., as Assignee of Javel Ronell Walter, Appellant. [252 NYS3d 212]—

**Judgments—Satisfaction—Issued Payments
Attorney and Client—Compensation—Attorneys’ Fees Pursuant to Insurance
Law § 5106 (a)—Overdue Claim for No-Fault Benefits**

In a proceeding pursuant to CPLR article 75 to confirm a master arbitration award, MTS Acupuncture, P.C., appeals from an order of the Supreme Court, Kings County (Ingrid Joseph, J.), dated July 3, 2024. The order, insofar as appealed from, granted that branch of the petitioner’s motion which was to direct the entry of a satisfaction of judgment, denied, as academic, those branches of the motion of MTS Acupuncture, P.C., which were to compel the petitioner to comply with an information subpoena, to impose a \$50 fine against the petitioner, and pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys’ fees, and denied, as academic, that branch of the petitioner’s cross-motion which was pursuant to CPLR 2304 to quash the information subpoena.

Ordered that the appeal from so much of the order as denied, as academic, that branch of the petitioner’s cross-motion which was pursuant to CPLR 2304 to quash the information subpoena is dismissed, as MTS Acupuncture, P.C., is not aggrieved by that portion of the order (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144, 156-157 [2010]); and it is further,

Ordered that the order is modified, on the law, by deleting the provision thereof denying, as academic, that branch of the motion of MTS Acupuncture, P.C., which was pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys’ fees, and substituting therefor a provision denying that branch of the motion on the merits; as so modified, the order is affirmed insofar as reviewed; and it is further,

Ordered that with one bill of costs is awarded to the petitioner.

In 2022, the petitioner, American Transit Insurance Company (hereinafter American Transit), commenced this proceeding pursuant to CPLR article 75 to vacate a master arbitration award entered in favor of MTS Acupuncture, P.C. (hereinafter MTS), for no-fault benefits. MTS cross-petitioned, inter alia, to confirm the master arbitration award. In a judgment dated March 21, 2023, the Supreme Court, among other things, confirmed the master arbitration award and awarded MTS attorneys’ fees. In April and May 2023, American Transit paid the sums owed.

Thereafter, MTS served American Transit with an information subpoena. MTS moved, inter alia, to compel American Transit to comply with the information subpoena, to impose a \$50 fine against American Transit, and pursuant to 11 NYCRR

65-4.10 (j) (4) for an award of additional attorneys' fees. American Transit cross-moved, among other things, pursuant to CPLR 2304 to quash the information subpoena. American Transit also moved, inter alia, to direct the entry of a satisfaction of judgment. In an order dated July 3, 2024, the Supreme Court, among other things, granted that branch of American Transit's motion which was to direct the entry of a satisfaction of judgment, denied, as academic, those branches of MTS's motion which were to compel American Transit to comply with the information subpoena, to impose a \$50 fine against American Transit, and pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees, and denied, as academic, that branch of American Transit's cross-motion which was pursuant to CPLR 2304 to quash the information subpoena. MTS appeals.

The Supreme Court properly determined that American Transit issued payments satisfying the judgment and directed the entry of a satisfaction of judgment pursuant to CPLR 5021 (a) (2) (*see Breck Contr. Corp. v Vecchione*, 73 Misc 2d 1002, 1004 [Suffolk Dist Ct, 2d Dist 1973]). Since the judgment was satisfied, MTS was not entitled to any additional discovery (*see* CPLR 5223). Moreover, the court properly denied, as academic, those branches of MTS's motion which were to compel American Transit to comply with the information subpoena and to impose a \$50 fine against American Transit.

However, the Supreme Court should have denied that branch of MTS's motion which was pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees on the merits, not as academic. The general rule is that in proceedings involving arbitration, as in other litigation, attorneys' fees are not recoverable unless provided for by agreement or statute (*see Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703, 705 [2017]; *Myron Assoc. v Obstfeld*, 224 AD2d 504 [1996]). "Pursuant to Insurance Law § 5106 (a), if a valid claim or portion of a claim for no-fault benefits is overdue, the claimant shall also be entitled to recover his [or her] attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations" (*Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d at 705 [internal quotation marks omitted]; *see American Tr. Ins. Co. v Comfort Choice Chiropractic, P.C.*, 239 AD3d 1, 15 [2025]). MTS was not entitled to an award of additional attorneys' fees pursuant to 11 NYCRR 65-4.10 (j) (4) for its postjudgment motion practice, as no claim or portion of a claim for no-fault benefits was overdue.

MTS's remaining contentions are without merit. Genovesi, J.P., Wooten, Ventura and Golia, JJ., concur.

31 In the Matter of American Transit Insurance Company, Respondent, v YSC Trinity Acupuncture, P.C., as Assignee of Shaba Hill, Appellant. [252 NYS3d 666]—

Judgments—Satisfaction—Issued Payments

Disclosure—Scope of Disclosure—Postjudgment Discovery—Judgment Satisfied

Attorney and Client—Compensation—Attorneys' Fees Pursuant to Insurance Law § 5106 (a)—Overdue Claim for No-Fault Benefits

In a proceeding pursuant to CPLR article 75 to vacate a master arbitration award, YSC Trinity Acupuncture, P.C., appeals from two orders of the Supreme Court, Kings County (Rupert V. Barry, J.), both dated November 1, 2023. The first order, insofar as appealed from, denied that branch of the motion of YSC Trinity Acupuncture, P.C., which was to compel the petitioner to comply with an information subpoena and granted that branch of the petitioner's cross-motion which was pursuant to CPLR 2304 to quash the information subpoena. The second order, insofar as appealed from, granted that branch of the petitioner's motion which was to direct the entry of a satisfaction of judgment and denied the cross-motion of YSC Trinity Acupuncture, P.C., pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees.

Ordered that the orders are affirmed insofar as appealed from, with one bill of costs.

In 2022, the petitioner, American Transit Insurance Company (hereinafter American Transit), commenced this proceeding pursuant to CPLR article 75 to vacate a master arbitration award entered in favor of YSC Trinity Acupuncture, P.C. (hereinafter YSC), on YSC's claim for no-fault benefits. YSC cross-petitioned, inter alia, to confirm the master arbitration award. A proposed judgment was prepared, among other things, awarding YSC attorneys' fees, plus additional attorneys' fees "in the sum of 20% of the sum of principal and interest." In July 2022, American Transit paid YSC the sums owed. In a judgment dated November 22, 2022, the Supreme Court, inter alia, confirmed the master arbitration award and awarded YSC attorneys' fees in the sum of \$1,000, plus additional attorneys' fees in the sum of 20% of the sum of principal and interest.

YSC served American Transit with an information subpoena. Thereafter, YSC moved, among other things, to compel American Transit to comply with the information subpoena. American Transit cross-moved, inter alia, pursuant to CPLR 2304 to quash the information subpoena. American Transit also moved,

among other things, to direct the entry of a satisfaction of judgment. YSC cross-moved pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees. In an order dated November 1, 2023, the Supreme Court, inter alia, denied that branch of YSC's motion which was to compel American Transit to comply with the information subpoena and granted that branch of American Transit's cross-motion which was to quash the information subpoena. In a second order dated November 1, 2023, the court, among other things, granted that branch of American Transit's motion which was to direct the entry of a satisfaction of judgment and denied YSC's cross-motion pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees. YSC appeals from both orders.

The Supreme Court properly determined that American Transit issued payments satisfying the judgment and directed the entry of a satisfaction of judgment pursuant to CPLR 5021 (a) (2) (*see Breck Contr. Corp. v Vecchione*, 73 Misc 2d 1002, 1004 [Suffolk Dist Ct, 2d Dist 1973]). Since the judgment was satisfied, YSC was not entitled to any additional discovery (*see* CPLR 5223).

The Supreme Court did not improvidently exercise its discretion in granting that branch of American Transit's cross-motion which was pursuant to CPLR 2304 to quash the information subpoena. "An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry" (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014] [alterations and internal quotation marks omitted]; *see Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-332 [1988]; *8206 N. Blvd, LLC v Ai Qiu Qu*, 232 AD3d 833, 834 [2024]). Here, American Transit established that the judgment had been satisfied and, as such, there was no reason for postjudgment discovery in an effort to collect the judgment. Moreover, the requested information in the information subpoena was irrelevant, and the information subpoena was served to harass American Transit.

The Supreme Court properly denied YSC's cross-motion pursuant to 11 NYCRR 65-4.10 (j) (4) for an award of additional attorneys' fees. The general rule is that in proceedings involving arbitration, as in other litigation, attorneys' fees are not recoverable unless provided for by agreement or statute (*see Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703, 705 [2017]; *Myron Assoc. v Obstfeld*, 224 AD2d 504 [1996]). "Pursuant to Insurance Law § 5106 (a), if a valid claim or portion of a claim for no-fault benefits is overdue, the claimant

shall also be entitled to recover his [or her] attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to limitations promulgated by the superintendent in regulations" (*Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d at 705 [internal quotation marks omitted]; see *American Tr. Ins. Co. v Comfort Choice Chiropractic, P.C.*, 239 AD3d 1, 15 [2025]). YSC was not entitled to an award of attorneys' fees for its postjudgment motion practice, as no claim or portion of a claim for no-fault benefits was overdue.

YSC's remaining contentions are without merit. Genovesi, J.P., Wooten, Ventura and Golia, JJ., concur.

32 In the Matter of Vincent Bertault, Appellant, v Zoning Board of Appeals of Town of Southold, Respondent. [250 NYS3d 221]—

Municipal Corporations—Zoning—Variance—Evidence of Variance Granted to Neighbor Not Submitted to Zoning Board

Municipal Corporations—Zoning—Variance—Condition Imposed Related to and Incidental to Proposed Use

In a proceeding pursuant to CPLR article 78 to review so much of a determination of the Zoning Board of Appeals of Town of Southold dated December 2, 2021, as, after a hearing, denied that branch of the petitioner's application which was for an area variance to install a swimming pool and granted that branch of the petitioner's application which was for an area variance relative to a front yard setback for a renovated dwelling only upon a condition that two off-street parking spaces be provided, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Linda Kevins, J.), dated May 9, 2023. The judgment denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

In June 2005, the petitioner purchased a property located in a historic residential district in the Town of Southold. The property, which is improved, among other things, with a single-family home, is a "through lot," fronting on Navy Street and Willow Street (Code of Town of Southold § 280-4 [B]). Thus, the property effectively has two front yards.

In October 2020, the petitioner applied to the Town Building Department (hereinafter the Building Department), inter alia, for building permits to renovate and expand a single-family home (hereinafter the residence) to add living space and extend a front porch and to install an in-ground swimming pool. The Building Department denied the application on the grounds

that the proposed work on the residence violated certain setback requirements and that the proposed swimming pool was not permitted pursuant to Code of Town of Southold § 280-15, which required such accessory structures to be located in a rear yard. The petitioner appealed the Building Department's determination to the Zoning Board of Appeals of the Town of Southold (hereinafter the ZBA) and sought, among other things, area variances to allow proposed work on the residence and installation of the swimming pool. After a public hearing, on December 2, 2021, the ZBA, inter alia, denied that branch of the petitioner's application which was for the area variance to install the swimming pool and granted that branch of the petitioner's application which was for the area variance pertaining to work on the residence only upon a condition that two off-street parking spaces be provided.

The petitioner commenced this proceeding pursuant to CPLR article 78 to review so much of the ZBA's determination as denied that branch of the petitioner's application which was for the area variance to install the swimming pool and granted that branch of the petitioner's application which was for the area variance pertaining to work on the residence only upon a condition that two off-street parking spaces be provided. In a judgment dated May 9, 2023, the Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

In deciding whether to grant an application for an area variance, a zoning board "is required to engage in a balancing test that weighs the benefit to the applicant if the variance is granted against the detriment to the health, safety, and welfare of the neighborhood or community" (*Matter of Blandeburgo v Zoning Bd. of Appeals of Town of Islip*, 110 AD3d 876, 877 [2013] [internal quotation marks omitted]; see Town Law § 267-b [3] [b]). In so doing, the zoning board must consider "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some other method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance'" (*Matter of Sasso v Osgood*, 86 NY2d 374, 382 [1995], quoting Town

Law § 267-b [3] [b]; see *Matter of 153 Mulford Assoc., LLC v Zoning Bd. of Appeals of the Town of E. Hampton*, 205 AD3d 1019, 1021 [2022]).

“Local zoning boards have broad discretion in considering variance applications, and judicial review is limited to determining whether the action taken by the board was affected by an error of law, arbitrary and capricious, or an abuse of discretion” (*Matter of White Birch Circle Realty Corp. v DeChance*, 212 AD3d 729, 730 [2023]; see CPLR 7803 [3]). A determination is not arbitrary and capricious where it has a rational basis, that is, where it has some objective factual basis (see *Matter of Gibson v Commissioner of the N.Y. State Dept. of Motor Vehs.*, 223 AD3d 667, 668 [2024]; *Matter of White Birch Circle Realty Corp. v DeChance*, 212 AD3d at 730).

Contrary to the petitioner’s contention, the ZBA’s denial of that branch of his application which was for an area variance to install a swimming pool was not arbitrary and capricious. The petitioner improperly seeks to rely upon evidence regarding a variance granted to a neighbor, which was not submitted to the ZBA (see *Matter of Veteri v Zoning Bd. of Appeals of the Town of Kent*, 202 AD3d 975, 979 [2022]). “‘Judicial review of administrative determinations is confined to the facts and record adduced before the agency’” (*id.* at 978, quoting *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]). Moreover, the petitioner did not demonstrate that the ZBA’s determination was inconsistent with a prior determination made on “essentially the same facts” (*Matter of Fagan v Colson*, 49 AD3d 877, 878 [2008] [internal quotation marks omitted]; see *Matter of Kaiser v Town of Islip Zoning Bd. of Appeals*, 74 AD3d 1203, 1205 [2010]). In addition, there was an objective factual basis for the ZBA’s findings that an area variance to install a swimming pool in a front yard, particularly given the swimming pool’s design and the lack of proposed screening, would produce an undesirable change in the historical character of the neighborhood or a detriment to nearby properties, that the variance sought was substantial, and that the hardship was self-created (see *Matter of Blandeburgo v Zoning Bd. of Appeals of Town of Islip*, 110 AD3d at 878).

“A zoning board may, where appropriate, impose reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance” (*Matter of St. Onge v Donovan*, 71 NY2d 507, 515-516 [1988] [internal quotation marks omitted]; see Town Law § 267-b [4]; *Matter of Martin v Brookhaven Zon-*

ing *Bd. of Appeals*, 34 AD3d 811, 812 [2006]). Here, the condition imposed by the ZBA was directly related to and incidental to the proposed use of the property and was not unreasonable (see *Matter of Martin v Brookhaven Zoning Bd. of Appeals*, 34 AD3d at 813).

Accordingly, we affirm the judgment. Iannacci, J.P., Chambers, Taylor and McCormack, JJ., concur.

33 In the Matter of Vincent Bertault, Appellant, v Zoning Board of Appeals of Town of Southold, Respondent. [250 NYS3d 651]—

Municipal Corporations—Zoning—Special Exception—Compliance with Legislatively Imposed Conditions

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of Town of Southold dated December 2, 2021, which, after a hearing, denied the petitioner's application for a special exception, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Linda Kevins, J.), dated May 9, 2023. The judgment denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

The petitioner is the owner of certain real property located in a historic residential district in the Town of Southold. The property is improved, among other things, with a single-family home and a wooden historic barn. The petitioner applied to the Zoning Board of Appeals of Town of Southold (hereinafter the ZBA) for a special exception pursuant to Code of Town of Southold § 280-13 (B) (13) so as to establish an accessory apartment in the barn. In a determination dated December 2, 2021, made after a public hearing, the ZBA denied the petitioner's application.

The petitioner commenced this proceeding pursuant to CPLR article 78 to review the ZBA's determination denying the petitioner's application for a special exception. In a judgment dated May 9, 2023, the Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

"Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right" (*Matter of Lazarus v Board of Trustees of Inc. Vil. of Malverne*, 140 AD3d 773, 773 [2016] [internal quotation marks omitted]; see *Matter of 790 Holdings Corp. v Board of Appeals of the Town of Hempstead*, 237 AD3d 924 [2025]). "The owner must show compliance with legisla-

tively imposed conditions pertaining to the intended use before a special exception permit may be granted” (*Matter of 790 Holdings Corp. v Board of Appeals of the Town of Hempstead*, 237 AD3d at 925-926 [internal quotation marks omitted]). Concomitantly, the “[f]ailure to meet any one of the conditions set forth in the ordinance is . . . sufficient basis upon which the zoning authority may deny the permit application” (*Matter of Chestnut Petroleum Dist., Inc. v Town of Mount Pleasant Planning Bd.*, 222 AD3d 748, 750 [2023] [internal quotation marks omitted]; see *Matter of Marcus v Planning Bd. of the Vil. of Wesley Hills*, 199 AD3d 1007, 1008 [2021]). Judicial review of a determination denying an application for a special exception is limited to ascertaining whether the determination was illegal, arbitrary and capricious, or an abuse of discretion (see CPLR 7803 [3]; *Matter of Marcus v Planning Bd. of the Vil. of Wesley Hills*, 199 AD3d at 1008).

Here, the ZBA’s determination that the petitioner failed to establish compliance with all of the legislatively imposed conditions for the issuance of the requested special exception had an objective factual basis in the record and was not arbitrary and capricious or irrational (see Code of Town of Southold § 280-13 [B] [13]; *Matter of 790 Holdings Corp. v Board of Appeals of the Town of Hempstead*, 237 AD3d 924 [2025]). Among other things, the ZBA rationally determined that the proposed accessory apartment, which required construction of a 25-foot-long sloped ramp joining the barn to the street so as to comply with an off-site parking requirement, would adversely impact the character of the neighborhood and the safety, health, and welfare of the Town (see Code of Town of Southold §§ 280-13 [B] [13] [k]; 280-142 [C]).

Accordingly, we affirm the judgment. Iannacci, J.P., Chambers, Taylor and McCormack, JJ., concur.

34 In the *Matter of Vincent Bertault, Appellant, v Zoning Board of Appeals of Town of Southold, Respondent*. [251 NYS3d 753]—

Municipal Corporations—Zoning—Stop Work Order—Built Drawings Materially Differed from Plans Previously Approved

In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of Town of Southold dated April 8, 2022, which, after a hearing, confirmed a stop work order issued in connection with construction on the petitioner’s property, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Christopher Modelewski, J.), dated March 7, 2024. The judgment denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

The petitioner is the owner of certain real property located in a historic residential district in the Town of Southold. In 2014, the Zoning Board of Appeals of Town of Southold (hereinafter the ZBA) granted the petitioner an area variance permitting him to relocate a historic barn from an existing nonconforming front yard location to a new nonconforming front yard location on his property (hereinafter the barn relocation project). The petitioner also obtained a certificate of appropriateness from the Town Historic Preservation Commission (hereinafter the HPC) for the barn relocation project, as well as a building permit to perform the work in conformance with the certificate of appropriateness and ZBA approvals.

On August 24, 2021, a Senior Building Inspector (hereinafter the Building Inspector) from the Building Department of Town of Southold (hereinafter the Building Department) issued a written stop work order (hereinafter the SWO) pertaining to the barn relocation project. The SWO explained that the work being performed had exceeded the scope of the building permit and that the work could only resume after the ZBA and the Building Department issued approvals for all changes. The petitioner appealed the SWO to the ZBA, which held a hearing over two days and a special meeting, at which it received oral and written comments and evidence from, among others, the Building Inspector, the petitioner's architect, and the petitioner's attorney. The Building Inspector explained his reasoning in issuing the SWO orally and in writing. The petitioner submitted architectural drawings representing the "as built" condition of the barn and argued that the work conformed to the approved plans and was generally approved by the Building Department. The ZBA also received letters from the HPC asserting that the relocated barn was not in compliance with the certificate of appropriateness that it had issued. In a determination dated April 8, 2022, the ZBA confirmed the SWO.

The petitioner commenced this CPLR article 78 proceeding to review the ZBA's determination confirming the SWO. In a judgment dated March 7, 2024, the Supreme Court denied the petition and dismissed the proceeding. The petitioner appeals.

A local zoning board has broad discretion in rendering a determination on matters within its jurisdiction and judicial review is limited to determining whether the action taken by the board was rational and not affected by an error of law, arbitrary and capricious, or an abuse of discretion (*see* CPLR 7803 [3]; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]; *Matter of Sasso v Osgood*,

86 NY2d 374, 384 [1995]). A ZBA determination is rational if it has some objective factual basis (see *Matter of Gibson v Commissioner of the N.Y. State Dept. of Motor Vehs.*, 223 AD3d 667, 668 [2024]; *Matter of 153 Mulford Assoc., LLC v Zoning Bd. of Appeals of the Town of E. Hampton*, 205 AD3d 1019, 1022 [2022]).

Here, the ZBA's determination confirming the SWO had an objective factual basis in the record and, thus, was not arbitrary and capricious. Among other things, the ZBA rationally concluded, based upon the evidence submitted to it, that the as built drawings materially differed from the plans previously approved by it and the HPC in that the roof line of the barn had been altered and the overall as-built height of the barn exceeded the height restrictions for accessory structures. The ZBA's interpretation of the zoning code provisions relating to the content requirements for stop work orders and its determination that the SWO issued herein complied with those provisions were reasonable and not arbitrary and capricious (see *Matter of Henderson v Zoning Bd. of Appeals*, 72 AD3d 684, 686 [2010]). Contrary to the petitioner's contention, he received due process of law in connection with the issuance of the SWO (see *Matter of Hamil Stratten Props., LLC v New York State Dept. of Env'tl. Conservation*, 79 AD3d 747, 749 [2010]; *Matter of Estate of Kadin v Bennett*, 163 AD2d 310 [1990]).

Accordingly, we affirm the judgment.

In light of our determination, we need not reach the petitioner's remaining contentions. Iannacci, J.P., Chambers, Taylor and McCormack, JJ., concur.

35 In the Matter of Chinese Christ Gospel Church, Appellant, v OATH, Respondent. [252 NYS3d 675]—

Administrative Law—Administrative Review—Eligibility to Request New Hearing—Defaulted Twice on Same Summons

In a proceeding pursuant to CPLR article 78 to review eight determinations of the New York City Office of Administrative Trials and Hearings, each dated March 13, 2023, each of which, inter alia, denied a motion of the petitioner to vacate its default in responding to a summons issued by the New York City Department of Buildings, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Queens County (Frederick D.R. Sampson, J.), entered February 14, 2024. The order and judgment, insofar as appealed from, denied the petition and dismissed the proceeding.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs.

On June 14, 2021, the New York City Department of Buildings issued eight summonses to the petitioner, the owner of a building located in Queens, alleging, *inter alia*, that the petitioner violated section 28-210.1 of the Administrative Code of the City of New York by converting the first floor and the cellar of the building into single-room occupancy units. Each of the summonses directed the petitioner to appear at a hearing before the New York City Office of Administrative Trials and Hearings (hereinafter OATH) on September 7, 2021. The petitioner failed to appear for the scheduled hearings, and OATH issued determinations dated September 14, 2021, in which a hearing officer, upon the petitioner's default, found violations of the Administrative Code and imposed penalties. In October 2021, the petitioner moved to vacate its defaults. Thereafter, OATH vacated the petitioner's defaults and rescheduled the hearings to March 1, 2022.

On March 1, 2022, the hearing officer adjourned the hearing with respect to only one summons (hereinafter summons 04Y) to June 7, 2022. OATH then issued determinations, one as to each of the remaining seven summonses, finding that the petitioner was in default, finding that the petitioner violated the Administrative Code, and imposing penalties. On June 7, 2022, the petitioner failed to appear for the scheduled hearing with respect to summons 04Y. OATH issued a determination, which, upon the petitioner's default in appearing at the hearing on June 7, 2022, with respect to summons 04Y, found that the petitioner violated the Administrative Code and imposed penalties.

In March 2023, the petitioner made separate motions before OATH to vacate each of its defaults. In eight determinations, each dated March 13, 2023, OATH found that the petitioner did not establish an exceptional circumstance for the failure to appear, denied the petitioner's motions to vacate its defaults, and affirmed the determinations finding violations of the Administrative Code and imposing penalties. In June 2023, the petitioner commenced this proceeding pursuant to CPLR article 78 to review the determinations dated March 13, 2023. In an order and judgment entered February 14, 2024, the Supreme Court, *inter alia*, denied the petition and dismissed the proceeding. The petitioner appeals.

Pursuant to 48 RCNY 6-21 (e) (1), a party who defaults twice on the same summons is not eligible to request a new hearing. "Notwithstanding the forgoing, upon application, the Chief Administrative Law Judge or his or her designee may grant a new hearing after default upon a showing of exceptional cir-

cumstances and in order to avoid injustice” (*id.* § 6-21 [e] [2]). A denial of a request to vacate a default is a final agency determination subject to judicial review under CPLR article 78 (*see* 48 RCNY § 6-21 [j]). “In a CPLR article 78 proceeding to review a determination of an administrative agency, the standard of judicial review is whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion” (*Matter of Wythe Berry, LLC v New York State Dept. of Env'tl. Conservation*, 188 AD3d 1225, 1228 [2020], quoting *Matter of Sierra Club v Martens*, 158 AD3d 169, 174 [2018]; *see* CPLR 7803 [3]).

Here, the petitioner defaulted twice on the same summonses and failed to establish exceptional circumstances warranting vacatur of its defaults (*see* 48 RCNY 6-21 [e] [2]). Therefore, OATH’s determinations denying the petitioner’s motions to vacate its defaults in appearing at the hearings on March 1, 2022, and June 7, 2022, did not constitute an abuse of discretion and were not arbitrary and capricious (*see* CPLR 7803 [3]; *Matter of Windermere Props., LLC v City of New York*, 231 AD3d 461, 462 [2024]).

The petitioner’s remaining contentions are not properly before this Court.

Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding. Dillon, J.P., Christopher, Wan and Hom, JJ., concur.

36 In the Matter of Iesha Ellis, Respondent-Appellant, v Johnny W. Wiley, Appellant-Respondent. [252 NYS3d 225]—

Parent, Child and Family—Support—Willful Violation of Support Order—Medical Records Did Not Establish Condition Affected Ability to Work
Parent, Child and Family—Support—Fair Hearing—Support Magistrate’s Comments and Questioning of Witnesses

In a proceeding pursuant to Family Court Act article 4, the father appeals, and the mother cross-appeals, from an order of commitment of the Family Court, Nassau County (Joy M. Watson, J.), dated December 11, 2024. The order of commitment, in effect, confirmed so much of an order of disposition of the same court (Nadine J. Satterthwaite, S.M.) dated November 19, 2024, made after a hearing, as found that the father willfully violated a prior order of child support, and committed him to the custody of the Nassau County Jail for a period of 60 days unless he paid a purge amount of \$50,000.

Ordered that the cross-appeal is dismissed as abandoned, without costs or disbursements; and it is further,

Ordered that the appeal from so much of the order of commitment as committed the father to the custody of the Nassau County Jail for a period of 60 days unless he paid the purge amount of \$50,000 is dismissed as academic, without costs or disbursements, as the period of incarceration has expired (*see Matter of Melendez v Osborne*, 236 AD3d 658 [2025]); and it is further,

Ordered that the order of commitment is affirmed insofar as reviewed on the appeal by the father, without costs or disbursements.

The father and the mother have one child together. The mother commenced this proceeding pursuant to Family Court Act article 4, alleging that the father was in willful violation of a prior child support order. In an order of disposition dated November 19, 2024, made after a hearing, the Support Magistrate, *inter alia*, found that the father willfully violated the child support order. In an order of commitment dated December 11, 2024, the Family Court, in effect, confirmed so much of the order of disposition as found that the father willfully violated the child support order, and committed the father to the custody of the Nassau County Jail for a period of 60 days unless he paid a purge amount of \$50,000. The father appeals.

Although the appeal from so much of the order of commitment as committed the father to the custody of the Nassau County Jail for a period of 60 days unless he paid the purge amount must be dismissed as academic, the appeal from so much of the order of commitment as, in effect, confirmed the finding that the father willfully violated the child support order is not academic in light of the enduring consequences that could flow from the determination that he violated his support obligations (*see Matter of Melendez v Osborne*, 236 AD3d 658, 660 [2025]; *Matter of Leathers v Smalls*, 192 AD3d 892 [2021]).

Pursuant to Family Court Act § 454 (3) (a), a “failure to pay support as ordered itself constitutes ‘prima facie evidence of a willful violation’” (*Matter of Powers v Powers*, 86 NY2d 63, 69 [1995], quoting Family Ct Act § 454 [3] [a]; *see Matter of Kimbrough v Murphy*, 156 AD3d 640, 641 [2017]). “Once a prima facie showing of willfulness has been made, the burden shifts to the party that owes the support to offer some competent, credible evidence of his or her inability to [make the required payments]” (*Matter of Rafferty v Ettinger*, 150 AD3d 1016, 1016 [2017]; *see Matter of Powers v Powers*, 86 NY2d at 69-70; *Matter of Kimbrough v Murphy*, 156 AD3d at 641).

Here, the mother established, prima facie, the father’s will-

ful violation of the child support order by submitting evidence that the father had paid only \$700 in child support, had not paid child support for more than eight years, and owed the sum of \$129,416 in child support arrears. Thus, the burden shifted to the father to offer competent, credible evidence of his inability to make the required payments (see *Matter of Powers v Powers*, 86 NY2d at 69-70; *Matter of Kimbrough v Murphy*, 156 AD3d at 641; *Matter of Rafferty v Ettinger*, 150 AD3d at 1016). The father failed to satisfy his burden because, as the Support Magistrate correctly determined, his medical records did not establish that his medical conditions affected his ability to work, as required (see *Matter of Leathers v Smalls*, 192 AD3d at 894). Thus, the father failed to offer competent, credible evidence of his inability to make the required payments, and the Family Court properly, in effect, confirmed the Support Magistrate's determination that the father willfully violated the child support order (see *id.*).

The father's contention that he was deprived of a fair hearing due to the Support Magistrate's prejudice or bias against him is unpreserved for appellate review (see *Matter of Esposito v Rosa*, 172 AD3d 858, 858-859 [2019]; *Matter of Berg v Berg*, 166 AD3d 763, 765 [2018]). In any event, although some of the Support Magistrate's comments would have been better left unsaid, and although the Support Magistrate actively participated in questioning witnesses at the hearing, such conduct did not unjustly affect the result of the proceedings (see *Matter of Ahnna N. [Rosa N.]*, 240 AD3d 964, 968 [2025]; *Matter of Yehudah v Yehudah*, 144 AD3d 1046, 1047 [2016]; *Matter of Bowe v Bowe*, 124 AD3d 645, 646 [2015]).

The father's remaining contentions either are not properly before this Court, are without merit, or do not warrant reversal. Dillon, J.P., Brathwaite Nelson, Landicino and Quirk, JJ., concur.

37 In the Matter of Jeffrey Fleischer, Respondent, v Rafe Friedman, Appellant. [252 NYS3d 684]—

Arbitration—Award—Capacity to Understand Arbitration Agreement
 Arbitration—Award—Prejudgment Interest from Date on Which Payment Period Expired

In a proceeding pursuant to CPLR article 75 to confirm an arbitration award dated August 15, 2019, Rafe Friedman appeals from a judgment of the Supreme Court, Queens County (Leonard Livote, J.), entered June 3, 2021. The judgment, upon an order of the same court dated May 4, 2021, granting the petition and denying the cross-motion of Rafe Friedman to vacate

or modify the arbitration award and to seal documents referencing psychiatric information, confirmed the arbitration award and awarded the petitioner prejudgment interest from August 15, 2019.

Ordered that the judgment is modified, on the law, by deleting the provision thereof awarding the petitioner prejudgment interest from August 15, 2019, and substituting therefor a provision awarding the petitioner prejudgment interest from September 14, 2019; as so modified, the judgment is affirmed, with costs to the petitioner, and the matter is remitted to the Supreme Court, Queens County, for calculation of the prejudgment interest due in accordance herewith and the entry of an appropriate amended judgment thereafter.

The petitioner and Rafe Friedman were long-time acquaintances, both of whom struggled with mental health disorders. According to the petitioner, Friedman convinced the petitioner to withdraw his retirement savings and invest in Friedman's corporations, claiming that Friedman could manage the investments more effectively. Additionally, Friedman requested to be added as an authorized user on the petitioner's credit card. In total, Friedman received \$356,277.75 from the petitioner. A dispute arose when the petitioner requested an accounting and Friedman could not provide the accounting.

In December 2018, the parties agreed to submit their dispute regarding the investments to binding arbitration before the Beth Din of America, a religious tribunal that resolves disputes according to Jewish law. The Beth Din of America issued an award dated August 15, 2019, finding that Friedman breached his fiduciary duty and was liable to the petitioner in the principal sum of \$356,277.75.

Subsequently, the petitioner commenced this proceeding to confirm the arbitration award. Friedman cross-moved to vacate or modify the arbitration award and to seal documents referencing psychiatric information. In an order dated May 4, 2021, the Supreme Court granted the petition and denied the cross-motion. On June 3, 2021, the court entered a judgment confirming the arbitration award and awarding the petitioner prejudgment interest from August 15, 2019. Friedman appeals.

Judicial review of an arbitration award is extremely limited (*see Matter of Tauber v Gross*, 216 AD3d 1066, 1068 [2023]). "CPLR article 75 codifies a limited role for the judiciary in arbitration" (*Matter of Nofal v MAS-UNY*, 234 AD3d 970, 971 [2025] [internal quotation marks omitted]; *see Matter of Tauber v Gross*, 216 AD3d at 1068). "A party seeking to overturn an arbitration award bears a heavy burden and must establish a

ground for vacatur by clear and convincing evidence” (*Matter of Hussaini v Hussaini*, 237 AD3d 1095, 1096 [2025]).

Contrary to Friedman’s assertion that the award should be vacated because he did not fully comprehend or understand the nature of the arbitration agreement, the Supreme Court providently exercised its discretion in determining that he was competent. As a general rule, a party’s competence is presumed (see *Matter of Moore*, 204 AD3d 1014, 1015 [2022]; *Matter of Gold*, 170 AD3d 1174, 1175 [2019]). “[T]he party asserting incapacity bears the burden of proving incompetence” (*Crawn v Sayah*, 31 AD3d 367, 368 [2006] [internal quotation marks omitted]; see *Weissman v Weissman*, 42 AD3d 448, 450 [2007]). Here, Friedman failed to show that he lacked the mental capacity to comprehend and understand the nature of the arbitration agreement (see *Crawford v Smith*, 219 AD3d 691, 692 [2023]; *Matter of Dinnerstein v New York State Div. of Hous. & Community Renewal*, 257 AD2d 444, 444 [1999]).

Friedman also failed to demonstrate, by clear and convincing evidence, any basis for vacating the arbitration award pursuant to CPLR 7511 (see *Matter of Dluhy v Sive, Paget & Riesel, P.C.*, 220 AD3d 659, 660 [2023]; *Matter of Denaro v Cruz*, 115 AD3d 742, 743 [2014]).

“Upon confirmation of an arbitrator’s award, interest should be awarded from the date of the award or, where an arbitration award provides for payment within a certain time period, interest should be awarded from the expiration of that period” (*Matter of Shimon v Silberman*, 92 AD3d 789, 790-791 [2012] [citations and internal quotation marks omitted]; see *Matter of Meehan v Nassau Community Coll.*, 242 AD2d 155, 159-160 [1998]). Accordingly, we modify the judgment to award the petitioner prejudgment interest from September 14, 2019, the date on which the payment period expired (see *Matter of Shimon v Silberman*, 92 AD3d at 790-791).

Further, the Supreme Court providently exercised its discretion in denying that branch of Friedman’s cross-motion which was to seal documents referencing psychiatric information (see 22 NYCRR 202.5-b [k]; 216.1; *Lurie v Lurie*, 226 AD3d 1001, 1003 [2024]).

Friedman’s remaining contentions are without merit. Connelly, J.P., Christopher, Voutsinas and Hom, JJ., concur.

38 In the Matter of Manuel G., Jr. Administration for Children’s Services, Appellant; Manuel G., Respondent. (Proceeding No. 1.) In the Matter of Marianna G. Administration for Children’s Services, Appellant; Manuel G., Respondent.

(Proceeding No. 2.) In the Matter of Cleopatra G. Administration for Children's Services, Appellant; Manuel G., Respondent. (Proceeding No. 3.) [252 NYS3d 682]—

Parent, Child and Family—Abused or Neglected Child—Commission of Domestic Violence against Other Parent —Supported by Children's Statements and Medical Records

In related proceedings pursuant to Family Court Act article 10, the Administration for Children's Services appeals from an order of the Family Court, Kings County (Melody Glover, J.), dated October 17, 2024. The order, after a fact-finding hearing, and upon a finding that the petitioner failed to establish that the father neglected the subject children, dismissed the petitions.

Ordered that the order is reversed, on the facts, without costs or disbursements, the petitions are reinstated, a finding is made that the father neglected the subject children, and the matter is remitted to the Family Court, Kings County, for a dispositional hearing and determinations thereafter.

The Administration for Children's Services (hereinafter ACS) commenced these related proceedings pursuant to Family Court Act article 10, alleging that the father neglected the subject children by committing an act of domestic violence against the children's mother in their presence. At a fact-finding hearing, ACS admitted a recording of the mother's 911 call related to the alleged act of domestic violence, the mother's certified medical records, and ACS's investigation records, which included various statements made by the children related to the alleged act of domestic violence. In an order dated October 17, 2024, made after the fact-finding hearing, the Family Court, upon a finding that ACS failed to establish that the father neglected the children, dismissed the petitions. ACS appeals.

"A finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence" (*Matter of Kyng T.B. [Theodore B.]*, 234 AD3d 682, 683 [2025] [internal quotation marks omitted]; see Family Ct Act § 1012 [f]). "Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding" (*Matter of Nina P. [Giga P.]*, 180 AD3d 1047, 1047 [2020]; see *Matter of Xierra N. [Lewis N.]*, 226 AD3d 790, 790 [2024]). "Furthermore, impairment or imminent danger of physical impairment should also be inferred from the subject

children's proximity to violence directed against a family member, even absent evidence that they were aware of or emotionally impacted by the violence" (*Matter of Najaie C. [Niger C.]*, 173 AD3d 1011, 1012 [2019] [internal quotation marks omitted]; see *Matter of Xierra N. [Lewis N.]*, 226 AD3d at 790-791).

Here, a preponderance of the credible evidence presented at the fact-finding hearing supported a finding that the children's physical, mental, or emotional conditions were impaired or in imminent danger of impairment by the father's commission of an act of domestic violence against the mother (see *Matter of Joseph M.H. [Frederick H.]*, 227 AD3d 996, 996-997 [2024]). The Family Court erred in concluding that the evidence did not sufficiently demonstrate that it was the father who cut the mother with a knife during the incident. Although the mother initially reported to a 911 operator that she did not know who had cut her, the medical records, the children's statements, and the other evidence presented at the fact-finding hearing were sufficient to meet ACS's burden of proof. Moreover, as the court properly determined, the father's failure to testify at the fact-finding hearing warranted a negative inference against him (see *Matter of Legend C.-F.F. [Demetri H.]*, 231 AD3d 1022, 1023 [2024]). Under these circumstances, the court's finding that the children were not neglected by the father is not supported by the record (see *Matter of Asani J. [Assata A.]*, 245 AD3d 711, 712 [2026]; *Matter of Najaie C. [Niger C.]*, 173 AD3d at 1012).

In light of the foregoing, we need not reach ACS's remaining contention.

Accordingly, we reverse the order, reinstate the petitions, find that the children are neglected within the meaning of Family Court Act § 1012 (f), and remit the matter to the Family Court, Kings County, for a dispositional hearing and determinations thereafter. Duffy, J.P., Wooten, Taylor and Hom, JJ., concur.

39 In the Matter of Brianna J. Administration for Children's Services, Appellant; Raphaline J., Respondent, et al., Respondent. (Proceeding No. 1.) In the Matter of Kevin J. Administration for Children's Services, Appellant; Raphaline J., Respondent, et al., Respondent. (Proceeding No. 2.) In the Matter of Ricardo J. Administration for Children's Services, Appellant; Raphaline J., Respondent, et al., Respondent. (Proceeding No. 3.) In the Matter of Richard J. Administration for Children's Services, Appellant; Raphaline J., Respondent, et al., Respondent. (Proceeding No. 4.) [252 NYS3d 677]—

Parent, Child and Family—Abused or Neglected Child—Parent Permitted Individual into Home Who Had Previously Been Violent Toward Her—Children Witnessed and Attempted to Stop Violence

In related proceedings pursuant to Family Court Act article 10, the petitioner appeals from an order of the Family Court, Kings County (Ben Darvil, Jr., J.), dated February 13, 2025. The order, after a fact-finding hearing, and upon a finding that the petitioner failed to establish that the mother neglected the subject children, dismissed the petitions insofar as asserted against the mother.

Ordered that the order is reversed, on the facts, without costs or disbursements, the petitions are reinstated insofar as asserted against the mother, a finding is made that the mother neglected the subject children, and the matter is remitted to the Family Court, Kings County, for a dispositional hearing and a determination thereafter.

The petitioner commenced these related proceedings pursuant to Family Court Act article 10, alleging, inter alia, that the mother neglected the subject children by failing to provide them with proper supervision or guardianship. The petitioner alleged, among other things, that the children's physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired as a result of acts of domestic violence perpetrated by Richecarde L. against the mother in their presence. After a fact-finding hearing, the Family Court found that the petitioner failed to establish by a preponderance of the evidence that the mother neglected the children by failing to provide them with proper supervision or guardianship. In an order dated February 13, 2025, the court dismissed the petitions insofar as asserted against the mother. The petitioner appeals.

"In a child protective proceeding, the petitioner has the burden of proving neglect by a preponderance of the evidence" (*Matter of Khamari S. [Keith S.]*, 163 AD3d 826, 826 [2018]; see Family Ct Act § 1046 [b] [i]). "[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Jaylen S. [Richard S.]*, 214 AD3d 885, 885 [2023], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; see Family Ct Act § 1012 [f] [i] [B]). "Where a neglect petition is predicated on a child's exposure to

domestic violence, the sole allegation that a parent has been the victim of abuse and that the child witnessed the abuse is insufficient to support a finding of neglect” (*Matter of Angelique L.*, 42 AD3d 569, 571 [2007]; see *Nicholson v Scoppetta*, 3 NY3d at 371).

Here, the petitioner established, by a preponderance of the evidence, that the mother neglected the children by failing to provide them with proper supervision or guardianship, and that, as a result, the children’s physical or emotional conditions were impaired or were in imminent danger of becoming impaired by the acts of domestic violence perpetrated in their presence (see *Matter of Malik M. [Taishona M.]*, 236 AD3d 1034, 1037-1038 [2025]; *Matter of Ruben G. [Claudia G.]*, 132 AD3d 761, 762 [2015]; *Matter of Angelique L.*, 42 AD3d at 571-572). The record established that the mother acknowledged that the children knew of repeated incidents of domestic violence involving Richecarde L. and the mother, yet she nonetheless allowed Richecarde L. to visit her home with some degree of regularity. In November 2023, the mother allowed Richecarde L. to visit her home despite the existence of an active temporary order of protection issued by the Criminal Court of the City of New York against him on her behalf. In the presence of the children, Richecarde L. pushed the mother, and when the oldest child attempted to intervene, Richecarde L. pushed the child out of the way. The second-oldest child also witnessed Richecarde L. punch the mother. Prior to that incident, the mother made multiple reports to the police against Richecarde L. alleging assault. The evidence presented by the petitioner, together with a negative inference drawn from the mother’s failure to testify, was sufficient to support a finding of neglect (see *Matter of Christopher D.B. [Lorraine H.]*, 157 AD3d 944, 948 [2018]; *Matter of Valentino R. [Dina R.]*, 128 AD3d 562, 562 [2015]; *Matter of Mylasia P. [Brenda P.]*, 104 AD3d 856, 856 [2013]).

The parties’ remaining contentions are either without merit or not properly before this Court. Iannacci, J.P., Ford, Landicino and Quirk, JJ., concur.

40 In the Matter of Kadri K. Administration for Children’s Services, Respondent; Kevin K., Appellant, et al., Respondent. (Proceeding No. 1.) In the Matter of Shanta S. Administration for Children’s Services, Respondent; Kevin K., Appellant, et al., Respondent. (Proceeding No. 2.) [252 NYS3d 219]—

Parent, Child and Family—Abused or Neglected Child—Sexual and Derivative Abuse—Minor Inconsistencies between Child’s Testimony and Prior Statements

In related proceedings pursuant to Family Court Act article 10, Kevin K. appeals from an order of fact-finding of the Family Court, Queens County (Elenor Reid-Cherry, J.), dated October 2, 2024. The order of fact-finding, after a fact-finding hearing, found that Kevin K. sexually abused the child S.S. and derivatively abused the child K.K.

Ordered that the order of fact-finding is affirmed, without costs or disbursements.

The Administration for Children's Services (hereinafter ACS) filed petitions alleging, inter alia, that Kevin K. (hereinafter the appellant) sexually abused his fiancée's daughter, the child S.S., and derivatively abused the child K.K., the appellant's son. Following a fact-finding hearing, the Family Court, in an order of fact-finding dated October 2, 2024, found that the appellant was a person legally responsible for the daughter, that the appellant sexually abused the daughter, and that the appellant derivatively abused the son. This appeal ensued.

The Family Court Act defines an abused child as, inter alia, "a child . . . whose parent or other person legally responsible for his [or her] care . . . commits . . . an offense against such child defined in article one hundred thirty of the penal law" (Family Ct Act § 1012 [e] [iii] [A]; see *Matter of Ashlyn M. [Robert J.]*, 228 AD3d 939, 941 [2024]; *Matter of Vered L. [Yoshi S.]*, 205 AD3d 1028, 1029 [2022]). "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party" (Penal Law § 130.00 [3]). "The intent to receive sexual gratification 'may be inferred from the nature of the acts committed and the circumstances in which they occurred' " (*Matter of Vered L. [Yoshi S.]*, 205 AD3d at 1030, quoting *Matter of Shaquan A. [Fan Fan A.]*, 137 AD3d 1119, 1120 [2016]).

At a fact-finding hearing in a proceeding pursuant to Family Court Act article 10, "the petitioner has the burden of establishing, by a preponderance of the evidence, that the subject child has been abused or neglected" (*Matter of Vered L. [Yoshi S.]*, 205 AD3d at 1029; see Family Ct Act § 1046 [b] [i]). "Great deference is given to the Family Court's credibility determinations, as it is in the best position to assess the credibility of the witnesses having had the opportunity to view the witnesses, hear the testimony, and observe their demeanor" (*Matter of Ashlyn M. [Robert J.]*, 228 AD3d at 941 [internal quotation marks omitted]). "Where, as here, there is conflicting testimony and the matter turns upon the assessment of the credibility of witnesses, the factual findings of the hearing court must be accorded great weight" (*id.* [internal quotation marks omitted]; see *Matter of Naima E. [Daryl M.]*, 227 AD3d 901, 902 [2024]).

Here, the Family Court’s finding that the appellant sexually abused the daughter and derivatively abused the son is supported by a preponderance of the evidence (*see Matter of Ashlyn M. [Robert J.]*, 228 AD3d at 941; *Matter of M.W. [Mohammad W.]*, 172 AD3d 879, 881 [2019]). The daughter’s hearing testimony established that the appellant sexually abused her within the meaning of Family Court Act § 1012 (e) (iii) (A) (*see Matter of Ashlyn M. [Robert J.]*, 228 AD3d at 941; *Matter of Naima E. [Daryl M.]*, 227 AD3d at 903). Contrary to the appellant’s contention, the daughter’s testimony, which differed in some respects from prior statements she made to representatives of the New York City Police Department and ACS, constituted “minor inconsistencies” that did not render her “testimony unworthy of belief” (*Matter of Jaretzy F. [Jesus F.-F.]*, 240 AD3d 892, 894 [2025] [internal quotation marks omitted]). Based on the totality of the circumstances, the court appropriately inferred that the appellant intended to gain sexual gratification from his conduct (*see Matter of Ashlyn M. [Robert J.]*, 228 AD3d at 941; *Matter of M.W. [Mohammad W.]*, 172 AD3d at 881).

The appellant’s remaining contention is unpreserved for appellate review. Duffy, J.P., Wooten, Taylor and Hom, JJ., concur.

41 In the Matter of Elaine Hernandez Lopez, Appellant, v Michael Rodriguez, Respondent. [252 NYS3d 673]—

Parent, Child and Family—Custody—Failure to Produce Acknowledgment of Paternity—Neither Parent Disputed Paternity and Father Listed on Birth Certificate

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Orange County (Victoria B. Campbell, J.), dated October 11, 2024. The order, without a hearing, sua sponte, dismissed the petition for failure to submit an acknowledgment of paternity.

Ordered that the order is reversed, on the law, without costs or disbursements, the petition is reinstated, and the matter is remitted to the Family Court, Orange County, for a hearing and a new determination thereafter of the petition.

The mother and the father, who were never married, have one child together, a daughter, born in 2011 in Pennsylvania. On March 14, 2024, the mother commenced this proceeding pursuant to Family Court Act article 6 for custody of the subject child. The mother alleged that the father had signed an acknowledgment of paternity with regard to the child on February 23, 2011. The mother did not attach a copy of the acknowledgment of paternity to the petition.

On August 12, 2024, the mother and her attorney appeared before the Family Court on the petition, which had been served on the father on July 24, 2024. The father did not appear in court. The court appointed an attorney for the child and adjourned the matter for an inquest, directing the mother to submit the acknowledgment of paternity prior thereto.

On September 10, 2024, the scheduled date for the inquest, the parties and their attorneys, as well as the attorney for the child, appeared before the Family Court. At that time, the mother still did not have a copy of the acknowledgment of paternity.

In an order dated October 11, 2024, the Family Court, without a hearing, sua sponte, dismissed the petition based on the mother's failure to submit the acknowledgment of paternity. The mother appeals.

Although on the scheduled inquest date the mother was unable, despite diligent efforts, to produce the acknowledgment of paternity as previously directed by the Family Court, her failure to do so did not deprive the court of the power to render a child custody determination. Rather, the court had the authority to make an order of filiation declaring the paternity of the child in this proceeding in accordance with Family Court Act § 564 (*see Matter of Comins v Briggs*, 25 AD3d 842, 843 [2006]). Of note, both the mother and the father appeared in this proceeding, and the father did not dispute paternity. Further, the mother had in her possession the child's Pennsylvania birth certificate on which the father was listed as the child's father (*see generally* Public Health Law § 4103 [2], [3]). Under Pennsylvania law, since the parties were not married at the time of the child's birth, the father could only be listed on the birth certificate as the child's father if the parties signed a voluntary acknowledgment of paternity or there was a legal adjudication of paternity (*see* 23 Pa Stat and Cons Stat Ann § 5103 [i]; *see also* Public Health Law § 4135 [2]). Moreover, the parties and the attorney for the child were all in favor of resolution of the petition on the merits.

Under the circumstances, the Family Court should not have, sua sponte, dismissed the petition without conducting a hearing or considering the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Accordingly, we remit the matter to the Family Court, Orange County, for a hearing and a new determination thereafter of the petition.

The remaining contention is academic in light of our determination. Dillon, J.P., Dowling, Taylor and McCormack, JJ., concur.

42 In the Matter of Robert Marzen, Respondent, v New York City Department of Correction, Appellant. [250 NYS3d 220]—

Limitation of Actions—Four-Month Statute of Limitations—CPLR Article 78 Proceeding—Final and Binding Determination

In a proceeding pursuant to CPLR article 78 to compel the New York City Department of Correction to submit the petitioner's disciplinary case to the New York City Office of Administrative Trials and Hearings for adjudication pursuant to Civil Service Law § 75, the New York City Department of Correction appeals from an order and judgment (one paper) of the Supreme Court, Queens County (Carmen R. Velasquez, J.), entered April 15, 2024. The order and judgment granted the petition and denied the cross-motion of the New York City Department of Correction to dismiss the petition.

Ordered that the order and judgment is reversed, on the law, with costs, the petition is denied, the cross-motion of the New York City Department of Correction to dismiss the petition is granted, and the proceeding is dismissed.

In July 2020, the petitioner, an employee of the New York City Department of Correction (hereinafter DOC), was served with disciplinary charges. In February 2021, the charges were upheld by a DOC human resources representative. Thereafter, the petitioner executed a waiver of the right to a hearing pursuant to Civil Service Law § 75. In August 2021, a DOC labor relations representative upheld the charges. In September 2022, the petitioner commenced this proceeding pursuant to CPLR article 78 to compel DOC to submit his disciplinary case to the New York City Office of Administrative Trials and Hearings (hereinafter OATH) for adjudication pursuant to Civil Service Law § 75. DOC cross-moved to dismiss the petition on the ground, inter alia, that the proceeding is time-barred. In an order and judgment entered April 15, 2024, the Supreme Court granted the petition and denied the cross-motion. DOC appeals.

A proceeding pursuant to CPLR article 78 must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner (*see id.* § 217 [1]; *Matter of Kaneev v City of New York Env'tl. Control Bd.*, 149 AD3d 742, 744 [2017]). “‘An administrative determination becomes final and binding’ within the meaning of CPLR 217 (1) ‘when the petitioner seeking review has been aggrieved by it’” (*Matter of Campos v New York City Dept. of Corr.*, 172 AD3d 1202, 1203 [2019] [internal quotation marks omitted], quoting *Matter of Caslin v Nassau County Civ. Serv. Commn.*, 104 AD3d 684, 684 [2013]). Here, the petitioner executed the

waiver on February 11, 2021, and DOC's labor relations representative upheld the disciplinary charges against the petitioner on August 4, 2021. Since the petitioner did not commence the instant proceeding until September 1, 2022, the proceeding is time-barred pursuant to CPLR 217 (1) (*see Matter of Campos v New York City Dept. of Corr.*, 172 AD3d at 1203).

Accordingly, the Supreme Court should have granted DOC's cross-motion to dismiss the petition on the ground that the proceeding is time-barred.

The parties' remaining contentions need not be reached in light of the foregoing. Barros, J.P., Warhit, Taylor and Golia, JJ., concur.

43 In the Matter of Orange and Rockland Utilities, Inc., Respondent, v Town Board of the Town of Clarkstown, Appellant. [252 NYS3d 687]—

Statutes—Construction—Scope of Authority under Town Law Chapter 153—Board Considered Overall Impact of Entire Project
Environmental Conservation—Environmental Quality Review—Denial of Certificate of Appropriateness—Based upon Board's Prejudgment of Project

In a proceeding pursuant to CPLR article 78, inter alia, to review a resolution of the Town Board of the Town of Clarkstown dated May 28, 2019, denying the petitioner's application for a certificate of appropriateness, the appeal is from a judgment of the Supreme Court, Rockland County (Sherri L. Eisenpress, J.), dated April 9, 2021. The judgment, insofar as appealed from, granted those branches of the petition which were to annul the resolution dated May 28, 2019, and to direct the Town Board of the Town of Clarkstown to adopt a resolution granting the petitioner's application for a certificate of appropriateness, annulled the resolution, and directed the Town Board of the Town of Clarkstown to adopt a resolution granting the petitioner's application for a certificate of appropriateness.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

In 2008, the petitioner applied for site plan development review to build an electrical substation (hereinafter the project) on certain property that it owned in the Town of Clarkstown on the corner of North Little Tor Road and South Mountain Road (hereinafter the property) where a mobile substation already existed. The property was approximately 10.2 acres and the substation was going to be built approximately 300 feet away from South Mountain Road. South Mountain Road was designated a historic road pursuant to the Town's Historic Road Preservation Law, Chapter 153 of the Code of the Town of Clarkstown (hereinafter Chapter 153 of the Town Code).

In 2017, the Town's Planning Board (hereinafter the Planning Board), which had declared itself lead agency for environmental review, adopted a State Environmental Quality Review Act (ECL art 8) Findings Statement that found, among other things, that the project minimized or avoided adverse environmental impacts to the maximum extent practicable. As review before the Planning Board continued, it was noted that the project included the removal of a driveway entrance on South Mountain Road, along with the installation of landscaping and the extension of an existing rock wall in the area where the driveway had been. Since South Mountain Road was designated a historic road and the planned removal of the driveway involved a physical change to South Mountain Road, a certificate of appropriateness was required from the Town Board of the Town of Clarkstown (hereinafter the Town Board).

In 2019, the petitioner filed an application with the Town Board for a certificate of appropriateness. The application was referred to the Clarkstown Superintendent of Highways and to the Architectural Historic Review Board (hereinafter the AHRB) for comment. After two public hearings, on April 29, 2019, the AHRB unanimously adopted a resolution recommending denial of the petitioner's application for a certificate of appropriateness to remove and close the driveway "and for a certificate of appropriateness to deny the entire substation project." On May 28, 2019, the Town Board met and included on an agenda was an item designated "Denying the Issuance of a Certificate of Appropriateness to Orange and Rockland Utilities (O & R) for a Project Known as the 'Little Tor Substation.'" On the same date, the Town Board adopted a resolution denying the petitioner's application for a certificate of appropriateness to "remove/close the driveway along South Mountain Road" and for the "entire substation project" (hereinafter the May 28, 2019 resolution).

In June 2019, the petitioner commenced this CPLR article 78 proceeding, *inter alia*, to annul the May 28, 2019 resolution and to direct the Town Board to adopt a resolution granting the petitioner's application for a certificate of appropriateness. In a judgment dated April 9, 2021, the Supreme Court, among other things, granted those branches of the petition, annulled the May 28, 2019 resolution, and directed the Town Board to adopt a resolution granting the petitioner's application for a certificate of appropriateness. The Town Board appeals.

"In reviewing the Town Board's actions as an administrative determination, this Court must consider only whether the 'termination was made in violation of lawful procedure, was af-

fectured by an error of law or was arbitrary and capricious or an abuse of discretion' ” (*Matter of Hack v Town Bd. of Town of Putnam Val.*, 219 AD3d 489, 489 [2023], quoting CPLR 7803 [3]). Judicial review of such a determination is limited to whether the determination was arbitrary and capricious or without rational basis in the administrative record (see *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of O'Hagan v City of New York*, 226 AD3d 1026, 1027 [2024] [internal quotation marks omitted]).

“Where the interpretation of a statute involves specialized knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts should defer to the administrative agency’s interpretation unless irrational or unreasonable” (*Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005] [internal quotation marks omitted]; see *Matter of Wythe Berry, LLC v New York State Dept. of Envtl. Conservation*, 188 AD3d 1225, 1228 [2020]). By contrast, where the “question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight” (*Matter of Wythe Berry, LLC v New York State Dept. of Envtl. Conservation*, 188 AD3d at 1228 [internal quotation marks omitted]; see *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). Contrary to the Town Board’s contention, because the interpretation of Chapter 153 of the Town Code was a matter of statutory reading and analysis, there was little basis for the Supreme Court to rely on any special competence or expertise of the AHRB (see *Matter of Wythe Berry, LLC v New York State Dept. of Envtl. Conservation*, 188 AD3d at 1228).

“[W]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used” (*Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60 [2013] [internal quotation marks omitted]; see *Patrolmen’s Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208 [1976]). Here, the Town Board’s determination exceeded the scope of its authority under Chapter 153 of the Town Code by considering the overall impact of the entire substation project rather than considering only the impact of the work that

was to be done along South Mountain Road—that is, the driveway removal, the addition of plantings, and the extension of the existing rock wall in the area where the driveway had been (*see* Code of Town of Clarkstown § 153-7 [D] [1] [d], [2]).

Moreover, the Supreme Court properly concluded that the Town Board’s determination was based not on a dispassionate review of the facts but on the Town Board’s prejudgment, as demonstrated by the Town Board’s years-long opposition to the project and, among other things, statements made at the meeting wherein the resolution was adopted (*see Matter of Heritage Hills Sewage Works Corp. v Town Bd. of Town of Somers*, 245 AD2d 450, 453 [1997]).

It was not necessary for the Supreme Court to remit the matter for reconsideration (*see* CPLR 7806; *Matter of Levada v Board of Zoning Appeals of Inc. Vil. of Freeport*, 199 AD2d 504, 505 [1993]).

The parties’ remaining contentions need not be reached in light of our determination. LaSalle, P.J., Dillon, Christopher and Landicino, JJ., concur.

44 In the Matter of Clare Polito, Appellant, v North Babylon School District, Respondent. [252 NYS3d 216]—

Municipal Corporations—Notice of Claim—Actual Knowledge of Essential Facts—Incident Reports and Documentation of Investigations Conducted by School District

In a proceeding pursuant to General Municipal Law § 50-e (5) for leave to serve a late notice of claim or to deem a late notice of claim timely served *nunc pro tunc*, the petitioner appeals from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated October 24, 2023. The order denied the petition and, in effect, dismissed the proceeding.

Ordered that the order is reversed, on the facts and in the exercise of discretion, with costs, that branch of the petition which was for leave to serve a late notice of claim is granted and that branch of the petition which was to deem a late notice of claim timely served *nunc pro tunc* is denied as academic.

In September 2023, the petitioner commenced this proceeding against the North Babylon School District (hereinafter the School District) pursuant to General Municipal Law § 50-e (5) for leave to serve a late notice of claim or to deem a late notice of claim timely served *nunc pro tunc*. The petitioner alleged that the infant O.P. was assaulted, harassed, and bullied on a number of specified occasions from September 2022 to June 2023 by other students and that the School District was negligent, *inter alia*, in its supervision of the children. In an

order dated October 24, 2023, the Supreme Court denied the petition and, in effect, dismissed the proceeding. The petitioner appeals.

“Pursuant to General Municipal Law § 50-e (1) (a), a party seeking to sue a public corporation, which includes a school district, must serve a notice of claim on the prospective defendant ‘within ninety days after the claim arises’” (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 460 [2016], quoting General Municipal Law § 50-e [1] [a]; see General Construction Law § 66 [1], [2]). That time may be extended, in the court’s discretion, pursuant to General Municipal Law § 50-e (5). In determining whether to grant leave to serve a late notice of claim, the statute directs the court to consider, “in particular, whether the public corporation . . . acquired actual knowledge of the essential facts constituting the claim within the [90 days]” (*id.*). The statute also directs the court to consider “all other relevant facts and circumstances,” including whether the delay in serving the notice of claim substantially prejudiced the public corporation (*id.*). “Courts also commonly consider whether the petitioner had a reasonable excuse for failing to serve a timely notice of claim” (*Matter of Jaime v City of New York*, 41 NY3d 531, 541 [2024]; see *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d at 463). While the presence or absence of any one factor is not determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance (see *Matter of Jaime v City of New York*, 41 NY3d at 540-541; *Matter of Ionescu v City of New York*, 230 AD3d 1143, 1144 [2024]).

Here, the petitioner established that the School District had actual knowledge of the essential facts constituting the claim within 90 days of each incident included in the notice of claim. The petitioner submitted, among other things, incident reports and documentation of investigations conducted by the School District within days of the incidents (see Education Law § 13 [1]; *Matter of Anghel v Town of Hempstead*, 223 AD3d 901, 903 [2024]), police reports that documented communications and an investigation by school officials (see *Matter of McVea v County of Orange*, 186 AD3d 1221, 1222 [2020]; *M.L. v City of New York*, 173 AD3d 848, 850 [2019]), an electronic communication between the petitioner and a school official (see *Matter of D.D. v Village of Great Neck*, 161 AD3d 861, 861-862 [2018]; *Kellman v Hauppauge Union Free Sch. Dist.*, 120 AD3d 634, 636 [2014]), and an “[a]ction [p]lan” created pursuant to a meeting between the petitioner and school officials where the al-

leged wrongful conduct and the plans to monitor the students and address the conduct were discussed (see *Matter of Rodriguez v Woodhull Sch.*, 105 AD3d 1050, 1051 [2013]; *Matter of Allende v City of New York*, 69 AD3d 931, 933 [2010]).

As the petitioner demonstrated that the School District acquired timely knowledge of the essential facts constituting the claim, the petitioner met her initial burden of showing that the School District would not be prejudiced by the late notice of claim (see *Matter of Steward v City of New York*, 226 AD3d 912, 914 [2024]; *Matter of Anghel v Town of Hempstead*, 223 AD3d at 903). In opposition to the petitioner's initial showing, the School District failed to come forward with particularized evidence showing that the late notice had substantially prejudiced its ability to defend the claim on the merits (see *Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d at 465-468; *Matter of Anghel v Town of Hempstead*, 223 AD3d at 903).

Although the petitioner failed to demonstrate a reasonable excuse for her failure to timely serve the notice of claim, "where, as here, there is actual knowledge and an absence of prejudice, the lack of a reasonable excuse will not bar the granting of leave to serve a late notice of claim" (*Matter of Anghel v Town of Hempstead*, 223 AD3d at 903 [internal quotation marks omitted]; see *Matter of Benedetto v New York City Sch. Constr. Auth.*, 230 AD3d 1138, 1140 [2024]).

In light of our determination, we need not reach the petitioner's remaining contention.

Accordingly, the Supreme Court improvidently exercised its discretion in denying that branch of the petition which was for leave to serve a late notice of claim. Duffy, J.P., Brathwaite Nelson, Warhit and Taylor, JJ., concur.

45 In the Matter of Diego Portillo, Respondent, v Kimberly E. Arevalo-Narvaez, Appellant. [252 NYS3d 214]—

Parent, Child and Family—Custody—Change in Circumstances—Record Insufficient to Review Determination

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Kings County (Ben Darvil, Jr., J.), dated February 5, 2024. The order, insofar as appealed from, after a hearing, granted the father's petition to modify a so-ordered stipulation of settlement dated February 10, 2022, so as to award him sole physical custody of the parties' child.

Ordered that the order is reversed, on the facts and in the exercise of discretion, without costs or disbursements, and the matter is remitted to the Family Court, Kings County, for a

reopened hearing and a new determination of the father's petition in accordance herewith; and it is further,

Ordered that pending a final determination of the father's petition, or until further order of the Family Court, Kings County, the terms of the order dated February 5, 2024, shall remain in effect.

The parties, who were never married, are the parents of one child, born in 2018. On February 10, 2022, the parties entered into a so-ordered stipulation of settlement in which they agreed that the mother would have sole legal and physical custody of the child and set forth a parental access schedule. On May 25, 2023, the father filed a petition to modify the so-ordered stipulation of settlement so as to award him sole physical custody of the child. After a hearing, in an order dated February 5, 2024, the Family Court, among other things, granted the father's petition and awarded him sole physical custody of the child. The mother appeals.

The court's paramount concern in any custody dispute is to determine, under the totality of the circumstances, what is in the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Here, new developments have arisen since the order appealed from was issued, which have been brought to this Court's attention by the attorney for the child. These developments include that the child now resides in the mother's care after the father relocated to Florida. As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may render a record on appeal insufficient to review whether the Family Court's determination is still in the best interests of the child (*see Matter of Michael B.*, 80 NY2d 299, 318 [1992]; *Matter of Baptiste v Gregoire*, 140 AD3d 746, 748 [2016]). In light of the new developments brought to this Court's attention, the record is no longer sufficient to review whether the Family Court's determination transferring physical custody of the child from the mother to the father is in the best interests of the child (*see Matter of Myers v Denning*, 241 AD3d 688 [2025]; *Matter of Martynchuk v Vasylkovska*, 223 AD3d 819 [2024]).

Accordingly, we remit the matter to the Family Court, Kings County, for a reopened hearing to consider these new facts and thereafter a new determination of the father's petition. In so doing, we express no opinion as to the appropriate determination (*see Matter of Baptiste v Gregoire*, 140 AD3d at 748). Connelly, J.P., Christopher, Ventura and Golia, JJ., concur.

46 Luis Naranjo, Appellant, v City of New York et al., Defendants, and Andrew Heiss, Respondent. [252 NYS3d 222]—

**Motor Vehicles—Injuries to Passengers—Liability of Vehicle’s Owner—Established Vehicle Stolen and Not Operated with Owner’s Consent
Motions and Orders—Timeliness of Motion—Summary Judgment—Speculation That Discovery Evidence May Defeat Motion**

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Tracy Catapano-Fox, J.), entered April 15, 2024. The order, insofar as appealed from, granted that branch of the motion of the defendant Andrew Heiss which was for summary judgment dismissing the complaint insofar as asserted against him.

Ordered that the order is affirmed insofar as appealed from, with costs.

In February 2022, the plaintiff allegedly was injured when a vehicle in which he was a passenger collided with a 2017 Lexus NX2 (hereinafter the Lexus) bearing a Florida license plate and operated by the defendant Naresh Deonarrain. The plaintiff commenced this action to recover damages for personal injuries against, among others, the defendant Andrew Heiss, as the owner of the Lexus. Heiss moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against him. In an affidavit in support of the motion, Heiss averred that he owned the Lexus, which had a New York registration, that it was stolen from his driveway in January 2022, that he had not seen the vehicle since, that he did not know Deonarrain, and that he had not given Deonarrain permission to drive the Lexus. Heiss also submitted a police report dated January 21, 2022, which confirmed that Heiss reported to the police that the Lexus, bearing the New York license plate to which the vehicle was registered, had been stolen from his driveway. In opposition, the plaintiff argued that the motion was premature and that there were triable issues of fact, including whether Heiss had left a key fob in the vehicle. In an order entered April 15, 2024, the Supreme Court, among other things, granted that branch of Heiss’s motion. The plaintiff appeals.

Vehicle and Traffic Law § 388 (1) makes every owner of a vehicle liable for injuries resulting from negligence “in the use or operation of such vehicle . . . by any person using or operating the [vehicle] with the permission, express or implied, of such owner,” with exceptions not relevant here. Proof of ownership “creates a rebuttable presumption that the driver was using the vehicle with the owner’s permission, express or implied” (*Murdza v Zimmerman*, 99 NY2d 375, 380 [2003] [internal quotation marks omitted]; see *Piano Exch. v Weber*, 168 AD3d

1017, 1018 [2019]). The presumption may be rebutted “by substantial evidence sufficient to show that a vehicle was not operated with the owner’s consent” (*Murdza v Zimmerman*, 99 NY2d at 380). “Evidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use” (*Piano Exch. v Weber*, 168 AD3d at 1018; see *Fuentes v Virgil*, 119 AD3d 522, 523 [2014]).

Here, Heiss demonstrated his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him by submitting substantial evidence sufficient to show that the Lexus was stolen at the time of the accident and that it was not being operated with his consent (see *Piano Exch. v Weber*, 168 AD3d at 1019; *Fuentes v Virgil*, 119 AD3d at 523). In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff’s contention, that a key fob may have been left in the Lexus at the time that it was stolen did not raise a triable issue of fact, as Vehicle and Traffic Law § 1210 (a) does not apply to a vehicle left in a private driveway (see *Albouyeh v County of Suffolk*, 62 NY2d 681, 683 [1984]; *Surace v Kersten*, 278 AD2d 226, 227 [2000]; *Koenig v Price*, 200 AD2d 559, 561 [1994]).

The plaintiff’s contention that the motion should have been denied as premature is without merit. “A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Morales v Amar*, 145 AD3d 1000, 1003 [2016]; see CPLR 3212 [f]; *Dalrymple v Morocho*, 208 AD3d 751, 753 [2022]). Here, the plaintiff failed to establish either basis, and “the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion” (*Houston v McQuiller*, 232 AD3d 732, 734 [2024] [internal quotation marks omitted]; see *Dalrymple v Morocho*, 208 AD3d at 753).

The plaintiff’s remaining contention, raised for the first time on appeal, is not properly before this Court.

Accordingly, the Supreme Court properly granted that branch of Heiss’s motion which was for summary judgment dismissing the complaint insofar as asserted against him. Brathwaite Nelson, J.P., Taylor, Ventura and McCormack, JJ., concur.

47 Nationstar Mortgage, LLC, Respondent, v Rick Rampersad et al., Defendants, and Windward Bora, LLC, Appellant. [252 NYS3d 680]—

Dismissal and Nonsuit—Discontinuance—Motion to Voluntarily Discontinue

In an action to foreclose a mortgage, the defendant Windward Bora, LLC, appeals from an order of the Supreme Court, Queens County (Tracy A. Catapano-Fox, J.), entered March 22, 2024. The order granted those branches of the plaintiff's motion which were, in effect, pursuant to CPLR 3217 (b) to discontinue the action and the counterclaims asserted by the defendant Windward Bora, LLC.

Ordered that the order is modified, on the law, by deleting the provision thereof granting that branch of the plaintiff's motion which was, in effect, pursuant to CPLR 3217 (b) to discontinue the counterclaims asserted by the defendant Windward Bora, LLC, and substituting therefor a provision denying that branch of the motion and severing and continuing those counterclaims; as so modified, the order is affirmed, without costs or disbursements.

In October 2019, the plaintiff commenced this action to foreclose a mortgage against, among others, the defendant Windward Bora, LLC (hereinafter Windward). In July 2020, Windward served an answer asserting various affirmative defenses and counterclaims. In December 2023, the plaintiff moved, inter alia, in effect, pursuant to CPLR 3217 (b) to discontinue the action and the counterclaims asserted by Windward. Windward opposed the motion, arguing, among other things, that its counterclaims could not be subject to discontinuance. In an order entered March 22, 2024, the Supreme Court granted those branches of the plaintiff's motion. Windward appeals.

"The determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR 3217 (b) rests within the sound discretion of the court" (*Wells Fargo Bank, N.A. v Chaplin*, 107 AD3d 881, 883 [2013]; see *Tucker v Tucker*, 55 NY2d 378, 383 [1982]; *Aurora Loan Servs., LLC v Hunte*, 189 AD3d 1525, 1526 [2020]). Generally, such motions should be granted, "unless the discontinuance would prejudice a substantial right of another party, circumvent an order of the court, avoid the consequences of a potentially adverse determination, or produce other improper results" (*Haughey v Kindschuh*, 176 AD3d 785, 786 [2019], quoting *Marinelli v Wimmer*, 139 AD3d 914, 915 [2016]; see *Jamaica Hosp. Med. Ctr., Inc. v Oxford Health Plans [NY], Inc.*, 58 AD3d 686 [2009]). "Factors militating against discontinuance include prejudice to an opposing party as well as the imposition of one or more counterclaims" (*Haughey v Kindschuh*, 176 AD3d at 786 [internal quotation marks omitted]; see *Aison v Hudson Riv. Black Riv.*

Regulating Dist., 279 AD2d 754, 755 [2001]; *Matter of Bronsky-Graff Orthodontics*, 270 AD2d 792, 793 [2000]).

Applying these principles here, the Supreme Court properly granted that branch of the plaintiff's motion which was, in effect, pursuant to CPLR 3217 (b) to discontinue the action. However, under the circumstances of this case, the court should have also directed that Windward's counterclaims be severed and continued (*see generally Banschick v Johnson*, 222 AD3d 608, 611 [2023]).

Windward's remaining contention is without merit. Connolly, J.P., Genovesi, Taylor and McCormack, JJ., concur.

48 Newtek Small Business Finance, LLC, Successor by Merger to Newtek Small Business Finance, Inc., Respondent, v Isaac Wisenfeld et al., Defendants, and Elias S. Wisenfeld et al., Appellants. [253 NYS3d 209]—

**Pleading—Amendment—Prejudice or Surprise
Motions and Orders—Reargument or Renewal—New Facts That Would
Change Determination**

In an action, inter alia, to foreclose certain mortgages, the defendants Elias S. Wisenfeld, Rachel Wisenfeld, and 86 Hewes Street, LLC, appeal from (1) an order of the Supreme Court, Kings County (Lawrence Knipel, J.), dated May 22, 2023, and (2) an order of the same court dated September 19, 2023. The order dated May 22, 2023, granted the plaintiff's motion for leave to amend the complaint and denied those defendants' cross-motion pursuant to CPLR 3211 (a) and 306-b to dismiss the complaint insofar as asserted against them. The order dated September 19, 2023, denied those defendants' motion for leave to renew and reargue their opposition to the plaintiff's prior motion for leave to amend the complaint and their prior cross-motion pursuant to CPLR 3211 (a) and 306-b to dismiss the complaint insofar as asserted against them.

Ordered that the order dated May 22, 2023, is affirmed; and it is further,

Ordered that the appeal from so much of the order dated September 19, 2023, as denied that branch of the motion of the defendants Elias S. Wisenfeld, Rachel Wisenfeld, and 86 Hewes Street, LLC, which was for leave to reargue their opposition to the plaintiff's prior motion for leave to amend the complaint and their prior cross-motion pursuant to CPLR 3211 (a) and 306-b to dismiss the complaint insofar as asserted against them is dismissed, as no appeal lies from an order denying reargument; and it is further,

Ordered that the order dated September 19, 2023, is affirmed insofar as reviewed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

In April 2013, the plaintiff's predecessor-in-interest executed a loan agreement (hereinafter the 2013 agreement), obtaining, inter alia, a security interest and mortgage on four parcels of real property. The 2013 agreement was guaranteed by, among others, Elias S. Wiesenfeld, Isaac Wiesenfeld, Rachel Wiesenfeld, Esther Wiesenfeld, 86 Hewes Street, LLC, and E & I Wise, LLC.

In September 2019, the plaintiff commenced this action against Elias S. Wiesenfeld, Rachel Wiesenfeld, and 86 Hewes Street, LLC (hereinafter collectively the original defendants), alleging that they had defaulted on their obligations under the 2013 agreement and seeking to foreclose on two of the four mortgaged properties. In February 2023, the plaintiff moved for leave to amend the complaint, seeking, inter alia, to foreclose on all four mortgaged properties listed in the 2013 agreement and to add Isaac Wiesenfeld, Esther Wiesenfeld, and E & I Wise, LLC, as defendants. The original defendants thereafter cross-moved pursuant to CPLR 3211 (a) (8) and 306-b to dismiss the complaint insofar as asserted against them on the ground that they were not properly served with process. In reply, the plaintiff submitted, for the first time, three unfiled affidavits of service, indicating that the summons and complaint were served on the original defendants in November 2019. In an order dated May 22, 2023, the Supreme Court granted the motion and denied the cross-motion. Thereafter, the original defendants moved, among other things, for leave to renew their prior cross-motion and their opposition to the plaintiff's prior motion. In an order dated September 19, 2023, the court, inter alia, denied that branch of the motion. The original defendants appeal from both orders.

The Supreme Court providently exercised its discretion in granting the plaintiff's motion for leave to amend the complaint. "Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Deutsche Bank Natl. Trust Co. v Nissan*, 230 AD3d 1105, 1108 [2024] [internal quotation marks omitted]; see CPLR 3025 [b]; *Dray v Staten Is. Univ. Hosp.*, 227 AD3d 664, 666 [2024]). "Applications to amend pleadings are within the sound discretion of the court" (*Dominge v Dannenberg*, 228 AD3d 729, 731 [2024] [internal quotation marks omitted]; see *U.S. Bank N.A. v Singer*, 192 AD3d 1182, 1185 [2021]). "The burden of demonstrating prejudice or surprise, or that a proposed amendment

is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion'” (*Cussick v R.L. Baxter Bldg. Corp.*, 228 AD3d 614, 616 [2024], quoting *Ditech Fin., LLC v Khan*, 189 AD3d 1360, 1362 [2020]; see *Wilmington Sav. Fund Socy., FSB v Sotomayor*, 222 AD3d 702, 703 [2023]). Here, the original defendants failed to establish that they would suffer prejudice or surprise as a result of the proposed amendment (see *National Loan Invs., L.P. v New Zion Church of the Apostolic Faith, Inc.*, 213 AD3d 860, 862 [2023]; *Wells Fargo Bank N.A. v E & G Dev. Corp.*, 138 AD3d 986, 988 [2016]).

Moreover, the Supreme Court providently exercised its discretion in denying that branch of the original defendants' motion which was for leave to renew their cross-motion pursuant to CPLR 3211 (a) (8) and 306-b to dismiss the complaint insofar as asserted against them. “A motion for leave to renew must be based upon new facts not offered on the prior motion which would change the prior determination, and must contain a reasonable justification for the failure to present such facts on the prior motion” (*Sutton v Sylva*, 223 AD3d 764, 766 [2024] [internal quotation marks omitted]; see CPLR 2221). Here, the original defendants failed to demonstrate that the purported new facts would have changed the prior determination (see *MD Aminul Islam v New York City Health & Hosps. Corp.*, 224 AD3d 819, 820-821 [2024]; *Ok Sun Chong v Scheelje*, 218 AD3d 691, 692 [2023]).

The parties' remaining contentions are either not properly before this Court or academic in light of the foregoing. Barros, J.P., Ford, Ventura and Golia, JJ., concur.

49 Oscar Rene Pacheco, Respondent, v P.V.E. Co., LLC, et al., Appellants, et al., Defendant. (And Third-Party Actions.) [253 NYS3d 204]—

**Estoppel—Collateral Estoppel—Workers' Compensation Law § 118-a
Statutes—Retroactive Application of Statute—Justice for Injured Workers
Act—Legislature's Intended Amendment to Have Remedial Effect**

In an action to recover damages for personal injuries, the defendants P.V.E. Co., LLC, P.V.E. II, Co., LLC, and 70 Nardozzi, LLC, appeal from an order of the Supreme Court, Kings County (Karen B. Rothenberg, J.), dated September 6, 2023. The order, insofar as appealed from, denied those defendants' motion for leave to amend their answer.

Ordered that the order is affirmed insofar as appealed from, with costs.

On June 15, 2020, the plaintiff allegedly was injured at a construction site while using a spray gun to apply fireproofing

material to wooden beams when the ladder on which he was standing shifted, causing him to discharge the spray gun onto his right index finger. In November 2020, the plaintiff commenced this action to recover damages for personal injuries against, among others, the owners of the subject premises, P.V.E. Co., LLC, and P.V.E. II, Co., LLC (hereinafter together the P.V.E. defendants), and the general contractor for the subject project, 70 Nardozzi, LLC (hereinafter Nardozzi). The plaintiff also filed a workers' compensation claim, and in a determination dated August 23, 2022, the Workers' Compensation Board (hereinafter WCB) disallowed a portion of the plaintiff's claim.

In January 2023, the P.V.E. defendants and Nardozzi (hereinafter collectively the defendants) moved for leave to amend their answer to assert an affirmative defense of collateral estoppel based upon the WCB's determination. The plaintiff opposed the motion based upon an amendment to the Workers' Compensation Law, section 118-a, also known as the Justice for Injured Workers Act (JIWA), which provides that "no finding or decision by the workers' compensation board, judge or other arbiter shall be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, other than the determination of the existence of an employer employee relationship" (Workers' Compensation Law § 118-a). In an order dated September 6, 2023, the Supreme Court, *inter alia*, denied the defendants' motion, determining that JIWA, which was enacted on December 30, 2022, applied retroactively and operated to bar the defendants' proposed affirmative defense of collateral estoppel. The defendants appeal.

"Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" (*Inglese v City of New York*, 237 AD3d 1077, 1078 [2025] [internal quotation marks omitted]; see *Spence v City of New York*, 202 AD3d 1124, 1126 [2022]).

"The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Harco Constr., LLC v Scottsdale Ins. Co.*, 239 AD3d 610, 613 [2025] [internal quotation marks omitted]; see *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). However, Workers' Compensation Law § 118-a provides that "no finding or decision by the workers' compensa-

tion board, judge or other arbiter shall be given collateral estoppel effect in any other action or proceeding arising out of the same occurrence, other than the determination of the existence of an employer employee relationship.”

“[G]enerally, a statute is presumed to apply only prospectively” (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 370 [2020]; see *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). “In determining whether a statute should be given retroactive effect, we have recognized two axioms of statutory interpretation” (*Matter of NYP Holdings, Inc. v New York City Police Dept.*, 43 NY3d 357, 362 [2025] [internal quotation marks omitted]; see *Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d 117, 122 [2001]). “First, retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it” (*Matter of NYP Holdings, Inc. v New York City Police Dept.*, 43 NY3d at 362 [internal quotation marks omitted]; see *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d at 583). “Second, remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose” (*Matter of NYP Holdings, Inc. v New York City Police Dept.*, 43 NY3d at 362-363 [internal quotation marks omitted]; see *Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d at 122). “In addition to these principles of statutory construction, we have identified [o]ther factors relevant to the retroactivity analysis, including whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be” (*Matter of NYP Holdings, Inc. v New York City Police Dept.*, 43 NY3d at 363 [internal quotation marks omitted]; see *Matter of Gleason [Michael Vee, Ltd.]*, 96 NY2d at 122).

Here, the Supreme Court properly determined that JIWA should be applied retroactively. The legislative history makes clear that the Legislature intended the amendment to the Workers’ Compensation Law to have a remedial effect, conveyed a sense of urgency by stating that it was to go into effect immediately, and stated that the intent of the amendment was to rewrite unintended judicial interpretation and to reaffirm the Legislature’s intended purpose (see Senate Introducer’s Mem in Support of 2022 NY Senate Bill S9149, Bill Jacket, L 2022, ch 835; *Garcia v Monadnock Constr., Inc.*, 235 AD3d 96, 98-99 [2025]; *Nunez v CH Hous. Dev. Fund Corp.*, 234 AD3d 600, 600

[2025]). Thus, based upon the operation of JIWA, the court properly determined that the defendants' proposed amendment to their answer to assert the affirmative defense of collateral estoppel was palpably insufficient and devoid of merit (*see Garcia v Monadnock Constr., Inc.*, 235 AD3d at 100).

Accordingly, the Supreme Court properly denied the defendants' motion for leave to amend their answer. Dillon, J.P., Wooten, Warhit and Golia, JJ., concur. **[Prior Case History: 80 Misc 3d 1109.]**

50 Jose Leon Palacios et al., Appellants, v Robert McEvoy et al., Respondents. (And a Third-Party Action.) [249 NYS3d 626]—

Labor—Safe Place to Work—Reversed Vehicle into Unguarded Trench on Worksites—Not Exposed to Risk That Safety Device Would Have Protected against

Labor—Safe Place to Work—Hazardous Openings—Unguarded Trench

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Suffolk County (Linda J. Kevins, J.), dated April 17, 2023. The order, insofar as appealed from, granted those branches of the defendants' motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) insofar as asserted against the defendant Farrell Building Company, Inc.

Ordered that the order is modified, on the law, by deleting the provision thereof granting that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against the defendant Farrell Building Company, Inc., and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff Jose Leon Palacios (hereinafter the injured plaintiff) was injured when he reversed his personal vehicle into an unguarded trench located on a work site at a new construction home. In September 2014, the injured plaintiff, and his wife suing derivatively, commenced this action against the defendants Robert McEvoy and Sabrina McEvoy, the owners of the property, and the defendant Farrell Building Company, Inc. (hereinafter Farrell), the general contractor for the construction of the home, asserting causes of action alleging, inter alia, violations of Labor Law §§ 240 (1) and 241 (6). The defendants moved, among other things, for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) insofar as asserted against

Farrell. The Supreme Court, inter alia, granted those branches of the motion. The plaintiffs appeal.

Labor Law § 240 (1) “‘is intended to protect workers from gravity-related occurrences stemming from the inadequacy or absence of enumerated safety devices’” (*Nucci v County of Suffolk*, 204 AD3d 817, 818 [2022], quoting *Ortega v Puccia*, 57 AD3d 54, 58 [2008]). The statute requires that contractors involved in construction or demolition of a building must provide to employees “scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person” (Labor Law § 240 [1]; see *Valentin v Stathakos*, 228 AD3d 985, 989 [2024]; *Lazo v New York State Thruway Auth.*, 204 AD3d 774, 775 [2022]). “The extraordinary protections of Labor Law § 240 (1) extend only to a narrow class of special hazards, and do not encompass any and all perils that may be connected in some tangential way with the effects of gravity” (*Laliashvili v Kadmia Tenth Ave. SPE, LLC*, 221 AD3d 988, 990 [2023] [internal quotation marks omitted]; see *Ortega v Fourtrax Contr. Corp.*, 214 AD3d 666, 667 [2023]). Therefore, “liability [remains] contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein” (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], quoting *Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; see *Giraldo v Highmark Ind., LLC*, 226 AD3d 874, 876 [2024]).

Here, the defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against Farrell by submitting, inter alia, transcripts of deposition testimony establishing that the injured plaintiff was not exposed to any risk that safety devices of the kind enumerated in Labor Law § 240 (1) would have protected against (see *Seem v Premier Camp Co., LLC*, 200 AD3d 921, 924 [2021]; *Kickler v Dove-Tree Greenery, Inc.*, 185 AD3d 1017, 1018 [2020]). In opposition, the plaintiffs failed to raise a triable issue of fact.

Labor Law § 241 (6) requires contractors to “provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993] [internal quotation marks omitted]; see *Fuentes v 257 Toppings Path, LLC*, 225 AD3d 746, 749 [2024]). “In order to establish li-

ability under Labor Law § 241 (6), a plaintiff must ‘establish the violation of an Industrial Code provision which sets forth specific safety standards,’ and which ‘is applicable under the circumstances of the case’” (*Laliashvili v Kadmia Tenth Ave. SPE, LLC*, 221 AD3d at 991, quoting *Aragona v State of New York*, 147 AD3d 808, 809 [2017]). 12 NYCRR 23-1.7 (b) (1) requires that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing” and is sufficiently specific to support a cause of action under Labor Law § 241 (6) (see *Mushkudiani v Racanelli Constr. Group, Inc.*, 219 AD3d 613, 616 [2023]).

Here, the defendants failed to establish, *prima facie*, that 12 NYCRR 23-1.7 (b) (1) was inapplicable to the circumstances of this case, as the trench, which was large enough for a car to fall into, was a hazardous opening within the meaning of 12 NYCRR 23-1.7 (b) (1) (see *Jarnutowski v City of Long Beach*, 210 AD3d 881, 883 [2022]; *Guaman v 178 Ct. St., LLC*, 200 AD3d 655, 657 [2021]; *Gjeka v Iron Horse Transp., Inc.*, 151 AD3d 463 [2017]; cf. *Gurewitz v City of New York*, 175 AD3d 658 [2019]). The defendants further failed to eliminate triable issues of fact as to whether a violation of 12 NYCRR 23-1.7 (b) (1) proximately caused the injured plaintiff’s injuries (see *Gonzalez v City of New York*, 227 AD3d 958, 960 [2024]). Accordingly, the Supreme Court should have denied that branch of the defendants’ motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against Farrell without regard to the sufficiency of the plaintiffs’ opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Iannacci, J.P., Voutsinas, Taylor and Love, JJ., concur.

51 The People of the State of New York, Respondent, v Julius Boone, Appellant. [249 NYS3d 236]—

Attorney and Client—Withdrawal from Representation

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Suzanne J. Melendez, J., at plea; David J. Kirschner, J., at sentence), rendered August 30, 2019, convicting him of rape in the second degree, upon his plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which she moves for leave to withdraw as counsel for the appellant.

Ordered that the judgment is affirmed.

We are satisfied with the sufficiency of the brief filed by the

defendant's assigned counsel pursuant to *Anders v California* (386 US 738 [1967]), and, upon an independent review of the record, we conclude that there are no nonfrivolous issues which could be raised on appeal. Counsel's application for leave to withdraw as counsel is, therefore, granted (*see id.*; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252 [2011]; *People v Paige*, 54 AD2d 631 [1976]; *cf. People v Gonzalez*, 47 NY2d 606 [1979]). Barros, J.P., Iannacci, Voutsinas and Quirk, JJ., concur.

52 The People of the State of New York, Respondent, v Travis Harrington, Appellant. [250 NYS3d 225]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeals by the defendant from two judgments of the Supreme Court, Kings County (Jill H. Konviser, J.), both rendered September 13, 2022, convicting him of aggravated sexual abuse in the second degree under indictment No. 5682/15 and bail jumping in the second degree under indictment No. 8479/17, upon his pleas of guilty, and imposing sentences.

Ordered that the judgments are affirmed.

Contrary to the defendant's contention, his waiver of the right to appeal was valid. Although much of the discussion of the waiver of the right to appeal took place after the defendant had admitted his guilt, the appeal waiver was mentioned as being a condition of the plea bargain prior to the defendant's entry of his pleas of guilty and admissions of guilt (*see People v Felipe*, 236 AD3d 920, 920-921 [2025]; *People v Kadriu*, 236 AD3d 820, 820 [2025]; *People v Victor*, 235 AD3d 783, 784 [2025]; *People v Francois*, 235 AD3d 657, 657 [2025]; *People v White*, 234 AD3d 884, 884-885 [2025]). Under the totality of the circumstances, including the exemplary explanation of the right to appeal provided to the defendant and the defendant's age, experience, and background, the appeal waiver was knowing, voluntary, and intelligent (*see People v Sanders*, 25 NY3d 337, 340 [2015]; *People v Bradshaw*, 18 NY3d 257, 264 [2011]; *People v Walcott*, 238 AD3d 1177 [2025]; *People v Victor*, 235 AD3d at 784; *People v White*, 234 AD3d at 885).

The defendant's valid waiver of his right to appeal precludes appellate review of his challenge to the procedure used to adjudicate him a second felony offender (*see People v Smith*, 244 AD3d 1144 [2025]; *People v Simpson*, 244 AD3d 762 [2025]; *People v Haynes*, 70 AD3d 718, 718-719 [2010]; *see also People v Lassiter*, 48 AD3d 700 [2008]; *People v Backus*, 43 AD3d 409, 410 [2007]), as well as his contention that the sentences imposed were excessive (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

To the extent the defendant contends that New York's predicate felony offender statutes are facially unconstitutional, that contention is not precluded by the appeal waiver (*see People v Johnson*, — NY3d —, 2025 NY Slip Op 06528 [2025]; *People v Smith*, 244 AD3d 1144 [2025]). However, that contention is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Hernandez*, 43 NY3d 591, 597 [2025]; *People v Munoz*, 237 AD3d 1110, 1111 [2025]), and we decline to reach it in the exercise of our interest of justice jurisdiction (*see People v Munoz*, 237 AD3d at 1111). Connolly, J.P., Voutsinas, Wan and Taylor, JJ., concur.

53 The People of the State of New York, Respondent, v Justin P. McClarin, Appellant. [251 NYS3d 311]—

Crimes—Unlawful Search and Seizure—Impoundment of Vehicle and Subsequent Inventory Search—Failure to Establish Public Safety or Community Caretaking Interests

Crimes—Unlawful Search and Seizure—Physical Evidence Recovered from Vehicle—Fruits of Unlawful Impoundment

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Ira H. Margulis, J.), rendered June 12, 2023, convicting him of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, criminal possession of a weapon in the second degree (four counts), aggravated unlicensed operation of a motor vehicle in the third degree, operating a motor vehicle without a license, operating a motor vehicle with a tinted window, operating an unregistered motor vehicle, and operating a motor vehicle without insurance, after a nonjury trial, and imposing sentence. The appeal brings up for review the denial, after a hearing (Gia Morris, J.), of that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the judgment is modified, on the law, by vacating the convictions of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, and criminal possession of a weapon in the second degree (four counts), vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed, and that branch of the defendant's omnibus motion which was to suppress physical evidence is granted.

"When the driver of a vehicle is arrested, the police may impound the car, and conduct an inventory search, where they act pursuant to 'reasonable police regulations relating to inventory procedures administered in good faith' " (*People v Walker*,

20 NY3d 122, 125 [2012], quoting *Colorado v Bertine*, 479 US 367, 374 [1987]). “The police may also impound a vehicle without a warrant ‘[i]n the interests of public safety and as part of what the [United States Supreme] Court has called community caretaking functions’ ” (*People v King*, 188 AD3d 721, 722 [2020] [internal quotation marks omitted], quoting *South Dakota v Opperman*, 428 US 364, 368 [1976]).

Here, the Supreme Court should have granted that branch of the defendant’s omnibus motion which was to suppress the physical evidence recovered from his vehicle. The People failed to establish the lawfulness of the impoundment of the defendant’s vehicle and subsequent inventory search (see *People v Gomez*, 13 NY3d 6, 11 [2009]; *People v Weeks*, 182 AD3d 539, 541 [2020]). At a suppression hearing, the arresting officer equivocated on whether or not the vehicle was parked legally on the street, and he did not testify as to the posted time limits pertaining to the parking space at which the defendant had pulled over. Although the officer testified that he had to impound the vehicle to safeguard it at the precinct station house and “for further investigation,” the People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had pulled over the vehicle. Thus, the People failed to establish that the impoundment of the vehicle was in the interests of public safety or part of the police’s community caretaking function (see *South Dakota v Opperman*, 428 US at 368; *People v Tardi*, 28 NY3d 1077, 1078 [2016]). Moreover, the People failed to present any evidence as to whether the New York City Police Department had a policy regarding impoundment of vehicles, what that policy required, or whether the arresting officer complied with that policy when he impounded the defendant’s vehicle (see *People v Tardi*, 28 NY3d at 1078; *People v Weeks*, 182 AD3d at 541; *People v Leonard*, 119 AD3d 1237, 1238 [2014]).

Accordingly, the impoundment of the defendant’s vehicle was unlawful, and the physical evidence that was recovered from the vehicle during the inventory search subsequent to that impoundment must be suppressed as fruits of the unlawful impoundment (see *People v King*, 188 AD3d at 723; *People v Weeks*, 182 AD3d at 541). Without the suppressed evidence, there could not be sufficient evidence to prove the defendant’s guilt beyond a reasonable doubt as to criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, and criminal possession of a weapon in the second degree, and those counts of indictment must therefore be dismissed (see *People v King*, 188 AD3d at 723; *People v Weeks*, 182 AD3d at 541).

The defendant's remaining contentions have been rendered academic in light of our determination. Genovesi, J.P., Ford, Landicino and Quirk, JJ., concur.

54 The People of the State of New York, Respondent, v Julius Boone, Appellant. [252 NYS3d 228]—

Crimes—Sex Offenders—Sex Offender Registration Act—Mitigating Factors Insufficient for Downward Departure

Appeal by the defendant from an order of the Supreme Court, Queens County (Karen Gopee, J.), dated September 30, 2021, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

At a hearing to designate the defendant's risk level pursuant to the Sex Offender Registration Act (Correction Law art 6-C), the defendant sought a downward departure from his presumptive level two risk designation. The Supreme Court denied the application and designated the defendant a level two sex offender. The defendant appeals.

“An offender seeking a downward departure from the presumptive risk level has the initial burden of (1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is not otherwise taken into account by [the] Guidelines, and (2) establishing the facts in support of its existence by a preponderance of the evidence” (*People v Curry*, 158 AD3d 52, 58 [2017]; see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [hereinafter Guidelines] at 4 [2006]; *People v Gillotti*, 23 NY3d 841, 861 [2014]). If the defendant makes that twofold showing, the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant's dangerousness and risk of sexual recidivism (see *People v Gillotti*, 23 NY3d at 861; *People v Bigelow*, 175 AD3d 1443 [2019]).

Here, the defendant failed to make the twofold showing with regard to the proffered mitigating factors of success in vocational roles and disciplinary record in prison (see *People v Gonzalez*, 238 AD3d 914, 915 [2025]; *People v Terrell*, 237 AD3d 982, 983 [2025]; *People v Watts*, 225 AD3d 638, 639 [2024]), response to sex offender treatment (see *People v Fernandez*, 219 AD3d 760, 763 [2023]; *People v Grunwald*, 201 AD3d 825, 826 [2022]), community support (see *People v Zarifa*, 237 AD3d

1113, 1115 [2025]), an alleged work history for which no evidence was submitted, and the alleged intrafamilial nature of the offense, which factor was already taken into account by the Guidelines (*see* Guidelines at 12; *People v Morrison*, 156 AD3d 831, 832 [2017]; *see also* *People v Velasquez*, 195 AD3d 762 [2021]; *People v Rodriguez*, 196 AD3d 43, 51 [2021]).

Accordingly, the Supreme Court properly denied the defendant's application for a downward departure and designated him a level two sex offender. Barros, J.P., Iannacci, Voutsinas and Quirk, JJ., concur.

Appeal from an order of the Supreme Court, Queens County, dated September 30, 2021. Motion by the appellant, inter alia, to strike certain material filed in this Court by the respondent and stated portions of the respondent's brief on the ground that the material is de hors the record and the respondent's brief refers to matter de hors the record. By decision and order on motion of this Court dated June 4, 2025, that branch of the motion which is to strike certain material filed in this Court by the respondent and stated portions of the respondent's brief was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the submission of the appeal, it is

Ordered that the branch of the motion which is to strike certain material filed in this Court by the respondent and stated portions of the respondent's brief is granted, and the transcript of the arraignment proceeding dated November 28, 2018, the arrest report dated November 27, 2018, the section that begins on page 4 of the respondent's brief entitled "THE CHARGES AND ARRAIGNMENT," the paragraph on page 6 of the respondent's brief beginning with the words "The PSR noted," footnote 4 on page 8 of the respondent's brief, the first sentence of footnote 6 on page 11 of the respondent's brief, the phrase "put his mouth on the victim's vagina" in the first paragraph on page 14 of the respondent's brief, the last sentence of the first paragraph on page 14 of the respondent's brief, the sentence beginning with the words "And while counsel claimed" in the second paragraph on page 14 of the respondent's brief, the phrase "putting his penis inside the victim's mouth, and putting his mouth on the victim's vagina" in the first full paragraph on page 19 of the respondent's brief, the phrase "oral sexual conduct" in the second full paragraph on page 19 of the respondent's brief, the sentences beginning

with the words “The PSR also describes” and “The PSR further states” in the carryover paragraph on page 21 of the respondent’s brief, and the last sentence on page 30 of the respondent’s brief, beginning with the words “Furthermore, under the,” are stricken and have not been considered in the determination of the appeal.

55 Kelley Peterson, Respondent, v Credit Agricole America Services, Inc., et al., Appellants, et al., Defendant. [253 NYS3d 212]—

**Motions and Orders—Vacatur of Order—Interest of Substantial Justice—Failure to Provide Basis for Vacatur
Disclosure—Penalty for Failure to Disclose—Dismissal of Complaint—Willful and Contumacious Nature of Conduct**

In an action, inter alia, to recover damages for employment discrimination on the basis of hostile work environment and sexual harassment in violation of Executive Law § 296, the defendants Credit Agricole America Services, Inc., Credit Agricole Structured Asset Management Advisors, LLC, Credit Agricole Securities (USA), Inc., and Credit Agricole Leasing (USA) Corp. appeal from an order of the Supreme Court, Kings County (Lisa S. Ottley, J.), dated March 25, 2024. The order granted that branch of the plaintiff’s motion which was pursuant to CPLR 5015 (a) to vacate an order of the same court dated February 1, 2024, granting the motion of the defendants Credit Agricole America Services, Inc., Credit Agricole Structured Asset Management Advisors LLC, Credit Agricole Securities (USA), Inc., and Credit Agricole Leasing (USA) Corp., in effect, pursuant to CPLR 3126, to dismiss the complaint insofar as asserted against them and for monetary sanctions.

Ordered that the order dated March 25, 2024, is reversed, on the law, with costs, and that branch of the plaintiff’s motion which was pursuant to CPLR 5015 (a) to vacate the order dated February 1, 2024, granting the motion of the defendants Credit Agricole America Services, Inc., Credit Agricole Structured Asset Management Advisors, LLC, Credit Agricole Securities (USA), Inc., and Credit Agricole Leasing (USA) Corp., in effect, pursuant to CPLR 3126, to dismiss the complaint insofar as asserted against them and for monetary sanctions, is denied.

In 2022, the plaintiff commenced this action against Credit Agricole America Services, Inc., Credit Agricole Structured Asset Management Advisors, LLC, Credit Agricole Securities (USA), Inc., and Credit Agricole Leasing (USA) Corp. (hereinafter collectively the defendants) and Mickael Abid, inter alia, to recover damages for employment discrimination on the basis of hostile work environment and sexual harassment in viola-

tion of Executive Law § 296, alleging that Abid, her supervisor, coerced her into a romantic and sexual relationship. The defendants served their first set of interrogatories and discovery demands in September 2022. The attorneys for the plaintiff and the defendants corresponded over subsequent months regarding the plaintiff's deficient or nonexistent responses, and in March 2023, the defendants served a second set of interrogatories and discovery demands, which they asserted also were not complied with by the plaintiff. Thereafter, the defendants moved, among other things, pursuant to CPLR 3124 to compel the plaintiff to provide outstanding discovery. The plaintiff opposed the motion. In an order dated June 8, 2023, the Supreme Court granted the defendants' motion to the extent of directing the plaintiff to provide certain discovery and stated that "[f]ailure to comply with this order will result in the non-complying party being appropriately sanctioned, pursuant to CPLR 3126, upon further motion for same."

Subsequently, the defendants moved, in effect, pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against them and for monetary sanctions based upon the plaintiff's failure to comply with her discovery obligations, and the plaintiff opposed the motion. In an order dated February 1, 2024, the Supreme Court granted the defendants' motion without comment. Thereafter, the plaintiff moved pursuant to CPLR 5015 (a) to vacate the order dated February 1, 2024, and for leave to reargue her opposition to the defendants' prior motion, in effect, pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against them and for monetary sanctions.

In an order dated March 25, 2024, the Supreme Court, without comment, granted that branch of the plaintiff's motion which was pursuant to CPLR 5015 (a) to vacate the order dated February 1, 2024. The defendants appeal.

Contrary to the plaintiff's contention, the order dated February 1, 2024, was not entered on default, and thus, there was no basis for the Supreme Court to vacate it pursuant to CPLR 5015 (a) (1). The plaintiff submitted opposition to the defendants' prior motion, in effect, pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against them and for monetary sanctions. As set forth in the order dated February 1, 2024, the plaintiff's opposition was read in determining the defendants' prior motion (*see id.* § 2219 [a]). Moreover, there is no indication in the order dated February 1, 2024, that it was entered on default. Thus, there was no basis for the Supreme Court to grant that branch of the plaintiff's motion which was pursuant to CPLR 5015 (a) (1) to vacate the order dated February 1, 2024.

Moreover, contrary to the plaintiff's contention, there was no basis for the Supreme Court to vacate the order dated February 1, 2024, in the interest of substantial justice. The court retains "inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice" (*Aurora Loan Servs., LLC v Dorfman*, 170 AD3d 786, 788 [2019] [internal quotation marks omitted]). However, "[a] court's inherent power to exercise control over its [orders and] judgments is not plenary, and should be resorted to only to relieve a party from [orders or] judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect" (*Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739, 742 [1984] [internal quotation marks omitted]; see *Gutierrez v Hillside Hotel, LLC*, 234 AD3d 672, 674 [2025]). Here, the plaintiff failed to provide any evidence of fraud, mistake, inadvertence, surprise, or excusable neglect that would constitute a basis for vacatur of the order dated February 1, 2024, in the interest of substantial justice (see *Aurora Loan Servs., LLC v Dorfman*, 170 AD3d at 788).

Additionally, there was no basis for the Supreme Court, upon reargument, to vacate the order dated February 1, 2024, and thereupon, deny the defendants' prior motion, in effect, pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against them and for monetary sanctions (see *Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2004]).

"The nature and degree of the penalty to be imposed [on a motion] pursuant to CPLR 3126 lies within the sound discretion of the Supreme Court" (*Lucas v Stam*, 147 AD3d 921, 925 [2017] [internal quotation marks omitted]; see *Morgenstern v Jeffsam Corp.*, 78 AD3d 913, 914 [2010]). "A determination to impose sanctions for conduct which frustrates the disclosure scheme of the CPLR should not be disturbed absent an improvident exercise of discretion" (*Duncan v Hebb*, 47 AD3d 871, 871 [2008]). "The striking of a pleading may be warranted where the conduct of a party is shown to be willful and contumacious" (*Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812, 814 [2012]; see *Morgenstern v Jeffsam Corp.*, 78 AD3d at 914).

Here, under the circumstances, the willful and contumacious nature of the plaintiff's conduct can be inferred from her failure, over an extended period of time, to comply with discovery demands, and the absence of an adequate excuse for the failure to comply (see *Morgenstern v Jeffsam Corp.*, 78 AD3d at 914). After the plaintiff's persistent and deliberate failure to timely comply with discovery demands, despite the defendants' good faith efforts to bring about compliance and the plaintiff's

counsel offering no excuses other than it “slipped through the cracks,” the plaintiff provided a late, deficient response. Thereafter the defendants were forced to move pursuant to CPLR 3124 to compel the plaintiff to provide outstanding discovery, as well as to request that the plaintiff’s mobile device be forensically examined for completeness and to determine if there had been impermissible deletions. Here, where one of the key issues claimed by the defendants was whether the plaintiff’s relationship with Abid was consensual, the plaintiff selectively and willfully withheld production of hundreds of documents relevant to the nature of her relationship with Abid, continually denying she had the ability to access them. However, it was later revealed, only after the court ordered a forensic examination of her mobile device and her personal accounts in order to investigate her communications with Abid, that these documents had been in her control. The plaintiff’s deception was compounded by the fact that, notwithstanding her continual claim that she did not have access to a Dropbox account she shared with Abid because he allegedly controlled the password and she did not have access to it, on the day of the forensic examination, it became clear that she did have access to this account, which actually had been created under her personal email address. Similarly, after the plaintiff provided only selected pages from her diary, and after repeated requests were made for her to provide the remainder of the diary, she then claimed it had been stolen. Under these circumstances, granting the defendants’ motion, in effect, pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against them and for monetary sanctions due to the plaintiff’s misconduct and dishonesty was justified (*see Morgenstern v Jeffsam Corp.*, 78 AD3d at 914).

Accordingly, the Supreme Court should not have granted that branch of the plaintiff’s motion which was pursuant to CPLR 5015 (a) to vacate the order dated February 1, 2024. Barros, J.P., Christopher, Wan and Taylor, JJ., concur.

56 Marie L. Placide, Appellant, v 455 Bainbridge Street, LLC, Respondent. [252 NYS3d 693]—

Adverse Possession—Continuous Possession—Tenancy with Predecessor in Interest—Predecessor Served Notice of Nonrenewal and Termination of Tenancy

In an action, inter alia, pursuant to RPAPL article 15 for a judgment declaring that the plaintiff is the owner of certain real property by adverse possession, the plaintiff appeals from an order of the Supreme Court, Kings County (Loren Bailly-Schiffman, J.), dated April 27, 2021. The order granted that

branch of the defendant's motion which was for summary judgment dismissing the complaint and, in effect, for a judgment declaring that the plaintiff is not the owner of the real property at issue by adverse possession.

Ordered that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the plaintiff is not the owner of the real property at issue by adverse possession.

In May 2019, the plaintiff commenced this action against the defendant, among other things, pursuant to RPAPL article 15 for a judgment declaring that the plaintiff is the owner of certain residential property located in Brooklyn (hereinafter the premises) by adverse possession. The complaint alleged, inter alia, that in November 1991, the plaintiff entered into an agreement in which the defendant's predecessor in interest agreed to convey the premises to the plaintiff once the plaintiff had made 120 monthly payments. The defendant interposed an answer asserting various affirmative defenses and counterclaims seeking, among other things, a judgment declaring that it is the sole owner of the premises.

Thereafter, the defendant moved, inter alia, for summary judgment dismissing the complaint and, in effect, for a judgment declaring that the plaintiff is not the owner of the premises by adverse possession. The plaintiff opposed the defendant's motion. In an order dated April 27, 2021, the Supreme Court granted that branch of the defendant's motion. The plaintiff appeals.

"To establish a claim of adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period" (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]; see RPAPL 501 [2]). "The element of continuity will be defeated where the adverse possessor interrupts the period of possession by abandoning the premises, where an intruder's presence renders the possession nonexclusive, or where the record owner acts to eject the adverse possessor" (*Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996]).

Here, contrary to the plaintiff's contentions, the defendant negated, prima facie, a necessary element of the plaintiff's adverse possession claim (see *Salzberg v Sena*, 204 AD3d 853, 857-858 [2022]; *Dorce v Family Dollar Stores of N.Y., Inc.*, 197 AD3d 1289, 1289 [2021]). Specifically, the defendant established

that the agreement its predecessor in interest entered into with the plaintiff terminated as of November 2001. The defendant demonstrated that in March 2004, the defendant's predecessor in interest served the plaintiff with a notice of nonrenewal and termination of tenancy and subsequently commenced a holdover proceeding and an ejectment action against the plaintiff. Thus, the defendant established, *prima facie*, that the plaintiff did not continuously possess the property for the requisite statutory period (*see Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d at 159). In opposition, the plaintiff failed to raise a triable issue of fact.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing the complaint and, in effect, for a judgment declaring that the plaintiff is not the owner of the premises by adverse possession.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Kings County, for the entry of a judgment, *inter alia*, declaring that the plaintiff is not the owner of the premises by adverse possession (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Duffy, J.P., Ford, Landicino and Ventura, JJ., concur.

Appeal from an order of the Supreme Court, Kings County, dated April 27, 2021. Motion by the appellant, *inter alia*, to strike stated portions of the respondent's brief on the ground that they refer to matter *dehors* the record. By decision and order on motion of this Court dated December 29, 2021, that branch of the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

Ordered that the branch of the motion which is to strike stated portions of the respondent's brief on the ground that they refer to matter *dehors* the record is granted to the extent that the following portions of the respondent's brief are stricken and have not been considered in the determination of the appeal: (1) the portion of the second full paragraph on page 9 beginning with the words "Bainbridge never refused to appear for a scheduled deposition," through the end of that paragraph, which ends with the words "to compel discovery, depositions, or otherwise," (2) the sentence on page 11 beginning with the

words “The reference in the Court’s Order,” (3) the fifth sentence of the first full paragraph on page 11, which begins with the words “That Order to Show Cause sought to strike,” (4) the paragraph that begins on the second to last line on page 11 with the words “Appellant falsely asserts” and ends on page 12 with the words “attempts to schedule depositions,” and (5) the sentence beginning on the fifth line of page 28 with the words “Indeed, appellant’s counsel made a motion to renew and reargue” and the citation following that sentence, which states, “Compare NYSCEF DOC. NO. 118 with NYSCEF DOC. NO. 186,” and that branch of the motion is otherwise denied.

57 PNC Bank, National Association, Appellant, v Hersh Rosner et al., Respondents, et al., Defendants. [253 NYS3d 218]—

**Mortgages—Foreclosure—Deficiencies in Default Judgment Affidavit—Failure to Identify Records Relied upon
Evidence—Business Records—Prepared by Different Company—Personal Knowledge of Record Keeping Practices**

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated December 20, 2023. The order, insofar as appealed from, denied those branches of the plaintiff’s motion which were for leave to enter a default judgment against the defendants Hersh Rosner and Raizy Rosner and for an order of reference.

Ordered that the order is affirmed insofar as appealed from, with costs.

On January 14, 2005, the defendant Hersh Rosner executed a home equity line of credit agreement establishing an initial line of credit in the amount \$200,000 with nonparty National City Bank (hereinafter National City). The line of credit was secured by a mortgage on certain real property located in Brooklyn. The mortgage was signed by both Hersh Rosner and the defendant Raizy Rosner (hereinafter together the defendants).

By summons and unverified complaint dated July 15, 2019, the plaintiff commenced the instant action to foreclose the mortgage against the defendants, among others. The defendants failed to answer the complaint. On August 24, 2023, the plaintiff moved, inter alia, for leave to enter a default judgment against the defendants and for an order of reference. In support of the motion, the plaintiff submitted, among other things, an affidavit of Jason D. Holstein, an assistant vice president of the plaintiff. In an order dated December 20, 2023, the Supreme Court, inter alia, denied those branches of the plaintiff’s motion. The plaintiff appeals.

“Where, as here, a foreclosure complaint is not verified, CPLR 3215 (f) states, among other things, that upon any application for a judgment by default, proof of the facts constituting the claim, the default, and the amount due are to be set forth in an affidavit made by the party” (*HSBC Bank USA, N.A. v Cooper*, 157 AD3d 775, 776 [2018] [emphasis omitted], quoting *HSBC Bank USA, N.A. v Betts*, 67 AD3d 735, 736 [2009]). However, under those circumstances, an affidavit is “insufficient to demonstrate proof of the facts constituting the claim and the amount due” where it is based on inadmissible hearsay (*JPMorgan Chase Bank, N.A. v Horsfield*, 227 AD3d 790, 793 [2024]; see *U.S. Bank N.A. v Simpson*, 216 AD3d 1043, 1045 [2023]).

Here, in opposition to the plaintiff’s motion, the defendants were entitled to rely on the facial deficiencies in the plaintiff’s motion and, therefore, were not required to demonstrate a reasonable excuse for their default and a potentially meritorious cause of action (see *JPMorgan Chase Bank, N.A. v Horsfield*, 227 AD3d at 793-794; cf. *Rosenzweig v Gubner*, 194 AD3d 1086, 1089 [2021]). The plaintiff, and Holstein’s affidavit in particular, failed to adequately identify the records relied upon to assert a default in payment, and the records attached to Holstein’s affidavit were otherwise insufficient to establish the defendants’ alleged default in payment (see *Bank of N.Y. Mellon v Mannino*, 209 AD3d 707, 708 [2022]; *Urban Equity Partners, LLC v Aribisala*, 143 AD3d 887, 888 [2016]).

Furthermore, the business records upon which the plaintiff relied to establish that the defendants had actually drawn on their line of credit were apparently created by National City, and the plaintiff did not establish personal knowledge of National City’s recordkeeping practices and procedures or that National City’s records were provided to the plaintiff and incorporated into the plaintiff’s own records or that the plaintiff routinely relied on such records in its business (see *Ventures Trust 2013-1-H-R by MCM Capital Partners, LLC v Zaks*, 184 AD3d 697, 699 [2020]). Moreover, the plaintiff did not submit evidence of its purported merger with National City, nor did Holstein aver that he had personal knowledge of such merger (see *id.*). Thus, Holstein failed to lay the proper foundation for the admission of the records relied upon.

Accordingly, the affidavit relied upon by the plaintiff was insufficient to demonstrate proof of the facts constituting the claim and the amount due, and therefore, those branches of the plaintiff’s motion which were for leave to enter a default judgment against the defendants and for an order of reference

were properly denied. Iannacci, J.P., Chambers, Taylor and McCormack, JJ., concur.

58 John J. Shaia, Appellant, v Saw Mill Capital, LLC, et al., Respondents. [253 NYS3d 216]—

Judgments—Res Judicata—Prior Action Dismissed on Merits

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Westchester County (Gretchen Walsh, J.), dated April 12, 2024. The order, insofar as appealed from, granted that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (5) to dismiss the causes of action to recover damages for breach of contract and for declaratory relief.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff, a former employee of Saw Mill Capital, LLC (hereinafter SMC), a private equity firm, alleged that SMC breached his employment agreement by not paying him a portion of carried interest from a blind pool fund known as the "Main Fund." In 2014, after the plaintiff's employment was terminated, he commenced an action (hereinafter the prior action), inter alia, to recover damages for breach of his employment agreement against, among others, SMC, Saw Mill Capital Associates, LP, and Saw Mill Capital Holdings, LP (hereinafter collectively the defendants). After a nonjury trial on the issue of liability, the Supreme Court found in favor of the defendants and issued a judgment dismissing the amended complaint. On the plaintiff's appeal, this Court affirmed so much of the judgment as dismissed the amended complaint insofar as asserted against SMC (*see Shaia v Saw Mill Capital, LLC*, 200 AD3d 731 [2021]).

Thereafter, in 2023, the plaintiff commenced this action against the defendants, among other things, to recover damages for breach of his employment agreement and for related declaratory relief. The defendants moved, inter alia, pursuant to CPLR 3211 (a) (5) to dismiss the causes of action to recover damages for breach of contract and for declaratory relief on the ground, among others, that they were barred by the doctrine of res judicata. In an order dated April 12, 2024, the Supreme Court, among other things, granted that branch of the motion. The plaintiff appeals.

"Pursuant to CPLR 3211 (a) (5), a party may move to dismiss a cause of action based on the doctrine of res judicata or collateral estoppel" (*Joseph v Bank of N.Y. Mellon*, 219 AD3d 596, 597 [2023]). Pursuant to the doctrine of res judicata, or claim

preclusion, a valid final judgment bars future actions between the same parties on the same cause of action (*see Mooney v Manhattan Occupational, Physical & Speech Therapies, PLLC*, 166 AD3d 957, 958-959 [2018]). A disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause or action that either was raised or could have been raised in the prior action (*see Altman v Orseck*, 235 AD3d 818, 818-819 [2025]; *Schwarz v Schwarz*, 150 AD3d 915, 917 [2017]). Here, the Supreme Court properly granted that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (5) to dismiss the causes of action to recover damages for breach of contract and for declaratory relief on the ground that they are barred by the doctrine of res judicata, based upon the dismissal, on the merits, of the amended complaint insofar as against them in the prior action (*see Schwarz v Schwarz*, 150 AD3d 915 [2017]).

The plaintiff's remaining contentions need not be reached in light of our determination. Brathwaite Nelson, J.P., Ford, Voutsinas and Love, JJ., concur.

59 Sam Strulovitch, Appellant, v Samcom 48 (DE), LLC, Doing Business as Holiday Inn Laguardia Airport, Defendant, and Wing Fung Chau et al., Respondents. (And a Third-Party Action.) [252 NYS3d 691]—

Interest—Prejudgment Interest—Calculated upon Principal Sum

In an action to recover a down payment made pursuant to a contract for the sale of real property, the plaintiff appeals from (1) an order of the Supreme Court, Queens County (Leonard Livote, J.), entered January 26, 2024, and (2) a judgment of the same court entered April 3, 2024. The order, inter alia, granted the plaintiff's cross-motion for summary judgment on so much of the complaint as sought to recover a down payment in the outstanding sum of \$75,000 insofar as asserted against the defendants Wing Fung Chau and Aiyun Chen. The judgment, insofar as appealed from, upon the order, awarded prejudgment interest in favor of the plaintiff and against the defendants Wing Fung Chau and Aiyun Chen in the sum of only \$7,285.06.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the respondents.

The appeal from the order entered January 26, 2024, must

be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

In November 2019, the plaintiff, as buyer, and the defendant Samcom 48 (DE), LLC (hereinafter Samcom), as seller, entered into a contract to purchase certain real property located in Queens. Pursuant to the contract, the plaintiff paid a down payment in the sum of \$2,100,000, which Samcom was obligated to return in full in the event that the plaintiff terminated the contract within a certain time period. The contract also contained a personal guaranty executed by the defendants Wing Fung Chau and Aiyun Chen (hereinafter together the defendants), pursuant to which the defendants agreed to be jointly and severally liable for Samcom's obligation to return the down payment. The plaintiff timely terminated the contract and demanded the return of the down payment. A portion of the down payment in the sum of \$950,000, which had been held in escrow, was returned to the plaintiff.

In 2022, the plaintiff commenced this action against Samcom and the defendants to recover the outstanding down payment amount, in the principal sum of \$1,150,000. While the action was pending, the plaintiff and Samcom entered into a settlement agreement containing a general release pursuant to which Samcom agreed to return \$1,075,000 of the outstanding down payment, and the action was discontinued insofar as asserted against Samcom. Thereafter, the plaintiff cross-moved for summary judgment on so much of the complaint as sought to recover the remaining down payment in the outstanding sum of \$75,000 plus interest insofar as asserted against the defendants. In an order entered January 26, 2024, the Supreme Court, *inter alia*, granted the plaintiff's cross-motion. The plaintiff submitted a proposed judgment to the court, which included an award of damages to the plaintiff in the principal sum of \$75,000 plus prejudgment interest in the sum of \$257,668.54, calculated upon the sum of \$1,150,000. The defendants submitted a counter-proposed judgment, which included no prejudgment interest upon the principal sum of \$75,000. In a judgment entered April 3, 2024, upon the order, the court awarded the plaintiff damages in the principal sum of \$75,000 plus prejudgment interest in the sum of \$7,285.06. The plaintiff appeals.

Pursuant to CPLR 5001 (a), "[i]nterest shall be recovered

upon a sum awarded because of a breach of performance of a contract.” Here, contrary to the plaintiff’s contention, the Supreme Court properly awarded prejudgment interest in the sum of only \$7,285.06, calculated upon the damages awarded in the principal sum of \$75,000, rather than upon the sum of \$1,150,000 (see *Mann v Gulf Ins. Co.*, 300 AD2d 452, 454 [2002]; *H.K.S. Hunt Club v Town of Claverack*, 222 AD2d 769, 770 [1995]; cf. *Donaldson Interiors, Inc. v F.J. Sciame Constr. Co., Inc.*, 188 AD3d 816, 817 [2020]).

The parties’ remaining contentions are either without merit or not properly before this Court. Dillon, J.P., Dowling, Landicino and Love, JJ., concur.

60 Michael Taliento, Respondent, v Sabrina Taliento, Appellant. [253 NYS3d 207]—

Motions and Orders—Vacatur of Order—Subsequent Motion Labeled as Renewal of Original Motion—Sought Further Relief Not in Original Motion

In a matrimonial action in which the parties were divorced by judgment dated February 24, 2020, the defendant appeals from an order of the Supreme Court, Richmond County (Dennis L. Owens, Ct. Atty. Ref.), dated July 12, 2023. The order, insofar as appealed from, denied that branch of the defendant’s motion which was to vacate a prior order of the same court dated June 2, 2022.

Ordered that the order dated July 12, 2023, is affirmed insofar as appealed from, with costs.

The parties were divorced by judgment of divorce dated February 24, 2020. The judgment of divorce incorporated, but did not merge, a stipulation of settlement dated June 13, 2019, which included a provision allowing the plaintiff to purchase the defendant’s interest in the marital residence before a certain date (hereinafter the right of first refusal provision).

In August 2021, the plaintiff moved, inter alia, to enforce the right of first refusal provision (hereinafter the original motion). The defendant did not oppose the original motion. In an order dated November 22, 2021 (hereinafter the 2021 order), the Supreme Court, among other things, denied that branch of the original motion with leave to renew.

Thereafter, the plaintiff moved, inter alia, “for leave to renew” that branch of the original motion which was to enforce the right of first refusal provision and for additional relief not sought in the original motion (hereinafter the subsequent motion). In an order dated June 2, 2022 (hereinafter the 2022 order), the Supreme Court, among other things, in effect, granted that branch of the subsequent motion which was to enforce the right of first refusal provision.

The defendant then moved, inter alia, to vacate the 2021 order and the 2022 order on the ground that she was not properly served with the original motion. In an order dated July 12, 2023, the Supreme Court, after a hearing, among other things, granted that branch of the defendant's motion which was to vacate the 2021 order but denied that branch of the motion which was to vacate the 2022 order. The defendant appeals.

Pursuant to CPLR 5015 (a) (5), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just," including "upon the ground of . . . reversal, modification or vacatur of a prior judgment or order upon which it is based." Here, the parties do not dispute that the Supreme Court properly vacated the 2021 order in its entirety based on its finding that the plaintiff had failed to establish proper service of the original motion (*see Crown Waterproofing, Inc. v Tadco Constr. Corp.*, 99 AD3d 964, 965 [2012]). However, contrary to the defendant's contention, vacatur of the 2021 order addressing the original motion does not require vacatur of the 2022 order addressing the subsequent motion.

Although the plaintiff styled the subsequent motion as one for leave to renew the original motion, "[i]t does not matter how a motion is titled by an attorney. What matters is what the motion actually is in substance" (*Citibank, N.A. v Kerszko*, 203 AD3d 42, 55 [2022]). "The courts are not bound by the label appended to the motion by a party, and can designate a motion for renewal as one for reargument if it presents neither new facts nor a change in the law" (*Coke-Holmes v Holsey Holdings, LLC*, 189 AD3d 1162, 1163 [2020]). The subsequent motion was not a motion for renewal or reargument, irrespective of the label placed on the motion by the plaintiff. Inasmuch as the Supreme Court lacked jurisdiction over the original motion, the subsequent motion was a new motion that sought similar relief to that which was sought in the original motion, in addition to further relief that was not sought in the original motion. It is undisputed that the defendant was properly served with and had notice of the subsequent motion, which adequately set forth the grounds for relief without reference to the original motion. The court properly addressed the merits of that motion in the 2022 order, and, as such, the defendant has provided no basis to vacate the 2022 order.

Accordingly, the Supreme Court properly denied that branch of the defendant's motion which was to vacate the 2022 order. Dillon, J.P., Dowling, Landicino and Love, JJ., concur.

61 Salvatore Trazzera, Appellant, v County of Nassau et al., Defendants, and Incorporated Village of Massapequa Park, Respondent. [252 NYS3d 234]—

Municipal Corporations—Notice of Street Defect—Prior Written Notice—Fallen Sign in Parking Lot**Municipal Corporations—Notice of Street Defect—Affirmative Negligence Exception—Limited to Work That Immediately Results in Existence of Dangerous Condition**

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Felice J. Muraca, J.), entered October 18, 2024. The order, insofar as appealed from, granted that branch of the motion of the defendant Incorporated Village of Massapequa Park which was for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff commenced this action against the Incorporated Village of Massapequa Park, among others, to recover damages for personal injuries he allegedly sustained when he tripped and fell on a downed parking sign in a parking lot owned by the Village. The Village moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against it on the ground that it did not have prior written notice of the alleged condition. In an order entered October 18, 2024, the Supreme Court, among other things, granted that branch of the motion. The plaintiff appeals.

“A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies” (*Barnes v Incorporated Vil. of Port Jefferson*, 120 AD3d 528, 529 [2014]; see *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). “To be entitled to summary judgment, the municipality must first establish that it lacked prior written notice of the alleged defect” (*Douglas v City of Mount Vernon, N.Y.*, 226 AD3d 973, 974 [2024]; see *Discepolo v County of Nassau*, 226 AD3d 646, 647 [2024]). Once a municipality makes a prima facie showing, “the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality” (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; see *Douglas v City of Mount Vernon, N.Y.*, 226 AD3d at 974).

Contrary to the plaintiff’s contention, prior written notice of the downed parking sign was required as a prerequisite to a negligence action against the Village (see Code of Village of Massapequa Park § 298-27; *Poirier v City of Schenectady*, 85

NY2d 310, 314 [1995]; *Waters v Town of Hempstead*, 166 AD2d 584, 585 [1990]). Here, the Village established, prima facie, that it did not have prior written notice of the allegedly defective condition in the parking lot through an affidavit of the Village Administrator, who averred that her search of the Village's relevant records revealed no prior written notice of any dangerous or defective condition at the subject location (see *Discepolo v County of Nassau*, 226 AD3d at 647; *Lyons v Inc. Vil. of Garden City*, 225 AD3d 679, 681 [2024]). In opposition, the plaintiff failed to raise a triable issue of fact as to whether the Village had prior written notice.

Contrary to the plaintiff's contention, he did not raise a triable issue of fact as to the affirmative negligence exception. That exception is limited to work by the municipality "that immediately results in the existence of a dangerous condition" (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [internal quotation marks omitted]; see *Yarborough v City of New York*, 10 NY3d at 728). The affidavit of the plaintiff's expert was insufficient to raise a triable issue of fact, as it was conclusory and speculative (see *O'Brien v Village of Babylon*, 196 AD3d 494, 496 [2021]). Furthermore, the plaintiff did not identify any evidence tending to show that the Village conducted work in the subject area which immediately resulted in the creation of the alleged defect (see *Wilson v Incorporated Vil. of Freeport*, 212 AD3d 870, 872 [2023]; *Smith v City of Mount Vernon*, 101 AD3d 847, 848 [2012]).

Accordingly, the Supreme Court properly granted that branch of the Village's motion which was for summary judgment dismissing the complaint insofar as asserted against it. Duffy, J.P., Brathwaite Nelson, Warhit and Taylor, JJ., concur.

62 Patricia Trim, Appellant, v New York City Transit Authority et al., Respondents. [249 NYS3d 630]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Permanent Consequential or Significant Limitation of Use

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Robin K. Sheares, J.), dated December 14, 2023. The order, insofar as appealed from, granted the separate motions of the defendants New York City Transit Authority, Metropolitan Transportation Authority, Star Cruiser Transportation, and Cesar E. Matias, and the defendants Asror Sangov and Akbar Mustafokulov, for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the mean-

ing of Insurance Law § 5102 (d) as a result of the subject accident.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, and the separate motions of the defendants New York City Transit Authority, Metropolitan Transportation Authority, Star Cruiser Transportation, and Cesar E. Matias, and the defendants Asror Sangov and Akbar Mustafokulov, for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident are denied.

The plaintiff commenced this action to recover damages for personal injuries that she allegedly sustained in a motor vehicle accident. The defendants Asror Sangov and Akbar Mustafokulov (hereinafter together the Sangov defendants) and the defendants New York City Transit Authority, Metropolitan Transportation Authority, Star Cruiser Transportation, and Cesar E. Matias (hereinafter collectively the Transit defendants) separately moved for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident. In an order dated December 14, 2023, the Supreme Court, *inter alia*, granted both motions. The plaintiff appeals.

The Sangov defendants and the Transit defendants failed to meet their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The papers submitted by the Sangov defendants and the papers submitted by the Transit defendants failed to adequately address the plaintiff's claim set forth in the supplemental bill of particulars that she sustained a serious injury to her right wrist as a result of the accident under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (*see Epstein v Kachar*, 166 AD3d 579, 580 [2018]; *O'Shaughnessy v Sanchez*, 164 AD3d 805, 806 [2018]).

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court should have denied the separate motions of the Sangov defendants and the Transit defendants for summary judgment dismissing the complaint

insofar as asserted against each of them regardless of the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Brathwaite Nelson, J.P., Taylor, Ventura and McCormack, JJ., concur.

63 U.S. Bank National Association, Appellant, v Karl Mitchell, Respondent, et al., Defendants. [251 NYS3d 316]—

Pleading—Affirmative Defense—Waiver—Pre-Answer Motion Granted upon Renewal

Dismissal and Nonsuit—Want of Prosecution—Failure to Comply with Scheduling Orders and Submit Order of Reference —Savings Provision under Foreclosure Abuse Prevention Act

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Queens County (Leonard Livote, J.), dated August 31, 2023. The order, insofar as appealed from, upon renewal, in effect, vacated an order of the same court dated July 26, 2022, denying the pre-answer motion of the defendant Karl Mitchell pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him, and thereupon granted the motion.

Ordered that the order dated August 31, 2023, is affirmed insofar as appealed from, with costs.

In August 2008, the plaintiff commenced an action against the defendant Karl Mitchell (hereinafter the defendant), among others, to foreclose a mortgage on certain real property located in Queens (hereinafter the 2008 foreclosure action). In an order dated September 9, 2016 (hereinafter the September 2016 order), the Supreme Court, among other things, sua sponte, directed dismissal of the complaint without prejudice “on the ground that the plaintiff had failed to comply with certain prior orders of the court” (*U.S. Bank N.A. v Mitchell*, 191 AD3d 731, 732 [2021]). Approximately 13 months later, the plaintiff moved, inter alia, to vacate the September 2016 order. In an order dated April 11, 2018 (hereinafter the April 2018 order), the court granted that branch of the plaintiff's motion. The defendant appealed, and, on February 3, 2021, this Court reversed the April 2018 order and denied that branch of the plaintiff's motion which was to vacate the September 2016 order (*see id.*).

In July 2021, the plaintiff commenced the instant action to foreclose the mortgage. In October 2021, the defendant moved, pre-answer, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him as barred by the statute of limitations, among other grounds. By order dated July 26, 2022, the Supreme Court denied the motion, concluding that the savings clause of CPLR 205 (a) applied to render timely the com-

mencement of the instant action within six months of February 3, 2021, when the 2008 foreclosure action was dismissed by this Court.

In November 2022, the plaintiff moved, among other things, for leave to enter a default judgment against the defendant and for an order of reference. The defendant served an answer dated November 7, 2022, which was rejected by the plaintiff as untimely.

In January 2023, the defendant opposed the plaintiff's motion, inter alia, for leave to enter a default judgment against him and cross-moved, among other things, to vacate his default and to compel the acceptance of a late answer. One month later, the defendant moved for leave to renew his pre-answer motion pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him based on the newly enacted CPLR 205-a.

In an order dated March 31, 2023, the Supreme Court granted the plaintiff's motion, inter alia, for leave to enter a default judgment against the defendant and for an order of reference and denied the defendant's cross-motion, among other things, to vacate his default and to compel the acceptance of a late answer.

However, in an order dated August 31, 2023, the Supreme Court, inter alia, upon renewal, in effect, vacated the order dated July 26, 2022, and thereupon granted the defendant's pre-answer motion pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against him based on the newly enacted CPLR 205-a. The plaintiff appeals.

"The statute of limitations is an affirmative defense that is waived by a party unless it is raised either in a responsive pleading or by motion prior to the submission of a responsive pleading" (*Associates First Capital Corp. v Roth*, 226 AD3d 636, 636 [2024]). Here, the defendant raised this affirmative defense in a pre-answer motion to dismiss the complaint insofar as asserted against him. While the defendant's pre-answer motion was originally denied, the defendant thereafter moved for leave to renew that motion based upon a change in the law. As the pre-answer motion was ultimately granted upon renewal, the defendant did not waive the affirmative defense of statute of limitations by failing to timely answer the complaint (*contra id.*) or by failing to vacate his default (*contra Ocwen Loan Servicing, LLC v Coles*, 223 AD3d 678, 680 [2024]).

The Foreclosure Abuse Prevention Act (FAPA) (L 2022, ch 821) replaced the savings provision of CPLR 205 (a) with CPLR 205-a in actions, like here, upon instruments described in

CPLR 213 (4) (*see id.* § 205 [c]; *U.S. Bank Trust, N.A. v Giangrande*, 229 AD3d 834, 835-836 [2024]). Under CPLR 205-a (a), “[i]f an action upon an instrument described under [CPLR 213 (4)] is timely commenced and is terminated in any manner other than . . . a dismissal of the complaint for any form of neglect, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, section thirty-two hundred fifteen, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter, . . . for failure to comply with any court scheduling orders, or by default due to nonappearance for conference or at a calendar call, or by failure to timely submit any order or judgment, . . . the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination.” Here, contrary to the plaintiff’s contentions, the Supreme Court correctly determined that the 2008 foreclosure action was dismissed for a form of neglect, as it was dismissed for failure to comply with court scheduling orders and failure to submit an order of reference. Accordingly, under FAPA, the plaintiff is not entitled to the benefit of the savings provision of CPLR 205-a (*see U.S. Bank Trust, N.A. v Giangrande*, 229 AD3d at 836).

The plaintiff’s arguments challenging FAPA’s retroactive application and constitutionality under the United States Constitution are without merit (*see Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065 [2024]; *97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038 [2024]). Genovesi, J.P., Ford, Love and Golia, JJ., concur.

64 U.S. Bank National Association, Appellant, v John Williams, Also Known as John H. Williams, Respondent, et al., Defendants. [252 NYS3d 231]—

Limitation of Actions—Six-Year Statute of Limitations—Mortgage Foreclosure—Voluntary Discontinuance of Prior Action

In an action to foreclose a mortgage, the plaintiff appeals from (1) an order of the Supreme Court, Putnam County (Gina C. Capone, J.), dated June 23, 2023, and (2) a judgment of the same court dated November 2, 2023. The order, insofar as appealed from, denied those branches of the plaintiff’s motion which were for summary judgment on the complaint insofar as asserted against the defendant John Williams and for an order of reference and granted that defendant’s motion for summary judgment dismissing the complaint insofar as asserted against

him and on his counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the subject mortgage. The judgment, upon the order, declared the mortgage to be unenforceable and discharged and directed the Putnam County Clerk to cancel and discharge of record the mortgage.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the defendant John Williams.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

In February 2008, the plaintiff commenced an action against, among others, the defendant John Williams (hereinafter the defendant) to foreclose a mortgage on certain real property located in Carmel (hereinafter the 2008 foreclosure action). The 2008 foreclosure action was voluntarily discontinued in January 2012.

A second action to foreclose the mortgage was commenced in December 2013 (hereinafter the 2013 foreclosure action), and a third action to foreclose the mortgage was commenced in July 2014 (hereinafter the 2014 foreclosure action). Thereafter, the 2013 foreclosure action and the 2014 foreclosure action were consolidated (hereinafter the consolidated action). By judgment dated August 22, 2019, following a nonjury trial, the consolidated action was dismissed for failure to comply with RPAPL 1303 and 1304.

In December 2019, the plaintiff commenced the instant action to foreclose the mortgage. The defendant answered the complaint, raising affirmative defenses and counterclaims.

The plaintiff moved, *inter alia*, for summary judgment on the complaint insofar as asserted against the defendant and for an order of reference. Shortly thereafter, the defendant moved for summary judgment dismissing the complaint insofar as asserted against him as time-barred and on his counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage. In an order dated June 23, 2023, the Supreme Court, among other things, denied those branches of the plaintiff's motion and granted the defendant's motion. In a judgment dated November 2, 2023, the court declared the

mortgage to be unenforceable and discharged and directed the Putnam County Clerk to cancel and discharge of record the mortgage. The plaintiff appeals.

An action to foreclose a mortgage is governed by a six-year statute of limitations (*see* CPLR 213 [4]; *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 261 [2019]; *Citimortgage, Inc. v Gunn*, 234 AD3d 922, 923 [2025]). “[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt” (*BHMPW Funding, LLC v Lloyd-Lewis*, 194 AD3d 780, 782 [2021] [internal quotation marks omitted]; *see GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d 915, 916 [2023]). “Acceleration occurs, inter alia, by the commencement of a foreclosure action wherein the plaintiff elects in the complaint to call due the entire amount secured by the mortgage” (*GMAT Legal Title Trust 2014-1 v Kator*, 213 AD3d at 916; *see Citimortgage, Inc. v Gunn*, 234 AD3d at 923).

Here, the defendant demonstrated, prima facie, that the six-year statute of limitations began to run in February 2008, when the plaintiff commenced the 2008 foreclosure action and elected in the complaint to call due the entire amount secured by the mortgage (*see Citimortgage, Inc. v Gunn*, 234 AD3d at 923; *U.S. Bank N.A. v Medianik*, 223 AD3d 935, 938 [2024]). It is undisputed that the instant action was commenced in December 2019, more than six years later (*see Citimortgage, Inc. v Gunn*, 234 AD3d at 923).

The plaintiff contends that the voluntary discontinuance of the 2008 foreclosure action on January 17, 2012, served to reset the statute of limitations and that, therefore, this action was timely. However, pursuant to CPLR 203 (h), part of the Foreclosure Abuse and Prevention Act (FAPA), “once a cause of action to foreclose a mortgage has accrued, no party may, in form or effect, unilaterally revive or reset the accrual thereof, or otherwise purport to effect a unilateral extension of the statute of limitations. Further, CPLR 3217 (e) provides, in relevant part, that the voluntary discontinuance of a foreclosure action shall not toll, extend, revive, or reset the statute of limitations, unless expressly prescribed by statute” (*FV-1, Inc. v Palaguachi*, 234 AD3d 818, 821 [2025]). Thus, contrary to the plaintiff’s contention, the statute of limitations was not reset by the plaintiff’s voluntary discontinuance of the 2008 foreclosure action.

The plaintiff’s arguments challenging FAPA’s retroactive application and constitutionality under the United States Constitution are without merit (*see Deutsche Bank Natl. Trust Co. v*

Dagrin, 233 AD3d 1065 [2024]; *97 Lyman Ave., LLC v MTGLQ Invs., L.P.*, 233 AD3d 1038 [2024]).

Accordingly, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint insofar as asserted against him as time-barred and on his counterclaim pursuant to RPAPL 1501 (4) to cancel and discharge of record the mortgage.

For similar reasons, the plaintiff failed to establish its entitlement to summary judgment on the complaint insofar as asserted against the defendant and for an order of reference.

The parties' remaining contentions are either improperly raised for the first time on appeal or academic in light of our determination. Connolly, J.P., Christopher, Voutsinas and Hom, JJ., concur.

65 Raul Vilca, Respondent, v Natalia Kim, Appellant. [251 NYS3d 319]—

Husband and Wife and Other Domestic Relationships—Equitable Distribution—Separate Property Credit—Contribution of Premarital Earnings to Marital Residence

Husband and Wife and Other Domestic Relationships—Support—Maintenance—Duration of Marriage and Ability to Become Self-Supporting

In an action for a divorce and ancillary relief, the defendant appeals from an amended judgment of divorce of the Supreme Court, Kings County (Eric I. Prus, J.), dated July 12, 2023. The amended judgment of divorce, insofar as appealed from, upon a decision of the same court (Carolyn Mazzu Genovesi, Ct. Atty. Ref.) dated August 10, 2018, made after a nonjury trial, awarded the plaintiff a separate property credit in the sum of \$226,557 with respect to the purchase of the marital residence and awarded the defendant maintenance in the sum of only \$2,400 per month for a period of only one year.

Ordered that the amended judgment of divorce is affirmed insofar as appealed from, with costs.

The parties were married in June 2011. In May 2016, the plaintiff commenced this action for a divorce and ancillary relief. Following a nonjury trial, inter alia, on the issues of equitable distribution of the marital property and maintenance, the Supreme Court issued a decision, and subsequently an amended judgment of divorce, among other things, awarding the plaintiff a separate property credit in the sum of \$226,557 with respect to the purchase of the marital residence and awarding the defendant maintenance in the sum of \$2,400 per month for a period of one year. The defendant appeals.

“Where a party contributes his or her separate property to-

ward the purchase of a marital asset, such as a marital residence, the party should be given a credit for the amount so contributed prior to the equitable division of the asset” (*Westreich v Westreich*, 169 AD3d 972, 977 [2019]; see *Sinnott v Sinnott*, 194 AD3d 868, 871 [2021]). However, where separate property has been commingled with marital property, for example in a joint bank account, there is a presumption that the commingled funds constitute marital property (see *Sinnott v Sinnott*, 194 AD3d at 871; *Signorile v Signorile*, 102 AD3d 949, 950 [2013]). “To overcome a presumption that commingled property is marital property, the party asserting that the property is separate must establish by clear and convincing evidence that the property originated solely as separate property and the joint account was created only as a matter of convenience, without the intention of creating a beneficial interest” (*Renck v Renck*, 131 AD3d 1146, 1149 [2015]; see *Sinnott v Sinnott*, 194 AD3d at 871).

Here, contrary to the defendant’s contention, the Supreme Court properly determined that the plaintiff was entitled to a separate property credit in the sum of \$226,557 with respect to funds he contributed toward the purchase of the marital residence in September 2011. The plaintiff testified at trial that he contributed approximately \$277,000 toward the down payment and related closing costs and that the majority of these funds were saved from his premarital earnings, which had been deposited into an account that was originally in his name alone. Additionally, the evidence established that the defendant’s name was added to the account approximately two to three months prior to the closing, and that the defendant did not contribute any funds to the account. Under the circumstances, the plaintiff adduced sufficient evidence to overcome the marital property presumption with respect to these funds (see *Wade v Steinfeld*, 15 AD3d 390, 391 [2005]; cf. *Sherman v Sherman*, 304 AD2d 744, 744 [2003]).

The defendant contends that the Supreme Court’s award of maintenance in the sum of \$2,400 per month for a period of one year was inadequate. As this action was commenced after January 23, 2016, it is governed by certain amendments to the calculation of postdivorce maintenance set forth in part B of section 236 of the Domestic Relations Law (see L 2015, ch 269, § 4; *Mahoney v Mahoney*, 197 AD3d 638, 639 [2021]). Where, as here, the payor’s income exceeds the statutory income cap, the court shall determine the guideline amount of post-divorce maintenance by performing the calculations set forth in Domestic Relations Law § 236 (B) (6) (c), and then shall determine

whether to award additional maintenance for income exceeding the cap by considering the factors set forth in Domestic Relations Law § 236 (B) (6) (e) (1) and setting forth the factors it considered (*see id.* § 236 [B] [6] [d]; *Mahoney v Mahoney*, 197 AD3d at 639).

The duration of postdivorce maintenance may be determined as set forth in an advisory schedule, which, for a marriage of 15 years or less, is 15% to 30% of the length of the marriage (*see* Domestic Relations Law § 236 [B] [6] [f] [1]). In determining the duration of postdivorce maintenance, whether or not the court utilizes the advisory schedule, the court shall consider the factors listed in Domestic Relations Law § 236 (B) (6) (e) (1) and set forth the factors it considered (*see id.* § 236 [B] [6] [f] [2]; *Torkin v Susac*, 236 AD3d 1082, 1085 [2025]).

“The overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become self-supporting” (*D’Iorio v D’Iorio*, 135 AD3d 693, 695 [2016]; *see Mahoney v Mahoney*, 197 AD3d at 639). “The amount and duration of maintenance is a matter committed to the sound discretion of the trial court, and every case must be determined on its unique facts” (*Culen v Culen*, 157 AD3d 926, 928 [2018]). Here, considering the relevant factors, including, *inter alia*, the duration of the marriage, and the ability of the party seeking maintenance to become self-supporting, the Supreme Court’s award of maintenance was a provident exercise of discretion.

The defendant’s remaining contention is without merit. Warhit, J.P., Voutsinas, McCormack and Hom, JJ., concur.

66 Wilmington Savings Fund Society, FSB, Respondent, v Allison Isom et al., Appellants, et al., Defendants. [252 NYS3d 244]—

Mortgages—Foreclosure—Delay in Conducting Foreclosure Sale—Prejudice to Opposing Party

In an action to foreclose a mortgage, the defendants Allison Isom, Geneva Isom Gibson, and Terrence A. Roberts appeal from an order of the Supreme Court, Suffolk County (C. Stephen Hackeling, J.), dated April 5, 2024. The order granted the plaintiff’s motion to extend the time to conduct a foreclosure sale.

Ordered that the order is affirmed, without costs or disbursements.

In this action to foreclose a mortgage, the plaintiff moved to extend the time to conduct a foreclosure sale pursuant to a

judgment of foreclosure and sale entered on November 21, 2023. The defendants Allison Isom, Geneva Isom Gibson, and Terrence A. Roberts (hereinafter collectively the defendants) opposed the motion. The Supreme Court granted the plaintiff's motion. The defendants appeal.

RPAPL 1351 (1) was amended, effective December 20, 2016, to provide that a judgment of foreclosure and sale shall direct that the subject property be sold “within ninety days of the date of the judgment” (*Nationstar Mtge., LLC v Dunn*, 230 AD3d 1327, 1329 [2024] [internal quotation marks omitted]; see *Bank of N.Y. Mellon v Ramsamooj*, 219 AD3d 1402, 1403 [2023]). “[S]tatutory time frames . . . are not options, they are requirements, to be taken seriously by the parties” (*Nationstar Mtge., LLC v Dunn*, 230 AD3d at 1329 [internal quotation marks omitted]). However, under CPLR 2004, “[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.” In exercising its discretion to grant an extension of time pursuant to CPLR 2004, a court may consider such factors as the length of the delay, the reason for the delay, and any prejudice to the opposing party (see *Nationstar Mtge., LLC v Dunn*, 230 AD3d at 1329; *Bank of N.Y. Mellon v Ramsamooj*, 219 AD3d at 1403; see also *Bank of N.Y. Mellon v Adam P10tch, LLC*, 226 AD3d 497 [2024]).

Here, the judgment of foreclosure and sale was entered on November 21, 2023. On or about February 27, 2024, the plaintiff moved to extend the time to conduct the foreclosure sale. Thus, the length of the delay in seeking the extension was minimal. The defendants did not contend that they were prejudiced by the delay. Accordingly, the Supreme Court providently exercised its discretion in granting the plaintiff's motion to extend the time to conduct the foreclosure sale (see *Nationstar Mtge., LLC v Dunn*, 230 AD3d at 1330; *Bank of N.Y. Mellon v Adam P10tch, LLC*, 226 AD3d at 498; *Bank of N.Y. Mellon v Ramsamooj*, 219 AD3d at 1403). Barros, J.P., Ford, Ventura and Golia, JJ., concur.

67 Wilmington Savings Fund Society, FSB, Respondent, v Nezam Zaman, Appellant, et al., Defendants. [251 NYS3d 314]—

Motions and Orders—Notice of Motion—Order to Show Cause Not Served Until after Foreclosure Sale
 Mortgages—Equity of Redemption—Extinguished upon Foreclosure Sale

In an action to foreclose a mortgage, the defendant Nezam

Zaman appeals from an order of the Supreme Court, Kings County (Larry D. Martin, J.), dated September 20, 2023. The order denied that defendant's motion to stay a foreclosure sale of the subject property and granted the plaintiff's cross-motion to ratify a foreclosure sale of the subject property *nunc pro tunc*.

Ordered that the order is affirmed, with costs.

On December 1, 2003, the defendant Nezam Zaman (hereinafter the defendant) executed a note in favor of the plaintiff's predecessor in interest, which was secured by a mortgage on certain real property located in Brooklyn. In 2007, the plaintiff's predecessor in interest commenced this action to foreclose the mortgage against, among others, the defendant. In an order and judgment of foreclosure and sale dated January 4, 2010, the Supreme Court, *inter alia*, directed the sale of the property. Between 2010 and 2022, multiple foreclosure sales were scheduled, but none of them were conducted due to, among other things, the defendant filing for bankruptcy multiple times. Thereafter, a foreclosure sale was scheduled for June 22, 2023, at 2:30 p.m.

On June 21, 2023, the defendant submitted to the Supreme Court a proposed order to show cause by which he would move to stay the foreclosure sale. The proposed order to show cause contained a temporary restraining order that, if granted, would, in effect, stay the foreclosure sale pending the determination of the motion.

On June 22, 2023, the Supreme Court signed the proposed order to show cause, without striking the temporary restraining order. The court directed that the plaintiff and the referee were to be served with the order to show cause and the supporting papers by specified means on or before June 22, 2023. Nevertheless, the foreclosure sale was held on June 22, 2023, at approximately 2:30 p.m., and the property was sold to a third-party bidder.

On July 3, 2023, the plaintiff cross-moved to ratify the foreclosure sale *nunc pro tunc*. In support of its cross-motion, the plaintiff submitted, *inter alia*, an affidavit from the referee, who averred, among other things, that he was not served with the order to show cause until June 23, 2023, after the foreclosure sale had already occurred and the property had been sold to a third-party bidder.

In an order dated September 20, 2023, the Supreme Court denied the defendant's motion and granted the plaintiff's cross-motion. The defendant appeals.

CPLR 2211 provides that "[a] motion on notice is made when

a notice of the motion or an order to show cause is served” (see *Wells Fargo Bank, N.A. v St. Louis*, 229 AD3d 116, 122 [2024]; *Wilmington Sav. Fund Socy., FSB v Sheikh*, 183 AD3d 783, 784 [2020]; *Foley v Fitzpatrick Container Co.*, 267 AD2d 637, 638 [1999]; *Cespedes v City of New York*, 172 AD2d 640, 641 [1991]). Here, the record reflects that the order to show cause was not served upon the referee until June 23, 2023. Thus, by the time the defendant made his motion to stay the foreclosure sale, it had already occurred.

“A mortgagor or other owner of the equity of redemption of a property subject to a judgment of foreclosure and sale may redeem the mortgage at any time prior to the foreclosure sale” (*Norwest Mtge., Inc. v Brown*, 35 AD3d 682, 683 [2006]; see *Liberty Dabar Assoc. v Mohammed*, 183 AD3d 880, 882 [2020]; *LIC Assets, LLC v Chriker Realty, LLC*, 131 AD3d 946, 947 [2015]). However, the right to redeem is extinguished as a matter of law upon the foreclosure sale, whether or not the deed has been delivered, and once the right to redeem is lost, it cannot be revived, even by court order (see *Liberty Dabar Assoc. v Mohammed*, 183 AD3d at 882; *LIC Assets, LLC v Chriker Realty, LLC*, 131 AD3d at 947). Here, the defendant’s right to redeem was extinguished upon the foreclosure sale held on June 22, 2023 (see *Liberty Dabar Assoc. v Mohammed*, 183 AD3d at 882; *LIC Assets, LLC v Chriker Realty, LLC*, 131 AD3d at 947).

The defendant’s remaining contention is without merit.

Accordingly, the Supreme Court properly denied the defendant’s motion to stay the foreclosure sale and granted the plaintiff’s cross-motion to ratify the foreclosure sale nunc pro tunc. Connolly, J.P., Genovesi, Taylor and McCormack, JJ., concur.

68 Dolores Young, as Executor of the Estate of John Young, Sr., Also Known as John J. Young, Deceased, Respondent, v Ganesh S. Kamath, M.D., et al., Appellants, et al., Defendants. [252 NYS3d 236]—

Hospitals—Malpractice—Withholding and Resuming Anticoagulant Drug Usage

Hospitals—Malpractice—Vicarious Liability for Independent Physician—Patient Did Not Seek Treatment from Particular Physician

Physicians and Surgeons—Lack of Informed Consent—Informed of Risks, Benefits, and Alternatives

In an action, inter alia, to recover damages for medical malpractice, the defendants Jeetinder K. Gujral and Southside Hospital and the defendants Ganesh S. Kamath and Eric R. Uyguanco separately appeal from an order of the Supreme

Court, Suffolk County (David T. Reilly, J.), dated December 23, 2020. The order, insofar as appealed from by the defendants Jeetinder K. Gujral and Southside Hospital, denied those branches of their motion which were for summary judgment dismissing the causes of action to recover damages for medical malpractice, wrongful death, and loss of services insofar as asserted against them and so much of the complaint as alleged that the defendant Southside Hospital was vicariously liable for the alleged malpractice of the defendant Ganesh S. Kamath. The order, insofar as appealed from by the defendants Ganesh S. Kamath and Eric R. Uygunco, denied those branches of their motion which were for summary judgment dismissing the causes of action to recover damages for medical malpractice, wrongful death, and loss of services insofar as asserted against them and the cause of action to recover damages for lack of informed consent insofar as asserted against the defendant Eric R. Uygunco.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the motion of the defendants Ganesh S. Kamath and Eric R. Uygunco which was for summary judgment dismissing the cause of action to recover damages for lack of informed consent insofar as asserted against the defendant Eric R. Uygunco, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the plaintiff.

In 2005, due to a history of pulmonary embolism and deep vein thrombosis, John J. Young (hereinafter the decedent) was prescribed Coumadin by his primary care physician. On November 19, 2013, the decedent presented to the defendant South Bay Cardiovascular (hereinafter South Bay), complaining of chest pain. Tests conducted revealed that the decedent had a low heart rate and varying degrees of atrioventricular (hereinafter AV) block. On February 18, 2014, the decedent presented to the defendant Eric R. Uygunco, an employee of South Bay, for an electrophysiologic consultation. Uygunco noted that the decedent took 7.5 milligrams of Coumadin five days a week and 3.25 milligrams of Coumadin two days a week, and determined that the decedent had evidence of sick sinus syndrome and AV node disease, for which Uygunco recommended a pacemaker placement procedure. Uygunco advised the decedent to stop taking Coumadin four days prior to the procedure, and then resume taking it thereafter, due to the risk of bleeding during the procedure.

On March 19, 2014, the decedent presented to Good Samari-

tan Hospital for the pacemaker placement procedure. The decedent's international normalized ratio (hereinafter INR) level at that time was noted to be 1.2. The decedent's pacemaker was placed without complication, and the decedent was instructed to resume taking Coumadin that evening. The decedent was discharged from Good Samaritan on March 20, 2014.

Within days of the decedent's discharge from Good Samaritan, he told his daughter that he did not feel right and felt that there was something wrong. On March 23, 2014, the decedent presented to the emergency department of the defendant Southside Hospital (hereinafter Southside), complaining of chest pain. The decedent was evaluated by the defendant Ganesh S. Kamath, a cardiologist employed at South Bay, on call at Southside. Kamath diagnosed the decedent with acute coronary syndrome and unstable angina and then referred the decedent to the defendant Jeetinder K. Gujral, a hospitalist employed by Southside.

Gujral discontinued the decedent's use of Coumadin and referred the decedent to undergo a right ventricular lead revision/repositioning of the pacemaker procedure to be conducted by Uyguanco. Following the procedure on March 24, 2014, after examination of the decedent, both Gujral and Kamath recommended that the decedent resume his Coumadin intake. On March 27, 2014, the decedent's INR level was noted to be 1.17. Thereafter, Gujral directed the decedent to take 5 milligrams of Coumadin. However, after the decedent's discharge from Southside on March 27, 2014, and upon returning home, he returned to taking 7.5 milligrams of Coumadin.

On March 29, 2014, the decedent returned to Southside by ambulance. The decedent complained of pain and swelling in his right leg, which was confirmed by examination. The decedent's lab results showed an INR level of 1.27, and the decedent was diagnosed with deep vein thrombosis (hereinafter DVT). On April 3, 2014, the decedent was discharged to Bellehaven Center for Rehabilitation & Nursing Care. On April 4, 2014, he was transferred back to Southside after complaining of swelling and pain in his left leg. Upon presentation to Southside, it was discovered that the decedent's INR level was 4.71. It was determined that the decedent's left common femoral, femoral, and popliteal veins were nearly completely occluded and the visualized segments of the posterior tibial and peroneal veins were occluded.

The decedent was thereafter transferred to Stony Brook University Hospital for treatment. On April 7, 2014, the

decedent underwent a catheter-directed thrombolysis. On April 10, 2014, a CT scan revealed a large left-sided hemorrhagic stroke. Thereafter, on April 11, 2014, the decedent died.

In April 2016, the plaintiff, the wife of the decedent and executor of his estate, commenced this action against, among others, Gujral, Southside, Kamath, and Uyguanco, inter alia, to recover damages for medical malpractice and wrongful death. Gujral and Southside (hereinafter together the Southside defendants) moved for summary judgment dismissing the complaint insofar as asserted against them. Kamath and Uyguanco (hereinafter together the South Bay defendants) moved for summary judgment dismissing the complaint insofar as asserted against them. In an order dated December 23, 2020, the Supreme Court, among other things, denied those branches of the Southside defendants' motion which were for summary judgment dismissing the causes of action to recover damages for medical malpractice, wrongful death, and loss of services insofar as asserted against them and so much of the complaint as alleged that Southside was vicariously liable for the alleged malpractice of Kamath. In addition, the court denied those branches of the South Bay defendants' motion which were for summary judgment dismissing the causes of action to recover damages for medical malpractice, wrongful death, and loss of services insofar as asserted against them and the cause of action to recover damages for lack of informed consent insofar as asserted against Uyguanco. The Southside defendants and the South Bay defendants separately appeal.

“The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury” (*Kunwar v Northwell Health*, 229 AD3d 528, 532 [2024], quoting *Mendoza v Maimonides Med. Ctr.*, 203 AD3d 715, 716 [2022]; see *Torres v Yakobov*, 222 AD3d 692, 693 [2023]). “On a motion for summary judgment dismissing a cause of action alleging medical malpractice, the defendant bears the initial burden of establishing that there was no departure from good and accepted medical practice or that any alleged departure did not proximately cause the plaintiff’s injuries” (*Vargas v Lee*, 207 AD3d 684, 685 [2022], quoting *Carradice v Jamaica Hosp. Med. Ctr.*, 198 AD3d 863, 864 [2021]). “In order to sustain this prima facie burden, the defendant must address and rebut any specific allegations of malpractice set forth in the plaintiff’s complaint and bill of particulars” (*id.*, quoting *Wiater v Lewis*, 197 AD3d 782, 783 [2021]; see *Ciceron v Gulmatico*, 220 AD3d 732, 734 [2023]). “A motion for sum-

mary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility’ ” (*Lee v South Nassau Communities Hosp.*, 231 AD3d 807, 809 [2024] [alteration omitted], quoting *Khutoryanskaya v Laser & Microsurgery, P.C.*, 222 AD3d 633, 635 [2023]). “ ‘Summary judgment is not appropriate in a medical malpractice action where the parties adduce conflicting medical expert opinions’ ” (*Gilmore v Mihail*, 174 AD3d 686, 687 [2019], quoting *Feinberg v Feit*, 23 AD3d 517, 519 [2005]; see *Fairchild v Lerner*, 229 AD3d 506, 508 [2024]).

Here, the Southside defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the medical malpractice and wrongful death causes of action insofar as asserted against them. The Southside defendants submitted affirmations of experts who opined, inter alia, that Gujral followed the proper standard of care by withholding and resuming Coumadin usage and that Gujral was not a proximate cause of the decedent’s injuries since the decedent did not take the directed five milligrams of Coumadin.

The South Bay defendants also demonstrated their prima facie entitlement to judgment as a matter of law dismissing the medical malpractice and wrongful death causes of action insofar as asserted against them. The South Bay defendants submitted an affirmation of an expert who opined, among other things, that the South Bay defendants followed the proper standard of care by withholding and resuming Coumadin usage and by monitoring the decedent’s INR levels. The South Bay defendants’ expert also opined that it was appropriate for the decedent to return to his normal at-home dosage of Coumadin, despite being prescribed five milligrams of Coumadin, and therefore, the South Bay defendants’ actions were not a proximate cause of the decedent’s injuries.

In opposition to these prima facie showings, the plaintiff raised triable issues of fact as to whether the Southside defendants and the South Bay defendants were liable for medical malpractice and the wrongful death of the decedent. The plaintiff submitted an affirmation of an expert who explained that the decedent was subtherapeutic for a prolonged period of time while remaining off any anticoagulation medication. The plaintiff’s expert opined, inter alia, that Kamath, Gujral, and Uyguanco departed from the standard of care in failing to determine whether the decedent was properly anticoagulated and failed to make sure his INR level was within therapeutic range at the time of discharge. The plaintiff’s expert opined

that such a departure from the standard of care allowed the decedent's blood to be coagulable and ultimately contributed to the blood clots and DVT that led to his death. Accordingly, the Supreme Court properly denied those branches of the separate motions of the Southside defendants and the South Bay defendants which were for summary judgment dismissing the medical malpractice and wrongful death causes of action insofar as asserted against each of them.

A "cause of action alleging loss of consortium is derivative in nature" (*Buzeska v Crystal Run Healthcare Physicians, LLP*, 234 AD3d 656, 659 [2025]; see *Many v Lossef*, 190 AD3d 721, 724 [2021]). In light of our determination that the Supreme Court properly denied those branches of the separate motions of the Southside defendants and the South Bay defendants which were for summary judgment dismissing the medical malpractice and wrongful death causes of action insofar as asserted against each of them, the court properly denied those branches of the separate motions of the Southside defendants and the South Bay defendants which were for summary judgment dismissing the loss of services cause of action insofar as asserted against each of them (see *Buzeska v Crystal Run Healthcare Physicians, LLP*, 234 AD3d at 659).

"In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for the negligence or malpractice of an independent physician who is not its employee" (*Russell v River Manor Corp.*, 216 AD3d 827, 830 [2023], citing *Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]). "However, '[a]n exception to this general rule exists where . . . a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing'" (*Fuessel v Chin*, 179 AD3d 899, 901 [2020], quoting *Muslim v Horizon Med. Group, P.C.*, 118 AD3d 681, 683 [2014]). Here, although the Southside defendants established that Kamath was not an employee of Southside, the evidence submitted in support their motion was insufficient to demonstrate, prima facie, that the decedent entered Southside's emergency room seeking treatment from a privately selected physician rather than from the hospital itself (see *id.* at 901-902; *Malcolm v Mount Vernon Hosp.*, 309 AD2d 704 [2003]). Accordingly, the Supreme Court properly denied that branch of the Southside defendants' motion which was for summary judgment dismissing so much of the complaint as alleged that Southside was vicariously liable for Kamath's alleged malpractice.

However, the Supreme Court should have granted that branch of the South Bay defendants' motion which was for summary judgment dismissing the lack of informed consent cause of action insofar as asserted against Uyguanco. To establish a cause of action to recover damages for lack of informed consent, a plaintiff must prove “(1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury” (*Ciceron v Gulmatico*, 220 AD3d at 735 [internal quotation marks omitted], quoting *Cox v Herzog*, 192 AD3d 757, 758 [2021]; see *Pirri-Logan v Pearl*, 192 AD3d 1149, 1151 [2021]).

Here, the South Bay defendants' submissions, including Uyguanco's deposition testimony, the decedent's medical records, written consent forms signed by the decedent, and the affirmation of the South Bay defendants' expert, were sufficient to establish, prima facie, that the decedent was informed of the reasonably foreseeable risks, benefits, and alternatives to the implantation of the pacemaker and that a reasonably prudent person in the decedent's position would not have declined to undergo the surgery had he or she been fully informed (see *Ciceron v Gulmatico*, 220 AD3d at 735; *Pirri-Logan v Pearl*, 192 AD3d at 1151). In opposition, the plaintiff failed to raise a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The parties' remaining contentions are without merit. Barros, J.P., Warhit, Voutsinas and Wan, JJ., concur.

THIRD DEPARTMENT, FEBRUARY, 2026

(February 5, 2026)

1 The People of the State of New York, Respondent, v Joseph Clark, Appellant. [250 NYS3d 701]—

Crimes—Plea of Guilty—Sufficiency of Allocution

Clark, J.P. Appeal from a judgment of the County Court of Columbia County (Jonathan Nichols, J.), rendered July 19, 2021, convicting defendant upon his plea of guilty of the crime

of criminal possession of a controlled substance in the third degree (two counts).

In 2017, defendant was charged in an indictment with two counts of criminal possession of a controlled substance in the third degree, arising from his alleged possession of a half-ounce or more of narcotics with intent to sell (*see* Penal Law § 220.16 [1], [12]). We affirmed County Court's dismissal of that indictment, with leave to resubmit to a new grand jury, due to the People's failure "to give defendant a reasonable opportunity to exercise his right to testify before the grand jury" (*People v Clark*, 182 AD3d 703, 704 [3d Dept 2020]). The People then notified defendant's previously assigned counsel that they were presenting the matter to a new grand jury and, in August 2020, a new indictment was handed up that charged defendant with the same offenses. Defendant was arraigned in October 2020 and embarked upon pretrial proceedings, including filing a February 2021 motion to dismiss the indictment pursuant to CPL 210.20 (1) (h), which was ultimately denied by County Court as untimely and, in any case, lacking in merit (*see* CPL 255.20 [1]; *People v Davidson*, 98 NY2d 738, 739 [2002]). As jury selection was getting underway at trial, defendant claimed that he had just learned that the motion to dismiss had been untimely and unsuccessfully sought an adjournment to retain new counsel. Apparently hoping to remain at liberty pending sentencing so that he could put his affairs in order, defendant elected to plead guilty to the indictment the next day with the understanding that no sentencing commitment had been made. Defendant did remain at liberty, and he failed to appear at sentencing despite warnings that he would be sentenced in his absence if he failed to appear. County Court did sentence him in his absence, as a second felony offender, to concurrent prison terms of eight years, to be followed by three years of post-release supervision. Defendant appeals.

We affirm. Defendant's assertion that his plea was not knowing, voluntary and intelligent, as well as his related claim that he received ineffective assistance of counsel that impacted upon the voluntariness of his plea, are unpreserved for our review absent any indication that he made an appropriate postallocation motion despite having had ample opportunity to do so (*see People v Scott*, 44 NY3d 302, 306 [2025]; *People v Guilder*, 235 AD3d 1044, 1045-1046 [3d Dept 2025], *lv denied* 43 NY3d 963 [2025]; *People v Castro*, 170 AD3d 1286, 1287-1288 [3d Dept

2019], *lv denied* 33 NY3d 1029 [2019]).* Defendant suggests that he was misled as to his sentencing exposure in a manner that would not require preservation, but the record confirms that he was accurately advised of that exposure at the time he pleaded guilty, both in a plea affidavit he executed in open court and during the plea colloquy itself (*compare People v Scott*, 44 NY3d at 306-307; *People v Shaw*, 239 AD3d 1034, 1035-1036 [3d Dept 2025]). He made no “statements during the plea colloquy or at sentencing that negated an element of the charged crime, were inconsistent with his guilt or otherwise called into question the voluntariness of his plea” so as to implicate the narrow exception to the preservation rule (*People v Merritt*, 210 AD3d 1209, 1210 [3d Dept 2022]; *see People v Newsome*, 238 AD3d 1219, 1220 [3d Dept 2025]). As the record reflects that defendant made a knowing, voluntary and intelligent decision to plead guilty and, in so doing, affirmed that he was satisfied with the performance of counsel, we decline his invitation to take corrective action in the interest of justice (*see People v Moses*, 236 AD3d 1201, 1202 [3d Dept 2025]).

Finally, we do not find the sentence imposed by County Court, which was well below the legally permissible maximum, to be unduly harsh or severe under the circumstances (*see CPL* 470.15 [6] [b]; *People v Miller*, 221 AD3d 1138, 1139 [3d Dept 2023]). Defendant’s remaining contentions have been examined and are lacking in merit.

Aarons, Pritzker, Reynolds Fitzgerald and Fisher, JJ., concur. Ordered that the judgment is affirmed.

2 The People of the State of New York, Respondent, v Alik Anthony, Appellant. [248 NYS3d 370]—

Crimes—Appeal—Waiver—Validity

Fisher, J. Appeal from a judgment of the County Court of Rensselaer County (Debra Young, J.), rendered September 13, 2021, convicting defendant upon his plea of guilty of the crime of failure to register or verify as a sex offender.

In satisfaction of a three-count indictment, defendant pleaded guilty to failure to register or verify as a sex offender with the understanding that he would be sentenced to a term of imprisonment of 1 $\frac{1}{3}$ to 4 years. The plea agreement required that defendant waive the right to appeal. County Court there-

* To the extent that defendant’s claim of ineffective assistance is premised upon facts outside of the record—most notably the alleged failure of counsel to advise him of his ability to move to withdraw his plea—such “is more appropriately addressed in the context of a motion pursuant to CPL article 440” (*People v Kindred*, 166 AD3d 1229, 1230 [3d Dept 2018]).

after imposed the agreed-upon sentence, and defendant appeals.

We affirm. Initially, contrary to defendant's contention, "[w]aiving one's right to appeal as part of a plea agreement is not inherently coercive or against public policy" (*People v Galletta*, 75 AD3d 753, 754 [3d Dept 2010]; see *People v Thomas*, 34 NY3d 545, 557-558 [2019]; *People v Seaberg*, 74 NY2d 1, 7-8 [1989]). We further reject defendant's challenge to the validity of his appeal waiver. The record reflects that County Court advised defendant that a waiver of the right to appeal was a condition of the plea agreement, the court explained that the right to appeal is separate and distinct from the trial-related rights forfeited by a guilty plea and delineated certain appellate rights that survive the waiver, and defendant affirmed his understanding thereof (see *People v Delosh*, 227 AD3d 1276, 1276 [3d Dept 2024]; *People v Ferretti*, 209 AD3d 1173, 1173 [3d Dept 2022]). Defendant also executed a written waiver that similarly delineated certain appellate rights that survive the waiver, and defendant confirmed that he had reviewed the waiver with counsel and he understood its terms (see *People v Sanchez*, 241 AD3d 1675, 1676 [3d Dept 2025], *lv denied* 44 NY3d 1029 [2025]; *People v Moses*, 236 AD3d 1201, 1201-1202 [3d Dept 2025]). "Under these circumstances, we are satisfied that the counseled defendant understood the distinction that some appellate review survived and find that defendant's combined oral and written waiver of the right to appeal was knowing, intelligent and voluntary" (*People v Sanchez*, 241 AD3d at 1676 [internal quotation marks and citations omitted]; see *People v Lane*, 233 AD3d 1207, 1208-1209 [3d Dept 2024], *lv denied* 43 NY3d 945 [2025]). Defendant's valid appeal waiver precludes his contention that Correction Law § 168-f "was unconstitutionally vague as applied to him, because it demanded his address when he was homeless and had none" (*People v Vega*, 239 AD3d 547, 547 [1st Dept 2025] [citation omitted], *lv denied* 44 NY3d 984 [2025]; cf. *People v Allen*, 213 AD3d 73, 80 [1st Dept 2023]).

Garry, P.J., Ceresia, McShan and Mackey, JJ., concur. Ordered that the judgment is affirmed.

3 The People of the State of New York, Respondent, v Jeffrey Butler, Appellant. [251 NYS3d 413]—

Crimes—Sex Offenders—Sex Offender Registration Act—Challenge to Assessment of Points for Drug or Alcohol Abuse and Number and Nature of Prior Crimes Risk Factors

Crimes—Sex Offenders—Sex Offender Registration Act—Receipt and Possession of Child Pornography—Denial of Downward Departure from Risk Level

Two Not Abuse of Discretion Given Abhorrent and Graphic Nature of Images

Reynolds Fitzgerald, J. Appeal from an order of the County Court of Albany County (Andra Ackerman, J.), entered January 12, 2022, which classified defendant as a risk level two sex offender pursuant to the Sex Offender Registration Act.

In 2017, defendant pleaded guilty to one count of receipt of child pornography (*see* 18 USC §§ 2252A [a] [2] [A]; [b] [1]; 2256 [8] [A]) and two counts of possession of child pornography depicting prepubescent minors or minors under 12 years of age (*see* 18 USC §§ 2252A [a] [5] [B]; [b] [2]; 2256 [8] [A]). Defendant was thereafter sentenced to concurrent terms of 87 months of incarceration in the Federal Bureau of Prisons for each count, to be followed by 15 years of supervised release. In anticipation of his release from prison, the Board of Examiners of Sex Offenders notified defendant that he was required to register as a sex offender under the Sex Offender Registration Act (*see* Correction Law art 6-C [hereinafter SORA]), and the Board prepared a risk assessment instrument (hereinafter RAI), assessing him 50 points and presumptively classifying him a risk level one sex offender. The People, in turn, prepared an RAI assessing 90 points against defendant, presumptively classifying him as a risk level two sex offender while reserving its right to request an upward departure if the points assessed to defendant classify him as only a risk level one sex offender. Following a hearing, County Court assessed defendant 100 points—a risk level two classification—and, among other things, denied defendant’s request for a downward departure. Defendant appeals.

On appeal, defendant challenges the assessment of 15 points under risk factor 11 (drug or alcohol abuse) and the apparent assessment of 30 points—instead of 5 points*—under risk factor 9 (number and nature of prior crimes). Initially, the People concede, and we agree, that to the extent that County Court sua sponte assessed defendant an additional 25 points (30 total) under risk factor 9 (number and nature of prior crimes—prior violent felony, or misdemeanor sex crime or endangering welfare of a child), this deprived defendant of a meaningful opportunity to respond to the court’s assessment (*see People v Furgeson*, 230 AD3d 1488, 1490 [3d Dept 2024]; *People v Maus*, 162 AD3d 1415, 1416-1417 [3d Dept 2018]). However, the additional assessment of 25 points (30 total) under risk factor 9

* Defendant did not object at the hearing to the assessment of 5 points under risk factor 9 (number and nature of prior crimes—prior history/no sex crimes or felonies) and raises no challenge on appeal to a 5-point assessment under risk factor 9.

stated in County Court’s written decision appears to be a clerical error as the court did not include the additional 25 points in its total assessment of points, and, therefore, we find that this clerical error is harmless and remittal is not required (*cf. People v Torres*, 210 AD3d 1027, 1028 [2d Dept 2022]). Further, inasmuch as defendant raised no objection at the SORA hearing to the 60 points scored for risk factors 3 and 5—and fails to raise any challenge on appeal relative to the 20 points assessed for risk factor 7 or to the 5 points assessed under risk factor 9—any challenge to the assessment of these 85 points under risk factors 3, 5, 7 and 9 is not properly before us (*see People v Scott*, 230 AD3d 1487, 1487 [3d Dept 2024]; *People v DeDona*, 102 AD3d 58, 63 [2d Dept 2012]). Accordingly, defendant’s contention that County Court erred in assessing additional points under risk factors 9 and 11 “is academic because, even without the [40] points at issue, defendant would still qualify as a level two risk” (85 points) (*People v Scott*, 230 AD3d at 1487 [internal quotation marks and citations omitted]; *see People v Hernandez*, 236 AD3d 835, 836 [2d Dept 2025], *lv denied* 44 NY3d 906 [2025]; *People v George*, 142 AD3d 1059, 1060-1061 [2d Dept 2016]).

County Court also providently exercised its discretion when it declined to grant defendant a downward departure to a risk level one classification (*see People v Gillotti*, 23 NY3d 841, 861-863 [2014]). In seeking a downward departure, it is a defendant’s burden to “(1) identify[], as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines; and (2) establish[] the facts in support of its existence by a preponderance of the evidence” (*People v Roubik*, 231 AD3d 1210, 1212 [3d Dept 2024] [internal quotation marks and citations omitted]). Upon such a showing, “the court must exercise its discretion by weighing the mitigating factor to determine whether the totality of the circumstances warrants a departure to avoid an overassessment of the defendant’s dangerousness and risk of sexual recidivism” (*People v Jones*, 226 AD3d 1265, 1267 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 42 NY3d 907 [2024]; *see People v Hyman*, 228 AD3d 1080, 1081 [3d Dept 2024]).

With regard to the various mitigating factors relied upon by defendant, he “failed to show how his prior military service . . . tended to lower his risk of reoffense or danger to the community” (*People v Pace*, 188 AD3d 732, 733 [2d Dept 2020], *lv*

denied 36 NY3d 907 [2021]; *see People v Oyola*, 217 AD3d 791, 792 [2d Dept 2023], *lv denied* 40 NY3d 907 [2023]). “[W]e find absolutely no merit to defendant’s claim that he should be entitled to a downward departure because, among other reasons, he only possessed several hundred images of child pornography, [some of which depicted children being subjected to pain and cruelty,] which he trivializes as a non-contact offense” (*People v Pardee*, 228 AD3d 1142, 1144 [3d Dept 2024], *lv denied* 42 NY3d 909 [2024]). “Under these circumstances, and given the abhorrent and graphic nature of the images possessed by defendant as described in the [federal presentence report] and case summary, County Court did not abuse its discretion in denying defendant’s request for a downward departure” (*People v Stammel*, 227 AD3d 1322, 1325 [3d Dept 2024] [internal quotation marks and citations omitted]; *see People v Dority*, 234 AD3d 1211, 1213 [3d Dept 2025]; *People v Kraft*, 229 AD3d 1016, 1018 [3d Dept 2024]; *People v Adams*, 216 AD3d 1376, 1378-1379 [3d Dept 2023], *lv denied* 40 NY3d 904 [2023]; *People v Kemp*, 163 AD3d 1339, 1341-1342 [3d Dept 2018], *lv denied* 32 NY3d 919 [2019]). To the extent that we have not addressed any of defendant’s remaining claims, they are not properly before us, are academic in light of our decision or have been considered and found to be without merit.

Clark, J.P., Aarons, Pritzker and Fisher, JJ., concur. Ordered that the order is affirmed, without costs.

4 The People of the State of New York, Respondent, v Jonathan McGeoch, Appellant. [251 NYS3d 410]—

Crimes—Sex Offenders—Sex Offender Registration Act—Defendant Pleaded Guilty to Federal Charge of Enticement of Minors to Engage in Sexual Activity—Upward Departure from Presumptive Risk Level One Justified—Aggravating Factors

Pritzker, J. Appeal from an order of the County Court of Albany County (Andra Ackerman, J.), entered March 28, 2022, which classified defendant as a risk level two sex offender pursuant to the Sex Offender Registration Act.

In 2012, defendant pleaded guilty to the federal charge of enticement of minors to engage in sexual activity and was sentenced to a prison term of 151 months, to be followed by 20 years of supervised release. The charges stemmed from defendant’s communication over the Internet with a 15-year-old male victim and another victim—who defendant believed to be a 13-

year-old male¹ —with whom he made arrangements to take on a camping trip with him and his four-year-old son with the understanding that he planned to engage in sexual conduct with the victims while his son slept; however, defendant was apprehended by law enforcement when he arrived at the location where he arranged to meet the victims.

Prior to defendant's anticipated release, the Board of Examiners of Sex Offenders prepared a risk assessment instrument (hereinafter RAI) that presumptively classified defendant as a risk level one sex offender (60 points) pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C) and sought an upward departure to a risk level two classification, with which assessment the People agreed. At the ensuing hearing, defendant did not contest the points assessment but opposed the request for an upward departure. County Court, among other things, accepted the People's points assessment, granted their request for an upward departure and classified defendant as a risk level two sex offender. Defendant appeals.

We are unpersuaded by defendant's contention that County Court erred in granting the People's request for an upward departure to a risk level two sex offender classification. "An upward departure from a presumptive risk level classification is justified when an aggravating factor exists that is not otherwise adequately taken into account by the risk assessment guidelines and the court finds that such factor is supported by clear and convincing evidence" (*People v Norris*, 223 AD3d 1060, 1061 [3d Dept 2024] [internal quotation marks and citations omitted]; *accord People v Newkirk*, 241 AD3d 1683, 1685 [3d Dept 2025]). "An aggravating factor, in turn, is one which tends to establish a higher likelihood of reoffense or danger to the community than the presumptive risk level calculated on the RAI" (*People v Furgeson*, 230 AD3d 1488, 1489 [3d Dept 2024] [internal quotation marks and citations omitted]; *accord People v Newkirk*, 241 AD3d at 1685). "Upon such a showing, the court makes a discretionary determination whether the overall circumstances warrant a departure to prevent an underassessment of the offender's risk of sexual recidivism and dangerousness" (*People v Norris*, 223 AD3d at 1061 [internal quotation marks and citations omitted]).

1. Upon the mother of the 15-year-old victim reporting to law enforcement inappropriate messages on the victim's Facebook account, law enforcement, with the mother's consent, took over the Facebook account. Law enforcement, posing as the 15-year-old victim, continued to communicate with defendant and eventually introduced defendant to a fictitious 13-year-old friend—the second victim—whom defendant also had sexually inappropriate communication with and included in the camping plans.

In granting the upward departure, County Court relied upon various aggravating factors presented by the People, including defendant's conduct reflecting his intent to have sexual contact with the victims. To that end, defendant drove to the location where he arranged to pick the victims up for the camping trip, at which point he was apprehended by law enforcement. At the time defendant was taken into custody, he admitted to taking steps to prepare for the detailed oral and anal sexual acts he planned with the victims, including grooming his genitals and shopping for lubricants and condoms. Such conduct demonstrated defendant's intent to engage in sexual conduct with the victims—which was only thwarted by law enforcement intervention—and, as such, the assessment of points on the RAI does not adequately reflect the risk to public safety (*see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* at 9 [2006]).

Furthermore, the People presented proof that defendant admitted that, for four or five years, he used Internet communication to successfully persuade numerous boys between the ages of 11 and 14 to send him sexually explicit photographs of themselves, which pictures defendant saved in his email account. In addition, evidence established that defendant, who acknowledged his sexual interest in young boys just hitting puberty, conducted Internet searches for, possessed and disseminated child pornography.² Notably, defendant was charged with state criminal conduct related to the pornographic photographs; however, those charges were dismissed in favor of federal prosecution. Notwithstanding defendant's assertion that an upward departure is outweighed by, among other things, the fact that he is under prolonged federal supervision, that he has secured employment and has a supportive family, we are satisfied that County Court did not abuse its discretion in finding that the People met their burden of establishing by clear and convincing evidence that aggravating factors exist that were not taken in to account by the RAI so as to warrant an upward departure from the presumptive risk level one to a risk level two sex offender classification (*see People v Trovato*, 222 AD3d 673, 675 [2d Dept 2023], *lv denied* 42 NY3d 913 [2025]; *People v Headwell*, 156 AD3d 1263, 1264 [3d Dept 2017], *lv denied* 31 NY3d 902 [2018]).

Aarons, J.P., Ceresia, Powers and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

2. Nine victims depicted in the pornographic pictures were identified, with one family submitting a victim impact statement herein.

5 The People of the State of New York, Respondent, v Thomas C. Tatro, Appellant. [247 NYS3d 841]—

Crimes—Appeal—Waiver—Challenge to Severity of Sentence Precluded

Ceresia, J. Appeal from a judgment of the County Court of Essex County (Richard Meyer, J.), rendered June 23, 2022, convicting defendant upon his plea of guilty of the crime of criminal contempt in the first degree.

In satisfaction of two felony complaints, defendant waived indictment and pleaded guilty to a superior court information charging him with criminal contempt in the first degree and agreed to waive his right to appeal. Although the People agreed to recommend jail time and a term of probation, County Court made no sentence commitment and advised defendant of the maximum permissible sentence exposure. Thereafter, the court sentenced defendant to the maximum prison term of 1 $\frac{1}{3}$ to 4 years. Defendant appeals.

Initially, to the extent that defendant's contention can be read as a challenge to the severity of the sentence imposed, such contention is precluded by the unchallenged waiver of his right to appeal (*see People v Chan*, 214 AD3d 1071, 1073 [3d Dept 2023], *lv denied* 40 NY3d 927 [2023]; *People v Harrington*, 185 AD3d 1301, 1302 [3d Dept 2020]). Further, defendant's challenge to the voluntariness of the plea, which issue is not precluded by an appeal waiver, is unpreserved for our review as the record does not reflect that defendant made an appropriate postallocution motion (*see People v Mahood*, 238 AD3d 1433, 1434 [3d Dept 2025], *lv denied* 44 NY3d 983 [2025]; *People v Quarterman*, 238 AD3d 1385, 1385-1386 [3d Dept 2025]).

Reynolds Fitzgerald, J.P., Fisher, McShan and Mackey, JJ., concur. Ordered that the judgment is affirmed.

6 The People of the State of New York, Respondent, v Anthony Pastel, Appellant. [247 NYS3d 842]—

Crimes—Appeal—Preservation of Issue for Review—Illegal Sentence Not Readily Discernible from Trial Record

Powers, J. Appeal from a judgment of the County Court of Greene County (Debra Young, J.), rendered July 8, 2022, convicting defendant upon his plea of guilty of the crime of assault in the second degree.

Defendant was charged in a three-count indictment with attempted murder in the second degree, assault in the second degree and endangering the welfare of a child stemming from allegations that he shoved the victim, with whom he had a personal relationship, against the walls of her residence and

repeatedly punched her in the head with a closed fist while she held her 20-month-old child. This incident resulted in various injuries to the victim, including a skull fracture and subarachnoid hemorrhage of her brain. Defendant pleaded guilty to assault in the second degree and agreed to waive his right to appeal. County Court sentenced defendant to the maximum permissible prison term of seven years, to be followed by two years of postrelease supervision. Defendant appeals.

Defendant contends that the sentence was rendered unlawful and constitutionally defective by County Court's consideration of improper factors—including its consideration of and implicit application of the sentencing range for the attempted murder charge—and insufficient consideration of mitigating factors in imposing the sentence. As defendant neither “object[ed] to the sentence actually imposed or move[d] to withdraw his guilty plea,” his challenge is unpreserved for appellate review (*People v Olds*, 36 NY3d 1091, 1092 [2021]; see CPL 470.05 [2]; *People v Jenne*, 224 AD3d 953, 958 [3d Dept 2024], *lv denied* 42 NY3d 927 [2024]; *People v Coler*, 214 AD3d 1207, 1207 [3d Dept 2023], *lv denied* 40 NY3d 1091 [2024]). Further, “the alleged error does not fall within th[e] narrow exception to the preservation rule [which] is reserved for the most fundamental flaws[, n]or did the court exceed its powers and impose a sentence that is illegal in a respect that is readily discernible from the trial record” (*People v Flowers*, 28 NY3d 536, 540 [2016] [internal quotation marks, brackets and citations omitted]; see *People v Olds*, 36 NY3d at 1092; *People v Stephenson*, 205 AD3d 1217, 1218-1219 [3d Dept 2022], *lv denied* 38 NY3d 1153 [2022]). Similarly, we decline defendant's request to take corrective action in the interest of justice (see CPL 470.15 [3] [c]).

Garry, P.J., Reynolds Fitzgerald, McShan and Mackey, JJ., concur. Ordered that the judgment is affirmed.

7 The People of the State of New York, Respondent, v Zaquon Woody, Appellant. [248 NYS3d 781]—

Crimes—Plea Bargaining—Enforcement of Agreement—Enhanced Sentence—Failure to Appear for Presentence Investigation and for Original Sentencing Date

Crimes—Plea of Guilty—Sufficiency of Allocution

Crimes—Possession of Weapon—Attempt—Indictment Not Jurisdictionally Defective

Corcoran, J. Appeal from a judgment of the County Court of Albany County (Andra Ackerman, J.), rendered November 18, 2022, convicting defendant upon his plea of guilty of the crime of attempted criminal possession of a weapon in the second degree.

Upon being dispatched to an active domestic disturbance, law enforcement recovered, among other things, a loaded handgun, and defendant was subsequently charged in an indictment with criminal possession of a weapon in the second degree and criminal mischief in the fourth degree. Following pretrial motion practice, defendant pleaded guilty to attempted criminal possession of a weapon in the second degree pursuant to a negotiated disposition that required defendant to waive his right to appeal both orally and in writing in exchange for a prison sentence of five years, to be followed by five years of postrelease supervision. At the plea colloquy, defendant was given *Parker* warnings and told that if he failed to cooperate with the Probation Department or failed to appear for sentencing, County Court was not bound by the plea agreement and could sentence defendant up to seven years in prison. Thereafter, defendant failed to appear for the presentence investigation and failed to appear for the original sentencing date, prompting County Court to issue a bench warrant in September 2021 based upon defendant's persistent willful failure to appear or respond to communications. In August 2022, defendant appeared after being arrested on the bench warrant, and he was remanded pending the presentence investigation. At sentencing in November 2022, defendant did not dispute that he violated the *Parker* warnings and acknowledged that County Court was no longer bound by the terms of the plea agreement. The court then imposed upon defendant, as a second felony offender, an enhanced sentence of seven years in prison, to be followed by five years of postrelease supervision. Defendant appeals.

We affirm. "Although the written waiver of appeal utilized in this matter indeed was overbroad, County Court's oral colloquy, wherein the court expressly delineated the appellate issues that would survive the waiver, was sufficient to overcome the deficiencies in the written waiver and to ensure that defendant understood that some appellate review survived" (*People v Williams*, 235 AD3d 1066, 1067 [3d Dept 2025] [citations omitted]). Accordingly, we are satisfied that defendant knowingly, intelligently and voluntarily waived his right to appeal. Inasmuch as defendant was advised of the consequences of failing to cooperate with the Probation Department and/or appear for sentencing, the valid appeal waiver precludes any challenge to the perceived severity of the enhanced sentence that was imposed (*see People v Sutton*, 237 AD3d 1317, 1318 [3d Dept 2025]; *People v Drennen*, 236 AD3d 1245, 1247 [3d Dept 2025], *lv denied* 43 NY3d 1045 [2025]; *People v Middlemiss*, 236 AD3d 1198, 1199 [3d Dept 2025]). Defendant's

claim that he was denied the effective assistance of counsel due to counsel's decision to not oppose the imposition of an enhanced sentence* is also precluded by the unchallenged appeal waiver (see *People v El-Begearmi*, 236 AD3d 1203, 1203 [3d Dept 2025]; *People v Gayle*, 221 AD3d 1061, 1063 [3d Dept 2023], *lv denied* 41 NY3d 1002 [2024]) and also unpreserved for our review (see *People v Gonzalez*, 234 AD3d 1186, 1187 [3d Dept 2025]; *People v Vivona*, 199 AD3d 1165, 1166-1167 [3d Dept 2021]; cf. *People v Howard*, 231 AD3d 1202, 1205 [3d Dept 2024]). "Nevertheless, inasmuch as defendant's contention implicates the motives of counsel that fall outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440" (*People v El-Begearmi*, 236 AD3d at 1204 [internal quotation marks, brackets and citations omitted]).

"To the extent that defendant challenges the sufficiency of the indictment itself, we find that defendant forfeited this claim by pleading guilty" (*People v Brown*, 75 AD3d 655, 656 [3d Dept 2010]; see *People v Tamaro*, 155 AD3d 473, 474 [1st Dept 2017], *lv denied* 30 NY3d 1109 [2018]; *People v Brice*, 146 AD3d 1152, 1154 [3d Dept 2017], *lv denied* 29 NY3d 996 [2017]). Although a defendant's guilty plea does not waive jurisdictional defects in an indictment (see *People v Guerrero*, 28 NY3d 110, 115-116 [2016]; *People v Iannone*, 45 NY2d 589, 600 [1978]; *People v Turner*, 202 AD3d 1375, 1375-1376 [2022], *lv denied* 38 NY3d 1036 [2022]), an indictment is jurisdictionally defective only if the acts alleged to have been performed by the defendant do not constitute an actual crime (see *People v Brabant*, 229 AD3d 892, 896 [3d Dept 2024]; *People v Brown*, 75 AD3d at 656). "To that end, where an indictment count incorporates by reference the statutory provision applicable to the crime intended to be charged, it has been repeatedly held that this is sufficient to apprise the defendant of the charge and, therefore, renders the count jurisdictionally valid" (*People v Brown*, 75 AD3d at 656 [internal quotation marks and citations omitted]; accord *People v Henry*, 237 AD3d 1258, 1259 [3d Dept 2025], *lv denied* 44 NY3d 982 [2025]). As the indictment here specified the provisions of the Penal Law under which defendant was charged—as well as the time and place of the crime and conduct of which defendant was accused—we also cannot say that the indictment was jurisdictionally defective (see Penal Law §§ 145.00 [1]; 265.03 [3]; *People v Hooker*, 230 AD3d 1465, 1467 [3d Dept 2024]; *People v Brabant*, 229

* At sentencing, counsel agreed that County Court had the discretion to impose an enhanced sentence but did advocate that a "lesser enhancement might be appropriate under the facts of this case."

AD3d at 896). Contrary to defendant's argument, a person can criminally attempt to possess a weapon (*see People v Saunders*, 85 NY2d 339, 341 [1995]; *People v Downs*, 26 AD3d 525, 526 [3d Dept 2006], *lv denied* 6 NY3d 847 [2006]; *see also People v Boyd*, 153 AD3d 1608, 1609 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018]), and, even if that were not the case as defendant avers here, "a defendant may plead guilty to a nonexistent crime in satisfaction of an indictment charging a crime for which a greater penalty may be imposed" (*People v Downs*, 26 AD3d at 526 [internal quotation marks and citation omitted]). To the extent that we have not discussed any of defendant's remaining contentions, they have been found to be without merit.

Clark, J.P., Pritzker, McShan and Powers, JJ., concur. Ordered that the judgment is affirmed.

8 The People of the State of New York, Respondent, v Jake B. Sweeney, Appellant. [250 NYS3d 295]—

Crimes—Arraignment—Validity

Crimes—Appeal—Waiver—Validity—Court's Oral Colloquy Cured Overly Broad Language in Written Waiver

Mackey, J. Appeal from a judgment of the County Court of Saratoga County (James Murphy III, J.), rendered October 12, 2023, convicting defendant upon his plea of guilty of the crime of criminal possession of a weapon in the second degree.

In March 2020, defendant appeared before County Court on charges related to his alleged illegal possession of a loaded handgun. During this initial appearance, in full satisfaction of a 10-count indictment, defendant pleaded guilty to criminal possession of a weapon in the second degree, admitting that he knowingly possessed a loaded and operable firearm away from his home or place of business. Pursuant to the plea agreement, which required that he waive his right to appeal, defendant was promised a prison sentence of 4½ years, to be followed by a period of postrelease supervision not exceeding five years. Defendant was given *Parker* warnings and released on bail, but he failed to appear for his sentencing. A bench warrant was issued for defendant's arrest and, once in custody, defendant appeared before County Court in August 2023 and was remanded. In October 2023, defendant agreed to an enhanced prison sentence of 5½ years, to be followed by a period of post-release supervision not exceeding five years, in lieu of an *Outley* hearing. County Court thereafter imposed the agreed-upon sentence of 5½ years, to be followed by five years of postrelease supervision. Defendant appeals.

We affirm. We find no merit in defendant's argument that County Court failed to obtain personal jurisdiction over him by failing to meet the statutory requirements of a valid arraignment. Defendant was present at the arraignment and represented by counsel, who acknowledged receipt of the indictment and waived a formal reading of the same. Accordingly, the statutory requirements for a valid arraignment, which do not include that defendant enter a plea, were met (*see* CPL 1.20 [9], [10]; 210.15; *People v Brooks*, 118 AD3d 1123, 1123 [3d Dept 2014], *lv denied* 24 NY3d 959 [2014]; *People v Oakley*, 112 AD3d 1064, 1064 [3d Dept 2013], *lv denied* 22 NY3d 1140 [2014]; *see also* *People v Cook*, 134 AD3d 1241, 1242-1243 [3d Dept 2015], *lv denied* 26 NY3d 1143 [2016]).* Furthermore, "a failure to arraign does not prejudice the rights of a defendant who pleads guilty" (*People v Roberts*, 6 AD3d 942, 943 [3d Dept 2004], *lv denied* 3 NY3d 662 [2004]) and "defendant submitted to the court's jurisdiction through his subsequent appearances and his guilty plea" (*People v Tiul-Putul*, 211 AD3d 1184, 1185 [3d Dept 2022]; *see* *People v Luckerson*, 135 AD3d 1186, 1187 [3d Dept 2016]; *see also* *People v Miller*, 27 AD3d 1017, 1017-1018 [3d Dept 2006]).

Turning to defendant's remaining arguments, we disagree with defendant's assertion that the waiver of his right to appeal is invalid. We find this written waiver contains overbroad and inaccurate language. However, using language similar to that of the model colloquy, County Court advised defendant of the separate and distinct nature of the waiver of the right to appeal and that appellate review remained available for certain issues that survived the waiver, providing specific examples of nonwaivable issues (*see* *People v Thomas*, 34 NY3d 545, 564 [2019]; *People v Martin*, 243 AD3d 968, 970 [3d Dept 2025]; *People v Lesson*, 241 AD3d 1051, 1055 [3d Dept 2025], *lv denied* 44 NY3d 1028 [2025]; *People v Murauskas*, 240 AD3d 1007, 1008 [3d Dept 2025], *lv denied* 43 NY3d 1057 [2025]; *compare* *People v Buchas*, 226 AD3d 1217, 1218 [3d Dept 2024]). The court further determined that defendant understood that not all appellate issues were foreclosed, and defendant confirmed he had discussed the waiver and his appellate rights with defense counsel, his questions had been answered, he had no further questions of the court and he understood his appellate rights and the consequences of the waiver (*see* *People v Thomas*,

* "Under the CPL 'arraignment' does not include entry of a plea: it is the occasion upon which the defendant is apprised of the charge, advised of his or her rights and submits to the control of the court" (Peter Preiser, *Prac Commentaries*, McKinney's Cons Laws of NY, CPL 170.10 [citation omitted]).

34 NY3d at 560; *People v Lesson*, 241 AD3d at 1055; *People v Murauskas*, 240 AD3d at 1008; compare *People v Guilianelle*, 233 AD3d 1179, 1180 [3d Dept 2024], *lv denied* 43 NY3d 1009 [2025]). Thus, despite the overly broad language in the written waiver, the court's oral colloquy cured this defect by ensuring that defendant understood that some appellate review survived, and we find the record is sufficient to demonstrate that defendant knowingly, voluntarily and intelligently waived his right to appeal (see *People v Thomas*, 34 NY3d at 559-560; *People v Sealey*, 234 AD3d 1184, 1185 [3d Dept 2025]; *People v Smith*, 232 AD3d 942, 942-943 [3d Dept 2024]). Accordingly, the valid appeal waiver precludes defendant's challenge to the severity of his sentence (see *People v Sutton*, 237 AD3d 1317, 1318 [3d Dept 2025]; *People v Williams*, 235 AD3d 1066, 1067 [3d Dept 2025]; *People v Patterson*, 228 AD3d 1138, 1139 [3d Dept 2024]).

Garry, P.J., Ceresia, Fisher and McShan, JJ., concur. Ordered that the judgment is affirmed.

9 In the Matter of the Claim of Than Moe, Claimant, v America Ootoya Chelsea et al., Appellants. Workers' Compensation Board, Respondent. [251 NYS3d 419]—

Workers' Compensation—Occupational Disease—Causal Relation—Notice of Controversy Not Timely Filed—No Showing of Good Cause for Delay

Workers' Compensation—Occupational Disease—Causal Relation—Denial of Carrier's Request for Adjournment of Deposition of Claimant's Treating Physician—No-Adjournment Rule for Expedited Hearings

Aarons, J.P. Appeals from a decision and an amended decision of the Workers' Compensation Board, filed April 16, 2024, and August 28, 2024, which, among other things, ruled that claimant sustained a causally-related occupational disease.

In December 2022, claimant submitted a workers' compensation claim asserting that she had sustained injuries to both her elbows resulting from her employment duties as a line cook. The Workers' Compensation Board assembled the claim and, on January 23, 2023, sent a notice that the claim was indexed to the parties of interest, including to the employer's workers' compensation carrier at the address on file with the Board. On February 28, 2023, claimant's counsel submitted a request for further action, seeking a hearing on the establishment of the occupational disease claim, noting that no timely notice of controversy had been filed by the carrier accepting or denying the claim. Following the imposition of a monetary penalty against the carrier for failing to timely file a notice of controversy, the carrier, on April 20, 2023, filed a notice of controversy denying the claim and asserting various defenses. On May 26, 2023, the carrier submitted its prehearing confer-

ence statement and attached a letter requesting that its notice of controversy be deemed timely, asserting that it never received the notice of indexing and only became aware of the claim in April 2023.

By decision filed June 13, 2023, the Workers' Compensation Law Judge (hereinafter WCLJ) found that the carrier filed the notice of controversy beyond the 25 days of the mailing of the notice that the matter had been indexed as required by Workers' Compensation Law § 25 (2) (b) and, finding no good cause for the delay, denied the carrier's request to deem the late notice of controversy timely. Accordingly, the carrier was barred from pleading that no employer-employee relationship existed, that no accident occurred and that there was no injury arising out of and in the course of the employment. In addition, the WCLJ noted that the matter was designated for transfer to the special part for expediated hearings and directed that the deposition of claimant's treating physician be filed prior to August 1, 2023. The carrier sought administrative review of that part of the WCLJ's decision denying its request to deem the late notice of controversy timely.

At the next scheduled hearing in July 2023, and at which claimant testified, the carrier sought an extension of time to depose claimant's treating physician based upon its pending administrative appeal. The WCLJ, in a decision filed July 21, 2023, denied the carrier's request to extend the deposition schedule pending resolution of the administrative appeal from the June 13, 2023 decision. The carrier then sought administrative review of the July 21, 2023 decision. Thereafter, by decision filed September 18, 2023, the WCLJ established the claim for an occupational disease for bilateral elbow injuries based upon claimant's testimony and the medical report submitted by claimant's treating physician. From that decision, a third administrative appeal by the carrier ensued.

In a decision filed April 16, 2024, the Board affirmed the WCLJ's June 13, 2023, July 21, 2023, and September 18, 2023 decisions. Subsequently, the Board, in a decision filed August 28, 2024, amended its prior decision by clarifying and correcting some information but otherwise affirmed. The carrier appeals from both Board decisions.

Initially, we are unpersuaded that the Board misapplied Workers' Compensation Law § 25 (2) (b) in finding the notice of controversy to be untimely. The statute provides, in relevant part, that "[f]ailure to file the notice of controversy within the prescribed [25-]day time limit [from the date of mailing of a notice that the case has been indexed] shall bar the employer and

its insurance carrier from pleading that the injured person was not at the time of the accident an employee of the employer, or that the employee did not sustain an accidental injury, or that the injury did not arise out of and in the course of the employment” (Workers’ Compensation Law § 25 [2] [b]). The record reflects that the notice of controversy was filed on April 20, 2023—87 days past the date that the notice of indexing was sent to the carrier on January 23, 2023. It was not until May 26, 2023, that the carrier requested in a letter attached to its prehearing conference statement that the notice of controversy be deemed timely. Although the carrier asserted that it did not receive the notice of indexing, the record reflects that such notice was mailed to the carrier’s address on file with the Board, there was no assertion that such address was incorrect and numerous other documents had also been sent to the carrier at that correct address. Given the belated request to excuse the delay in filing the notice of controversy, and there being no showing of good cause to excuse such failure, we find no error in the Board denying the carrier’s request to deem the notice of controversy timely filed (*see* Workers’ Compensation Law § 25 [2] [b]; *Matter of Cappellino v Baumann & Sons Bus Co.*, 18 NY3d 890, 891-892 [2012]). As such, and contrary to the carrier’s contention, the carrier was properly precluded from disputing claimant’s evidence on the issue of causation (*see Matter of Cappellino v Baumann & Sons Bus Co.*, 18 NY3d at 891-892; *see also* Workers’ Compensation Law § 25 [2] [b]).

We also find no error in the Board denying the carrier’s request for an adjournment of the deposition of claimant’s treating physician. The record reflects that the matter was scheduled on the expedited hearing process. Pursuant to the Board’s regulations, a matter transferred to the special expedited hearing process shall only be adjourned “in an emergency” (12 NYCRR 300.38 [j] [1]), which is a “serious event” that “includes death in the family, serious illness, significant prior professional or business commitment, and inclement weather that prevents travel[, and] does not include any event that can be prevented or mitigated by the timely taking of reasonable action” (12 NYCRR 300.38 [j] [5]; *see* 12 NYCRR 300.34 [f] [1]). The carrier’s adjournment request was premised on its pending administrative appeal challenging the WCLJ’s June 13, 2023 decision, which does not fall within the emergency exceptions to the no-adjournment rule for expedited hearings (*see* 12 NYCRR 300.38 [j] [5]). As such, the Board’s denial of the adjournment request will not be disturbed (*see Matter of Maffei v Russin Lbr. Corp.*, 146 AD3d 1207, 1208-1209 [3d Dept 2017]).

To the extent that the carrier challenges the establishment of the claim, a review of claimant's testimony regarding her employment history and onset of bilateral elbow pain, together with the medical report and opinion of her treating physician, provide substantial evidence to support the Board's finding that claimant demonstrated a causal relationship between her condition and a distinctive feature of her employment so as to establish a claim for an occupational disease (*see Matter of Brancato v New York City Tr. Auth.*, 206 AD3d 1418, 1418-1419 [3d Dept 2022]; *Matter of Bigdoski v Bausch & Lomb*, 197 AD3d 1379, 1380 [3d Dept 2021]). The carrier's remaining contentions, to the extent not explicitly addressed, are without merit.

Pritzker, Ceresia, Powers and Mackey, JJ., concur. Ordered that the decision and amended decision are affirmed, without costs.

10 In the Matter of the Claim of Daphne Paron, Respondent. Bilingual Birdies LLC, Appellant. Commissioner of Labor, Respondent. [250 NYS3d 703]—

Unemployment Insurance—Contributions—Existence of Employment Relationship—Substantial Evidence—Employer Exercised Overall Control over Important Aspects of Services Performed by Teaching Professional

Garry, P.J. Appeal from a decision of the Unemployment Insurance Appeal Board, filed December 20, 2023, which ruled that Bilingual Birdies LLC was liable for unemployment insurance contributions on remuneration paid to claimant and others similarly situated.

Bilingual Birdies LLC (hereinafter BB) provides foreign language instruction to preschool children through music, movement and puppetry via a database of trained instructors. Claimant entered into an agreement with BB in January 2019 to be a French language instructor. After claimant stopped being an instructor in August 2019, she applied for unemployment insurance benefits. The Department of Labor issued an initial determination finding that claimant was an employee of BB for purposes of unemployment insurance benefits and that BB was responsible for unemployment insurance contributions on remuneration paid to claimant and others similarly situated, effective the first quarter of 2019. BB objected, and, following a hearing, an Administrative Law Judge sustained the Department's determination. Upon administrative appeal, the Unemployment Insurance Appeal Board affirmed, and BB appeals.

We affirm. "Whether an employment relationship exists within the meaning of the unemployment insurance law is a

question of fact, no one factor is determinative and the determination of the Board, if supported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record that would have supported a contrary conclusion” (*Matter of Perez [Columbus Mgt. Sys., Inc.—Commissioner of Labor]*, 211 AD3d 1261, 1261 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Matter of Gisser [iTutor.com, Inc.—Commissioner of Labor]*, 211 AD3d 1258, 1258 [3d Dept 2022], *lv dismissed* 39 NY3d 1128 [2023]). “Substantial evidence is a minimal standard requiring less than a preponderance of the evidence. As such, if the evidence reasonably supports the Board’s choice, we may not interpose our judgment to reach a contrary conclusion” (*Matter of Vega [Postmates Inc.—Commissioner of Labor]*, 35 NY3d 131, 136-137 [2020] [internal quotation marks, brackets and citations omitted]; accord *Matter of McIntyre [Northeast Logistics, Inc.—Commissioner of Labor]*, 213 AD3d 1003, 1004 [3d Dept 2023]). “Additionally, the evaluation of evidence and the inferences to be drawn therefrom are within the exclusive province of the Board, and the Board is the final arbiter of witness credibility” (*Matter of Hosang [Crystal Cargo Inc.—Commissioner of Labor]*, 202 AD3d 1241, 1242 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Matter of Ito [International Business Promotion, Inc.—Commissioner of Labor]*, 234 AD3d 1215, 1218 [3d Dept 2025]). “ ‘[W]here, as here, the services of teaching professionals are involved, the pertinent inquiry is whether the purported employer retains overall control of important aspects of the services performed’ ” (*Matter of Pearson [Town Hall Found., Inc.—Commissioner of Labor]*, 167 AD3d 1178, 1179 [3d Dept 2018], quoting *Matter of Strauss [RMC Research Corp.—Commissioner of Labor]*, 135 AD3d 1268, 1269 [3d Dept 2016]).

The record establishes that claimant responded to an advertisement for instructors posted by BB on Craigslist by submitting a resume. BB then conducted an interview with claimant, and the parties entered a written agreement that included claimant’s rate of pay, as well as nonsolicitation and noncompete clauses. Claimant received paid training regarding BB’s “best practices,” including videos on how to teach, and she was provided BB’s curriculum that she was required to learn and apply in the classroom. BB also provided claimant with audio files, songs and lyrics, as well as a puppet and other props to use as part of the lessons. Claimant was required to learn the songs and teach a mock class where she was given feedback from BB representatives and fellow instructors prior to conducting a class on her own. Once hired, instructors would

provide their instruction at schools that contracted with BB. On one occasion, BB sent a representative to claimant's classroom to observe her methods. BB would email the instructors at an email address provided by BB with offers to teach that would include the school, the address where to report, who to contact at the school, the weekly schedule and the rate of pay. The instructors were then free to accept or reject the offers and could negotiate for a higher rate of pay. Claimant was required to report her hours worked on a Google spreadsheet in order to get paid. BB would bill the school based on the hours reported but would pay the instructors even if the school had not paid BB. Despite evidence that could support a contrary result, the foregoing constitutes substantial evidence supporting the Board's decision that BB "exercised overall control over important aspects of the services performed by . . . claimant" sufficient to establish an employment relationship (see *Matter of Colon [Geneva Worldwide Inc.—Commissioner of Labor]*, 222 AD3d 1141, 1143 [3d Dept 2023], *lv dismissed* 42 NY3d 966 [2024]; *Matter of Pearson [Town Hall Found., Inc.—Commissioner of Labor]*, 167 AD3d at 1179; *Matter of Piano School of N.Y. City [Commissioner of Labor]*, 71 AD3d 1358, 1359 [3d Dept 2010]).

Clark, Pritzker, Powers and Corcoran, JJ., concur. Ordered that the decision is affirmed, without costs.

11 In the Matter of the Claim of John Foster, Claimant, v Monadnock Construction Inc. et al., Appellants. Workers' Compensation Board, Respondent. [248 NYS3d 372]—

Workers' Compensation—Limitation of Right to Compensation—Timeliness of Claim—Board Received Sufficient Notice

Mackey, J. Appeal from a decision of the Workers' Compensation Board, filed August 27, 2024, which ruled that claimant's claim was not barred by Workers' Compensation Law § 28.

Claimant, a laborer, was injured on the job in May 2020 when a ladder struck him in the face. The Workers' Compensation Board was notified of the injury several days later and, as the employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) accepted liability for claimant's facial injuries, no further action was taken. There matters stood until the spring of 2023, when claimant's physicians sought authorization for various medications and treatment to tackle what they diagnosed as a traumatic brain injury, postconcussion syndrome, cognitive deficits and headaches that were causally linked to the injuries he sustained in the 2020 accident. The carrier declined to accept liability for those condi-

tions, prompting claimant to file a claim for workers' compensation benefits in June 2023. The carrier argued in response that, even accepting that the new conditions were related to the 2020 accident, the claim for benefits relating to them was barred by the two-year limitations period set forth in Workers' Compensation Law § 28. Following further proceedings, the Board disagreed. The carrier appeals.

We affirm. The relevant portion of Workers' Compensation Law § 28 provides that "[t]he right to claim compensation . . . shall be barred . . . unless within two years after the accident . . . a claim for" workers' compensation benefits is filed with the Board (*see Matter of Garcia v WTC Volunteer*, 45 NY3d 141, 143-144 [2025]; *Matter of Davenport v Oxford Cent. Sch. Dist.*, 236 AD3d 1264, 1266 [3d Dept 2025]). The filing of a claim is not necessarily measured from the date the injured employee submits a claim form; rather, a claim is deemed filed at the point that the "claim form or other documents are sufficient to provide the Board with the facts of the injury from which it might be reasonably inferred that a claim for compensation was being made" (*Matter of Perry v DOCCS Clinton Corr. Facility*, 218 AD3d 973, 974 [3d Dept 2023] [internal quotation marks and citations omitted]; *see Matter of Davenport v Oxford Cent. Sch. Dist.*, 236 AD3d at 1267). The question of whether a claim was filed in a timely manner is a factual one for the Board to resolve, and its determination will not be disturbed if supported by substantial evidence in the record as a whole (*see Matter of Davenport v Oxford Cent. Sch. Dist.*, 236 AD3d at 1267; *Matter of Cotterell v Trinity Health Corp.*, 209 AD3d 1071, 1071 [3d Dept 2022]).

Here, although claimant did not file a claim or seek indemnity benefits in the wake of the 2020 accident, the Board was promptly notified that the accident had occurred and that the carrier had accepted liability for the injuries claimant sustained in it. The Board was further provided in November 2020 with the medical records from claimant's treatment at a hospital emergency department in the hours after the accident, and those records documented how claimant had not only sustained lacerations on his left cheek, a facial contusion and a large hematoma with swelling around his left eye, but had also complained to treatment providers of having been lightheaded after he was struck by the ladder and of experiencing pain that was radiating through his head. The records also indicated how claimant was kept under observation in the emergency department and underwent a CT scan with contrast to assess the extent of trauma to his jaw and face.

Notwithstanding the carrier's arguments to the contrary, the foregoing proof constitutes substantial evidence to "support[] the Board's decision that it received sufficient notice of a claim for compensation within two years of the alleged accident" (*Matter of Davenport v Oxford Cent. Sch. Dist.*, 236 AD3d at 1267; see *Matter of Cotterell v Trinity Health Corp.*, 209 AD3d at 1072; *Matter of McCutcheon v Public Serv. Dept.*, 290 AD2d 679, 680 [3d Dept 2002]). As the Board noted, the timeliness of that claim would not be impacted if claimant ultimately demonstrated that the alleged conditions for which he sought treatment in 2023 arose out of his initial injuries, as "the two-year time limit set forth in Workers' Compensation Law § 28 does not bar amendment of the timely claim to include" consequential injuries (*Matter of Palevsky v New York City Bd. of Educ.*, 246 AD2d 836, 837 [3d Dept 1998], *lv dismissed* 92 NY2d 876 [1998], *lv denied* 93 NY2d 818 [1999]; see *Matter of Traver v Rickard Constr. Co.*, 286 AD2d 808, 809 [3d Dept 2001]). To the extent that they are not addressed by the foregoing, the carrier's arguments have been examined and are lacking in merit.

Garry, P.J., Ceresia, Fisher and McShan, JJ., concur. Ordered that the decision is affirmed, without costs.

12 In the Matter of Douglas Hoyt, Appellant, v Juan Figueroa, as Sheriff of Ulster County, et al., Respondents. [251 NYS3d 416]—

Appeal—Academic and Moot Questions—Sheriff's Return of Surrendered Handguns upon Restoration of Petitioner's Concealed Carry Pistol License—Declaration of Lawfulness of Refusal to Return Handguns No Longer Possessed Would Not Result in Immediate and Practical Consequences to Parties Appeal—Academic and Moot Questions—Exception to Mootness Doctrine Not Applicable

Aarons, J. Appeal from a judgment of the Supreme Court (David Gandin, J.), entered September 3, 2024, in Ulster County, which dismissed petitioner's application, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, to, among other things, review respondents' determination denying petitioner's request for return of certain firearms that had been surrendered to respondents.

Nonparty Karen Frolish, petitioner's wife, obtained a concealed carry pistol license in 2016, at which time the law required her to recertify her license every five years (see Penal Law § 400.00 [former (10) (b)]). Frolish recertified her license in January 2021, and so, under then-existing law, her next recertification was due in January 2026. In 2022, however, the Concealed Carry Improvement Act (see L 2022, ch 371) was

enacted, which had the effect of changing her recertification period to three years (*see* Penal Law § 400.00 [10] [d]), thereby moving up her recertification due date to January 2024. Frolish did not recertify by that date, and thus her license was revoked by operation of law (*see* Penal Law § 400.00 [10] [b]).

In early 2024, Frolish applied to amend her license by adding a handgun. Supreme Court (A. McGinty, J.), acting as pistol licensing officer, denied her amendment application in a March 2024 “Decision and Order” (hereinafter the surrender order) because her license had been revoked when she missed her recertification due date. The court also ordered Frolish to surrender all weapons on her pistol permit to respondent Juan Figueroa, as Ulster County Sherriff, and authorized the sheriff to seize those weapons if Frolish did not promptly surrender them. Petitioner attempted to avert the surrender of the handguns to the sheriff by appearing at the sheriff’s office with his valid pistol license and proof of co-ownership. Petitioner was accompanied by a federal firearms licensee (hereinafter FFL), and petitioner requested that the FFL take possession of the handguns registered to Frolish. Respondent Tim McGuire, a deputy sheriff, refused the request, citing sheriff’s office policy, and Frolish surrendered her handguns two days later as scheduled.

In May 2024, petitioner commenced this combined CPLR article 78 proceeding and declaratory judgment action, seeking to compel respondents to release the handguns to him and/or to an FFL, and to obtain a judicial declaration that respondents have no legal authority to withhold the handguns. Respondents joined issue, after which Supreme Court (Gandin, J.) dismissed the petition/complaint, concluding that petitioner had no clearly established legal right to an order compelling respondents to release the handguns, and declining to entertain the declaratory judgment action because petitioner had an adequate remedy in challenging the surrender order in a CPLR article 78 proceeding against the issuing justice. Petitioner appeals.

We have been advised that the handguns have been returned upon restoration of Frolish’s pistol license. “As a general principle, courts are precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances” (*Matter of Kern v Adirondack Park Agency*, 223 AD3d 990, 991 [3d Dept 2024] [internal quotation marks and citations omitted]). In this connection, “an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal

and the interest of the parties is an immediate consequence of the order” (*Matter of Association of Motor Veh. Trial Attorneys, Inc. v New York State Dept. of Motor Vehs.*, 223 AD3d 948, 949 [3d Dept 2024] [internal quotation marks and citations omitted]). Although petitioner asserts the declaratory judgment action remains justiciable, declaring the lawfulness of respondents’ refusal to return handguns they no longer possess would not “result in immediate and practical consequences to the parties” (*Coleman v Daines*, 19 NY3d 1087, 1090 [2012]).

Petitioner contends that the exception to the mootness doctrine applies with respect to whether a sheriff in possession of handguns surrendered for safekeeping by a licensee has any legal authority to refuse the request of a lawful co-owner for the release of those handguns to the co-owner or an FFL. Invocation of the mootness exception requires a three-part showing: “the issue to be decided, though moot, (1) is likely to recur, either between the parties or other members of the public, (2) is substantial and novel, and (3) will typically evade review in the courts” (*Matter of Correction Officers Benevolent Assn., Inc. v Poole*, 188 AD3d 1525, 1529 [3d Dept 2020] [internal quotation marks and citations omitted]). Even assuming the identified issue is likely to recur, the second and third requirements are not met in view of the authorities defining, or that are premised upon, a sheriff’s duty in connection with surrendered firearms (*see* Penal Law §§ 265.00 [3] [a]; 265.20 [a] [1] [f]; 400.05 [6]; *Maio v Kralik*, 70 AD3d 1, 9 [2d Dept 2009]; *Razzano v County of Nassau*, 73 Misc 3d 42, 44-45 [App Term, 2d Dept, 9th & 10th Jud Dists 2021]; *see also* County Law § 650 [1]; General Construction Law § 28-a; *Mallard v Potenza*, 376 Fed Appx 132, 134 [2d Cir 2010], *cert denied* 562 US 1071 [2010]). Accordingly, the appeal must be dismissed as moot. The arguments remaining in petitioner’s supplemental briefing have been reviewed and are deemed meritless.

Garry, P.J., Clark, McShan and Mackey, JJ., concur. Ordered that the appeal is dismissed, as moot, without costs.

13 In the Matter of Kevin Downey, Petitioner, v Thomas P. DiNapoli, as State Comptroller, Respondent. [250 NYS3d 706]—

Civil Service—Retirement and Pension Benefits—Performance of Duty Disability Retirement—Conflicting Medical Evidence—Failure of Police Sergeant to Demonstrate That Permanent Incapacity was Natural and Proximate Result of Pursuit of Suspect Incident

Fisher, J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent denying petitioner’s application for performance of duty disability retirement benefits.

Petitioner, a police sergeant, filed an application for performance of duty disability retirement benefits in May 2014, alleging that he was permanently incapacitated therefrom due to injuries sustained during an incident that occurred in July 2007. Regarding the incident, petitioner alleged that during a foot pursuit of a suspect through a wooded area, he was struck in the left eye by a tree branch. Petitioner was initially treated at the scene for an injury to his left eye before going to the emergency room that same night, and he was cleared to return to full duty three days later. Petitioner ultimately retired in March 2014 and filed the instant application. The New York State and Local Police and Fire Retirement System conceded that petitioner was permanently incapacitated and could not perform his duties but denied the application, finding that his disability was not the natural and proximate result of an incident sustained in the service upon which his membership was based. Petitioner requested a hearing and redetermination, during which petitioner, his treating physician and the physician who evaluated petitioner at the request of the Retirement System appeared and testified. At the conclusion of the hearing, the Hearing Officer upheld the denial, finding that petitioner failed to demonstrate that his permanent incapacity was the natural and proximate result of the July 2007 incident. Respondent accepted the Hearing Officer's findings and conclusions, prompting this CPLR article 78 proceeding.

We confirm. "In order to be entitled to performance of duty disability retirement benefits, petitioner bore the burden of demonstrating that he was incapacitated from the performance of duty as the natural and proximate result of a disability sustained in service" (*Matter of Harder v DiNapoli*, 213 AD3d 1101, 1102 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Matter of Bucci v DiNapoli*, 211 AD3d 1191, 1192 [3d Dept 2022]). "Where, as here, there is conflicting medical evidence, respondent is vested with the exclusive authority to weigh such evidence and credit the opinion of one medical expert over another" (*Matter of Mozdziak v DiNapoli*, 231 AD3d 1215, 1216 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]). "Our review of respondent's determination is limited to ascertaining whether it is supported by substantial evidence" (*Matter of Stefanik v Gardner*, 236 AD3d 75, 78 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]; see *Matter of Clarke v DiNapoli*, 187 AD3d 1286, 1287 [3d Dept 2020]).

The medical evidence presented in this case included testimony and medical records from Liviu Saimovici, an oph-

thalmologist and treating physician for petitioner. Saimovici, who examined petitioner in February 2014 and October 2015, testified that upon his initial examination, petitioner's left eye was measured with and without correction at 20/40. He opined that, although petitioner had been diagnosed by a previous treating physician with central serous retinopathy (hereinafter CSR), a condition which results in "a collection of fluid" in the macula, petitioner instead suffered from a macular scar as the result of "macular damage in his left eye" that appeared like a "scratch" in his left retina. Notably, Saimovici stated that fluid in the macula related to CSR "could become a scar" in rare circumstances. Saimovici further opined that the damage was caused by the "blunt trauma" from petitioner's July 2007 incident and that, in his medical opinion, the damage to the retina caused "swelling" and petitioner subsequently developed "the scar which is impairing his vision." Notably, Saimovici agreed that other possible causes of macular damage to petitioner's left eye included "macular degeneration, diabetic retinopathy, and in extremely rare cases, [CSR]."

On behalf of the Retirement System, Gary Turer, a board-certified ophthalmologist, conducted a medical examination of petitioner in January 2017, reviewed his medical records and the work requirements of a police sergeant and issued a report regarding his examination. Upon his examination, petitioner's left eye was measured at an uncorrected visual acuity of 20/80 and a best corrected visual acuity of 20/60. Turer noted that petitioner had previously been diagnosed with a chronic form of CSR and that the "diminished vision in his left eye is due to a macular lesion." He opined that petitioner was permanently disabled and unable to perform the duties of a police sergeant. However, Turer attributed the macular lesion to the "sequelae of [CSR]" and further noted that although "there have been cases of CSR that have been caused by trauma, it is considered a rare cause of this condition." Turer opined that, based upon a documented left eye visual acuity of 20/20 found in petitioner's medical records dated May 2014, nearly seven years after sustaining trauma to the eye, the July 2007 incident was not the "competent producing cause" of petitioner's eye condition, and his disability was accordingly not the natural and proximate result of his job duties.

The conflicting medical evidence presented a credibility issue for respondent to resolve, and the testimony of petitioner's treating physician was not entitled to any greater weight (*see Matter of Stancarone v DiNapoli*, 219 AD3d 1649, 1651 [3d Dept 2023]; *Matter of Clarke v DiNapoli*, 187 AD3d at 1288;

Matter of Solarino v DiNapoli, 171 AD3d 1434, 1437 [3d Dept 2019]). Here, the Hearing Officer specifically credited the opinion of respondent's expert over petitioner's treating physician, finding that competent medical evidence supported that the July 2007 incident "was not the cause of [petitioner's] disability." "Inasmuch as the opinion of the Retirement System's expert was a rational fact-based opinion formed upon a physical examination of petitioner and a review of pertinent medical records, respondent was free to credit such opinion over that of petitioner's treating physician" (*Matter of Mozdziak v DiNapoli*, 231 AD3d at 1217 [internal quotation marks and citations omitted]; see *Matter of Solarino v DiNapoli*, 171 AD3d at 1437; *Matter of Ashley v DiNapoli*, 97 AD3d 1057, 1059-1060 [3d Dept 2012]; *Matter of Space v DiNapoli*, 96 AD3d 1226, 1227 [3d Dept 2012]; see also *Matter of Lenci v DiNapoli*, 210 AD3d 1224, 1227 [3d Dept 2022]). Accordingly, given that the determination denying petitioner's application is supported by substantial evidence, we find no reason to disturb it.

Reynolds Fitzgerald, J.P., Ceresia, McShan and Mackey, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

14 In the Matter of the Claim of Dai Kwang Lim, Appellant. Supreme Home Care Agency of NY Inc., Respondent. Commissioner of Labor, Respondent. [250 NYS3d 292]—

Unemployment Insurance—Benefits—Ophthalmic Technician Not Totally Unemployed—Provision of Home-Care Services to Father under Medicaid/Medicare Program during Relevant Time Period

Unemployment Insurance—Benefits—Recovery of Overpayments—Claimant Made Willful Misrepresentation in Order to Obtain Benefits

McShan, J. Appeal from a decision of the Unemployment Insurance Appeal Board, filed October 22, 2024, as superseded by a decision filed March 25, 2025, which ruled, among other things, that claimant was ineligible to receive unemployment insurance benefits because he was not totally unemployed.

Claimant, a full-time ophthalmic technician who additionally provided home-care services to his father under a Medicaid/Medicare program during the relevant time period, applied for unemployment insurance benefits, effective October 2, 2023, after his employment ended with an employer due to lack of work. Based upon his online certifications attesting to the fact that he was totally unemployed during the applicable time period, claimant received regular unemployment insurance benefits from October 2, 2023, through March 24, 2024. The Department of Labor subsequently determined in an April 2024 revised determination that, among other things, claimant was

ineligible to receive unemployment insurance benefits during the at-issue time period because he was not totally unemployed due to the income that he received for providing home-care services. The Department also charged claimant with a recoverable overpayment of benefits, and, in light of a finding that claimant made willful misrepresentations in order to obtain benefits, a monetary penalty and a forfeiture of future benefit days were imposed. Claimant challenged the Department's revised determination, and, following a hearing, an Administrative Law Judge (hereinafter ALJ) upheld the denial of benefits, finding that claimant made willful false statements to obtain benefits for which he was not eligible because he was not totally unemployed. The ALJ also charged claimant with a recoverable overpayment of benefits, reduced his right to future benefits by a certain number of days and imposed a civil (monetary) penalty. Upon administrative appeal, the Unemployment Insurance Appeal Board affirmed the ALJ's decision in an October 2024 decision, from which claimant took an appeal. During the pendency of this appeal, the Board reopened its decision sua sponte pursuant to Labor Law § 534, and, upon doing so, rescinded its prior decisions in this matter and, in a March 2025 decision, issued new factual findings and again affirmed the decision of the ALJ.*

We affirm. It is well settled that “[u]nder state law, regular unemployment insurance benefits require total unemployment” (*Matter of Almindo* [New York State Dept. of Corr. & Community Supervision-Commissioner of Labor], 223 AD3d 5, 8 [3d Dept 2023], *affd sub nom. Matter of Klosterman* [New York State Dept. of Corr. & Community Supervision-Commissioner of Labor], — NY3d —, 2025 NY Slip Op 06960 [2025]; see Labor Law §§ 522, 591 [former (1)]; *Matter of Kelly* [Commissioner of Labor], 215 AD3d 1157, 1158 [3d Dept 2023]). Whether a claimant is totally unemployed and thereby eligible to receive unemployment insurance benefits is a factual issue for the Board to decide and its decision, if supported by substantial evidence, will not be disturbed (see *Matter of Svarczkopf* [Commissioner of Labor], 233 AD3d 1117, 1118 [3d Dept 2024]; *Matter of Cardella* [Commissioner of Labor], 179 AD3d 1367, 1368 [3d Dept 2020]; *Matter of Boscarino* [Commissioner of Labor], 117 AD3d 1145, 1146 [3d Dept 2014]). “Issues of witness cred-

* The merits of the March 2025 decision are reviewable on this appeal in that claimant is aggrieved by that decision in essentially the same manner as he was by the prior appealed-from decision (see *Matter of Harry's Nurses Registry, Inc.* [Commissioner of Labor], 171 AD3d 1410, 1411 [3d Dept 2019], *lv denied* 34 NY3d 907 [2020]).

ibility, the evaluation of evidence and the inferences to be drawn therefrom are within the exclusive province of the Board” (*Matter of Douglas [Commissioner of Labor]*, 217 AD3d 1311, 1312 [3d Dept 2023] [internal quotation marks, brackets and citations omitted]; accord *Matter of Martin [Commissioner of Labor]*, 228 AD3d 1201, 1202 [3d Dept 2024]).

The record here reflects that, during the at-issue time period, claimant worked four days per week at six hours per day, except for the week ending March 24, 2024, during which claimant worked three days at six hours per day. Inasmuch as claimant testified, and does not dispute, that he was paid an hourly wage for the services of care that he provided to his father during the relevant time period, we find that there is substantial evidence in support of the Board’s determination that claimant was ineligible for the benefits that he received during this time based upon the ground that he was not totally unemployed (see *Matter of Knehnetsky [Commissioner of Labor]*, 239 AD3d 1218, 1218-1219 [3d Dept 2025]; *Matter of Nottage [Commissioner of Labor]*, 234 AD3d 1163, 1165 [3d Dept 2025]; *Matter of Park [Commissioner of Labor]*, 231 AD3d 1248, 1249 [3d Dept 2024]; see also 12 NYCRR 470.2 [h]).

“Turning to the issue of willfulness, and the Board’s imposition of recoverable overpayment of benefits, it is well settled that a claimant is responsible for accurate reporting and must disclose any employment activity when certifying for unemployment insurance benefits, and there is no acceptable defense to making a false statement and a claim that the misrepresentation was unintentional is not sufficient” (*Matter of Park [Commissioner of Labor]*, 231 AD3d at 1249 [internal quotation marks and citations omitted]; see *Matter of Carmody [Commissioner of Labor]*, 228 AD3d 1203, 1205 [3d Dept 2024], *affd* — NY3d —, 2025 NY Slip Op 06963 [2025]). When claimant certified for benefits online during the time period in question, he reported zero days of work and did not report that he was being paid for providing care to his father approximately 24 hours per week (and 18 hours during the week ending March 24, 2024). Inasmuch as claimant did not disclose, when certifying for benefits, his part-time employment and compensation, there is no basis to disturb the Board’s finding that claimant made willful false statements to obtain benefits warranting the recovery of the benefits paid to him (see *Matter of Park [Commissioner of Labor]*, 231 AD3d at 1249; *Matter of Almino [New York State Dept. of Corr. & Community Supervision-Commissioner of Labor]*, 223 AD3d at 8). “Regardless of whether claimant read the [unemployment insurance] hand-

book online, he is charged with constructive knowledge of its contents” (*Matter of Arrigo [Commissioner of Labor]*, 211 AD3d 1287, 1289 [3d Dept 2022] [citation omitted]; *accord Matter of Stoddard [Farm Family Cas. Ins. Co. Corp.—Commissioner of Labor]*, 228 AD3d 1198, 1200 [3d Dept 2024]). In any event, when certifying for benefits online, claimant was made aware of the requirement that he must report all work, including part-time or temporary work, which he failed to do. The Board, as the sole arbiter of credibility, was also entitled to reject claimant’s exculpatory testimony, including his claims that his inaccurate certifications were made as a result of an inadvertent error and/or an honest mistake (*see Matter of Yura [Commissioner of Labor]*, 224 AD3d 1055, 1058 [3d Dept 2024]; *Matter of Canonico [Commissioner of Labor]*, 217 AD3d 1307, 1308 [3d Dept 2023]). Given the Board’s finding that claimant willfully made a false statement or representation to obtain benefits, there is also no basis to disturb the Board’s imposition of a monetary penalty and forfeiture of future benefit days (*see Labor Law §§ 594, 597 [4]; Matter of McNamara [Commissioner of Labor]*, 215 AD3d 1215, 1217 [3d Dept 2023]; *Matter of Spring [Syracuse City Sch. Dist.—Commissioner of Labor]*, 215 AD3d 1211, 1212 [3d Dept 2023]).

Garry, P.J., Reynolds Fitzgerald, Powers and Mackey, JJ., concur. Ordered that the March 25, 2025 decision is affirmed, without costs.

15 In the Matter of Drew James Beesley, an Attorney. (Attorney Registration No. 5470299.) [247 NYS3d 555]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Drew James Beesley was admitted to practice by this Court in 2016 and lists a business address in British Columbia, Canada with the Office of Court Administration. Beesley now seeks leave to resign from the New York bar for nondisciplinary reasons (*see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]*). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Beesley’s application.

Upon reading Beesley’s affidavit sworn to October 29, 2025, and filed January 14, 2026, and upon reading the January 28, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Beesley is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Garry, P.J., Ceresia, Fisher, Powers and Mackey, JJ., concur.

Ordered that Drew James Beesley's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Drew James Beesley's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Drew James Beesley is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Beesley is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Drew James Beesley shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

16 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Michelle Patricia Gallon, Respondent. (Attorney Registration No. 4128260.) [247 NYS3d 549]—

Attorney and Client—Reinstatement—Motion Granted

Motion by respondent for an order reinstating her to the practice of law following her suspension by May 2019 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 172 AD3d 1706, 1724 [3d Dept 2019]; *see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibits sworn to December 2, 2025, the December 22, 2025 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department and respondent's supplemental correspondence of December 26, 2025, and having determined, by clear and convincing evidence, that (1) respondent has satisfied the requirements of Rules of the Appellate Division, Third Department (22 NYCRR) § 806.16 (c) (5), (2) respondent has complied with the order of suspension and the rules of this Court, (3) respondent has the requisite character and fitness to practice law, and (4) it would be in the public interest to reinstate respondent to the practice of law (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is

granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Clark, J.P., Aarons, Pritzker, McShan and Mackey, JJ., concur.

17 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Si Li, Respondent. (Attorney Registration No. 5054093.) [247 NYS3d 557]—

Attorney and Client—Reinstatement—Motion Granted

Motion by respondent for an order reinstating her to the practice of law following her suspension by October 2021 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 198 AD3d 1068, 1080 [3d Dept 2021]; *see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's affidavit with exhibits sworn to December 24, 2024, the December 22, 2025 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department and respondent's supplemental affidavit sworn to December 26, 2025, and having determined, by clear and convincing evidence, that (1) respondent has satisfied the requirements of Rules of the Appellate Division, Third Department (22 NYCRR) § 806.16 (c) (5), (2) respondent has complied with the order of suspension and the rules of this Court, (3) respondent has the requisite character and fitness to practice law, and (4) it would be in the public interest to reinstate respondent to the practice of law (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately.

Clark, J.P., Aarons, Pritzker, McShan and Mackey, JJ., concur.

18 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; Gregory Kevin McGoldrick, Respondent. (Attorney Registration No. 4524682.) [247 NYS3d 549]—

Attorney and Client—Reinstatement—Motion Granted

Motion by respondent for an order reinstating him to the practice of law following his suspension by May 2019 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 172 AD3d 1706, 1740 [3d Dept 2019]; *see* Rules for

Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibits sworn to November 23, 2025, and the January 12, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has satisfied the requirements of Rules of the Appellate Division, Third Department (22 NYCRR) § 806.16 (c) (5), (2) respondent has complied with the order of suspension and the rules of this Court, (3) respondent has the requisite character and fitness to practice law, and (4) it would be in the public interest to reinstate respondent to the practice of law (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately. Clark, J.P., Aarons, Pritzker, McShan and Mackey, JJ., concur.

19 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; James Brody McMurtry, Respondent. (Attorney Registration No. 4636601.) [247 NYS3d 550]—

Attorney and Client—Reinstatement—Motion Denied

Motion by respondent for an order reinstating him to the practice of law following his suspension by September 2022 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 208 AD3d 1421, 1437 [3d Dept 2022]; *see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's notice of motion and affidavit with exhibits sworn to December 13, 2025, respondent's supplemental submission of that date and the January 12, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined that respondent has not demonstrated, by clear and convincing evidence, his compliance with the rules of this Court (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]; Rules of App Div, 3d Dept [22 NYCRR] § 806.16 [c] [5]),* it is ordered that respondent's motion for reinstatement is denied. Clark, J.P., Aarons, Pritzker, McShan and Mackey, JJ., concur.

* Respondent's request for a waiver of the continuing legal education requirement as stated in Rules of the Appellate Division, Third Department (22 NYCRR) § 806.16 (c) (5) is likewise denied.

20 In the Matter of Attorneys in Violation of Judiciary Law § 468-a. Attorney Grievance Committee for the Third Judicial Department, Petitioner; David Michael Viscovich, Respondent. (Attorney Registration No. 2894798.) [247 NYS3d 551]—

Attorney and Client—Reinstatement—Motion Granted

Motion by respondent for an order reinstating him to the practice of law following his suspension by September 2024 order of this Court (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 230 AD3d 1498, 1520 [3d Dept 2024]; see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16; Rules of App Div, 3d Dept [22 NYCRR] § 806.16).

Upon reading respondent's affidavit with exhibits sworn to December 23, 2025, and the January 22, 2026 responsive correspondence from the Attorney Grievance Committee for the Third Judicial Department, and having determined, by clear and convincing evidence, that (1) respondent has complied with the order of suspension and the rules of this Court, (2) respondent has the requisite character and fitness to practice law, and (3) it would be in the public interest to reinstate respondent to the practice of law (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.16 [a]), it is ordered that respondent's motion for reinstatement is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law, effective immediately. Clark, J.P., Aarons, Pritzker, McShan and Mackey, JJ., concur.

21 In the Matter of Alexa Elena Bertinelli, an Attorney. (Attorney Registration No. 5368089.) [247 NYS3d 553]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Alexa Elena Bertinelli was admitted to practice by this Court in 2015 and lists a business address in Baltimore, Maryland with the Office of Court Administration. Bertinelli now seeks leave to resign from the New York bar for nondisciplinary reasons (see Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Bertinelli's application.

Upon reading Bertinelli's affidavit sworn to December 5, 2025, and filed December 15, 2025, and upon reading the January 28, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Bertinelli is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Aarons, J.P., Pritzker, Ceresia, Powers and Mackey, JJ., concur. Ordered that Alexa Elena Bertinelli's application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that Alexa Elena Bertinelli's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Alexa Elena Bertinelli is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Bertinelli is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Alexa Elena Bertinelli shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

22 In the Matter of Neal David Carter, an Attorney. (Attorney Registration No. 5169149.) [247 NYS3d 552]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Neal David Carter was admitted to practice by this Court in 2013 and lists a business address in Queen Creek, Arizona with the Office of Court Administration. Carter now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Carter's application.

Upon reading Carter's affidavit sworn to December 4, 2025, and filed December 10, 2025, and upon reading the January 21, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Carter is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Aarons, J.P., Pritzker, Ceresia, Powers and Mackey, JJ., concur. Ordered that Neal David Carter's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Neal David Carter's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective im-

mediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Neal David Carter is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Carter is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Neal David Carter shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

23 In the Matter of Antony Ian Grossman, an Attorney. (Attorney Registration No. 2181519.) [247 NYS3d 843]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Antony Ian Grossman was admitted to practice by this Court in 1988 and lists a business address in London, United Kingdom with the Office of Court Administration. Grossman now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Grossman's application.

Upon reading Grossman's affidavit sworn to December 12, 2025, and filed December 22, 2025, and upon reading the January 28, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Grossman is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Aarons, J.P., Pritzker, Ceresia, Powers and Mackey, JJ., concur. Ordered that Antony Ian Grossman's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Antony Ian Grossman's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Antony Ian Grossman is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Grossman is hereby forbid-

den to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Antony Ian Grossman shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

24 In the Matter of Hayter Lamar Whitman, an Attorney. (Attorney Registration No. 5317870.) [247 NYS3d 556]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Hayter Lamar Whitman was admitted to practice by this Court in 2015 and lists a business address in Washington, DC with the Office of Court Administration. Whitman now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Whitman's application.

Upon reading Whitman's affidavit sworn to December 14, 2025, and filed December 19, 2025, and upon reading the January 28, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Whitman is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Aarons, J.P., Pritzker, Ceresia, Powers and Mackey, JJ., concur. Ordered that Hayter Lamar Whitman's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Hayter Lamar Whitman's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Hayter Lamar Whitman is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Whitman is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Hayter Lamar Whitman shall, within 30

days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

25 In the Matter of Xiao Bing Xu, an Attorney. (Attorney Registration No. 4268348.) [247 NYS3d 554]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Xiao Bing Xu was admitted to practice by this Court in 2005 and lists a business address in Orlando, Florida with the Office of Court Administration. Xu now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Xu's application.

Upon reading Xu's affidavit sworn to December 22, 2025, and filed December 26, 2025, and upon reading the January 28, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Xu is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Aarons, J.P., Pritzker, Ceresia, Powers and Mackey, JJ., concur. Ordered that Xiao Bing Xu's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Xiao Bing Xu's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Xiao Bing Xu is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Xu is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Xiao Bing Xu shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

(February 11, 2026)

1 The People of the State of New York, Respondent, v Terry L. Davis Jr., Appellant. [247 NYS3d 844]—

Crimes—Plea Bargaining—Enforcement of Agreement—Violation of Plea Condition—Enhanced Sentence Warranted

Garry, P.J. Appeal from a judgment of the County Court of Sullivan County (E. Danielle Jose-Decker, J.), rendered August 9, 2024, convicting defendant upon his plea of guilty of the crime of unlawful imprisonment in the first degree.

In satisfaction of a three-count indictment stemming from a domestic incident, defendant pleaded guilty to unlawful imprisonment in the first degree and agreed to waive his right to appeal. As part of the plea agreement, County Court conditionally committed to sentencing him to four months of weekend incarceration, to be followed by five years of probation. The court premised that promised sentence on defendant abiding by certain conditions pending sentencing, including that defendant cooperate with and truthfully answer all questions asked of him by the Department of Probation in preparation of the presentence report (hereinafter PSR). The court advised defendant that it would not be bound by the agreed-upon sentence and could impose a term of up to four years in prison if he did not abide by those conditions, which defendant acknowledged he understood. At sentencing, the court found that defendant's statements during the probation interview may have been inconsistent with evidence pertaining to the underlying offense. After an adjournment to allow defendant an opportunity to consider withdrawing his plea, the court ultimately scheduled a hearing regarding defendant's violation of the plea conditions. Following that hearing, at which the probation officer who interviewed defendant testified and the PSR and an audio recording of the underlying offense that the victim managed to record were submitted, County Court found that defendant had violated the plea condition that he be truthful in answering the questions presented to him by the Department of Probation, determined that an enhanced sentence was warranted and imposed the maximum permissible term of imprisonment of 1 $\frac{1}{3}$ to 4 years. Defendant appeals.

Initially, defendant's contention that County Court improperly imposed an enhanced sentence based upon his violation of the condition that he be truthful with the Department of Probation is not precluded regardless of the validity of his unchallenged appeal waiver (see *People v Hendrie*, 232 AD3d 1067, 1069 [3d Dept 2024]; *People v Larock*, 211 AD3d 1234, 1235 [3d Dept 2022]). As for the merit of defendant's contention, it is well established that the violation of an explicit and objective plea condition, including a condition that a defendant truthfully answer questions during an interview with probation in

compiling information for the PSR, can result in the imposition of an enhanced sentence (see *People v Hendrie*, 232 AD3d at 1069; *People v Becker*, 80 AD3d 795, 796 [3d Dept 2011]).

The probation officer who interviewed defendant testified that defendant was given the opportunity to explain in his own words what occurred with regard to the underlying offense. In response, defendant stated that a discussion with the victim—with whom defendant shared two children—escalated and that the victim threatened to take the children and leave, which resulted in him preventing the victim from leaving the bedroom that they were in. A review of an audio recording taken at the time of the offense, however, contradicts defendant's assertion that the victim threatened to take the children and leave. In fact, the audio recording establishes that the victim, numerous times, assured defendant that he could see the children whenever he wanted.

Defendant also stated during the probation interview that, although he was unloading a shotgun during the time that he was arguing with the victim, he was unaware that the presence of the shotgun made the victim feel unsafe, which is at odds with his admission during the plea that he restrained the victim under circumstances exposing her to a risk of serious injury while pointing a loaded, operable shotgun at her and threatening to kill her and their children with it. His admission is similarly belied by the same audio recording, which captures the sound of a gun cocking followed by defendant's taunts to the victim as to whether she is "scared now." Although the probation officer acknowledged that she did not ask defendant any follow-up questions or ask that he clarify his statement, defendant neglected to mention in his version of the underlying offense that he repeatedly threatened to kill the victim, himself and their children. The probation officer further testified that, although defendant did not deny any specific conduct, he seemed to be "glossing over certain events."

The foregoing provides a valid basis for County Court's finding that defendant violated the explicit, objective and accepted condition of the plea agreement that he be truthful with the Department of Probation regarding the circumstances of the underlying offense. Failing to truthfully discuss conduct pertinent to the underlying offense "hindered the preparation of an accurate report for the court's use at sentencing" (*People v Hicks*, 98 NY2d 185, 189 [2002]). As such, we find no abuse of discretion in County Court imposing an enhanced sentence (see *id.*; *People v Larock*, 211 AD3d at 1236; compare *People v Hendrie*, 232 AD3d at 1069-1070; *People v Becker*, 80 AD3d at

796-797). As defendant was advised of the specific conditions to abide by and consequences of violating such conditions, including his maximum sentencing exposure, his challenge to the severity of the enhanced sentence imposed is precluded by his unchallenged waiver of his right to appeal (*see People v El-Begearmi*, 236 AD3d 1203, 1204 [3d Dept 2025]; *People v Brown*, 163 AD3d 1269, 1271 [3d Dept 2018]). Defendant's remaining arguments, to the extent not expressly addressed herein, have been evaluated and determined to be without merit.

Ceresia, Fisher, McShan and Mackey, JJ., concur. Ordered that the judgment is affirmed.

2 In the Matter of Rocco Merante, Petitioner, v Thomas P. DiNapoli, as State Comptroller, Respondent. [250 NYS3d 712]—

Civil Service—Retirement and Pension Benefits—Accidental Disability Retirement—Substantial Evidence That Police Officer Not Permanently Incapacitated from Performing Job Duties—Conflicting Medical Opinions

Clark, J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent denying petitioner's applications for accidental and performance of duty disability retirement benefits.

Petitioner, a police officer, filed separate applications for accidental and performance of duty disability retirement benefits alleging that he was permanently incapacitated from the performance of his duties due to a September 2016 incident wherein he was an unrestrained passenger in a police car that struck a deer. Both applications were denied by the New York State and Local Retirement System based upon a finding that petitioner was not permanently incapacitated from the performance of his duties. Following a hearing and redetermination, a Hearing Officer upheld the denials and, upon administrative review, respondent affirmed the Hearing Officer's decision. Petitioner then commenced this CPLR article 78 proceeding to challenge respondent's determination.

As an initial procedural matter, we are unpersuaded by petitioner's argument that the determination is arbitrary and capricious or lacking in substantial evidence insofar as it was based upon the review of an incomplete record that did not include certain outstanding medical records (*see* CPLR 7803 [3], [4]). Petitioner's counsel had several opportunities to admit the outstanding medical records into evidence during the administrative hearing and instead relied upon his client's statement that the Retirement System had all of his records.

The transcript from the hearings sets forth that petitioner's counsel never moved the medical records into evidence despite ample opportunity to do so and even after the Retirement System reminded him that they were not in evidence. In these circumstances, the Hearing Officer appropriately decided the applications on the record before it, and respondent was justified in rendering the final administrative determination based upon such record (*see Matter of Levine v New York State Liq. Auth.*, 23 NY2d 863, 864 [1969]; *Matter of Hammonds v New York State Educ. Dept.*, 206 AD3d 1334, 1334 [3d Dept 2022]; compare *Matter of Angelino v New York State Comptroller*, 176 AD3d 1376, 1381 [3d Dept 2019]; *Matter of Cook v New York State Comptroller*, 135 AD3d 1117, 1118-1119 [3d Dept 2016]; *Matter of Danieu v DiNapoli*, 77 AD3d 1152, 1154-1155 [3d Dept 2010]).

Turning to the merits of the underlying determination, “‘[i]n connection with any application for accidental or performance of duty disability retirement benefits, the applicant bears the burden of proving that he or she is permanently incapacitated from the performance of his or her job duties’” (*Matter of Hannon v DiNapoli*, 226 AD3d 1122, 1123 [3d Dept 2024] [citation omitted], quoting *Matter of Byrne v DiNapoli*, 85 AD3d 1530, 1531 [3d Dept 2011]; see *Matter of Graham v Gardner*, 239 AD3d 1175, 1175 [3d Dept 2025]). “Where, as here, there is conflicting medical evidence, respondent is vested with the exclusive authority to weigh such evidence and credit the opinion of one medical expert over another, and our review of respondent's determination is limited to ascertaining whether it is supported by substantial evidence” (*Matter of Mozdziak v DiNapoli*, 231 AD3d 1215, 1216 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]; see *Matter of McGowan v DiNapoli*, 178 AD3d 1243, 1243-1244 [3d Dept 2019], *lv denied* 35 NY3d 917 [2020]).

Cristian Brotea, petitioner's treating orthopedic surgeon, testified that he first examined petitioner in October 2016 for complaints involving petitioner's neck and back. According to Brotea, MRIs taken in March and May 2017 revealed a lumbar disc herniation, right side worse than left, with some compression of the S-1 nerve root, an annular fissure disc herniation at L4-5, slightly right to midline, a disc herniation at C5-6 with impingement of the nerve roots and a large, right-sided disc herniation at T6-7 with impingement of the nerve roots. Brotea opined that petitioner's injuries were consistent with his status as an unrestrained passenger in a police vehicle that collided with a deer with heavy damage to the vehicle. Brotea further

testified that he was aware of “some of the duties” of a police officer, and opined that, given petitioner’s injuries, he would not be able to restrain and handcuff violent suspects, perform foot pursuits, lift ambulance stretchers or perform any other heavy exertion aspects of the job. According to Brotea, petitioner’s condition is permanent, and it would be “unlikely,” even with surgical intervention, for petitioner to return to full duty.

Petitioner also presented the testimony of the commanding officer at petitioner’s precinct when petitioner was involved in the September 2016 motor vehicle accident. He testified that the damage to the police car was “pretty extensive,” requiring the same to be put out of service. He also noted that the full duties of a police officer may include violent altercations, providing security and directing traffic on roadways. Petitioner did not testify nor did his counsel put any of his medical records into evidence. However, the Retirement System admitted several exhibits that included portions of petitioner’s medical records.

On behalf of the Retirement System, Gregory Galano, an orthopedic surgeon, conducted an examination of petitioner in September 2018, reviewed his medical records and issued a report regarding his examination. Galano testified that, although he measured decreased ranges of motion ranging from mild to moderate in the cervical and lumbar spine, petitioner exhibited signs of suboptimal effort and symptom magnification. Galano further testified that among the additional tests he performed were a Spurling test of the cervical spine for radiculopathy in the upper extremities and a straight leg raise test of the lumbar spine for radiculopathy in the lower extremities. Galano explained that the radiculopathy tests he performed returned objective findings, whereas the range of motion tests returned subjective measurements, and that the absence of objective findings matching petitioner’s subjective complaints was further evidence of symptom magnification. Consequently, according to Galano, there was no objective evidence of disability. Thereafter, with the additional support of his review of the same 2017 MRIs as Brotea, Galano diagnosed petitioner with cervical, thoracic and lumbar strains and opined that petitioner did not have a permanent disability and could return to full duty as a police officer.

In our view, although there was medical evidence that could support a contrary conclusion, Galano’s rational opinion based upon his examination of petitioner and review of his medical records provides substantial evidence to support the determi-

nation that petitioner was not permanently incapacitated from performing his job duties (see *Matter of Graham v Gardner*, 239 AD3d at 1176; *Matter of McGowan v DiNapoli*, 178 AD3d at 1245; *Matter of Solarino v DiNapoli*, 171 AD3d 1434, 1437 [3d Dept 2019]; see also *Matter of Studdert v New York State Comptroller*, 163 AD3d 1343, 1346 [3d Dept 2018]) and respondent was free to credit Galano's opinion over that of petitioner's treating physician (see *Matter of Mozdziak v DiNapoli*, 231 AD3d at 1217; *Matter of Stancarone v DiNapoli*, 219 AD3d 1649, 1651 [3d Dept 2023]). Accordingly, we find no reason to disturb respondent's determination denying petitioner's applications for accidental and performance of duty disability retirement benefits.

Aarons and McShan, JJ., concur.

Garry, P.J. (dissenting). We do not disagree that the Hearing Officer acted well within his authority at every stage of these proceedings, nor that petitioner's counsel bears primary responsibility for the state of the record. However, arbitrary and capricious review is not concerned with fault. The inquiry is whether the administrative entity's ultimate determination was rational—that is, whether it was made with a sound basis in reason and with due regard to the relevant facts (see generally *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Here, respondent rendered a final merits determination while fully aware that extensive, postapplication surgical records—directly bearing on several sites of injury—existed, had been repeatedly referenced in this proceeding, were in the possession of the New York State and Local Retirement System and had never been evaluated. Put another way, the determination being upheld here is not arbitrary because the Hearing Officer acted inappropriately; it is arbitrary because the ultimate question of permanent incapacity was resolved on a record that was universally understood to not reflect the facts and underlying medical reality of petitioner's conditions. In light of these foundational concerns as to the substantive reliability of the determination before us, albeit resulting from counsel's abysmal performance with respect to the outstanding records, we respectfully dissent.

On February 27, 2020, the parties appeared for the first hearing day. Counsel for the Retirement System informed the Hearing Officer that he had received an email from petitioner's counsel the day prior containing nearly 800 pages of haphazard additional medical records and advising that petitioner

had undergone multiple surgeries to the sites of injury alleged in his applications following the independent medical examination.* Counsel for the Retirement System culled through those records and advised petitioner's counsel that operative reports for certain surgeries were still missing and, moreover, all additional records and operative reports needed to be sent to the Retirement System's disability processing unit with a request for reconsideration, if that was what was intended. Petitioner's counsel took an adjournment as of right for that purpose, confident that, upon review of the additional records, disability processing would find petitioner to be permanently incapacitated, eliminating the need for a hearing. The Hearing Officer admonished petitioner's counsel for his belated submissions, and the case was put on hold.

On October 22, 2020, the parties appeared for a second hearing day, notably pursuant to a request by petitioner's counsel to reopen the case to take the testimony of the physician who treated petitioner's neck and back conditions. That physician was ultimately unavailable for testimony, and counsel for the Retirement System reported that petitioner's counsel had still not submitted all missing reports or any written request for further consideration. To explain those failings, petitioner's counsel pointed to a variety of law office issues, the COVID-19 pandemic and, ultimately, his client, and he was again admonished for his excuses and delays, as well as the resultant cost to the State. Nevertheless, the Retirement System, endeavoring to ensure the right outcome for its member, agreed to an adjournment for cause so that petitioner's counsel could appropriately file his documents and request reconsideration. It appears that counsel emailed disability processing during that hearing, and the case was put on hold again for such reconsideration and, potentially, the opportunity for the Retirement System to reexamine petitioner or issue an addendum based on the additional records.

Before either of those things could happen, petitioner's counsel again requested that the matter be reopened for the testimony of petitioner's treating physician. At the hearing that followed on August 16, 2021, petitioner's counsel failed to explain why he requested reopening given his pending request for reconsideration, other than the fact that he had found a date that worked for the physician. Out of courtesy to the physician, and with further admonishment, the Hearing Officer took testimony, despite acknowledging that it could very

* It appears that petitioner had surgery on his left knee in 2016 and 2018, surgeries on both wrists in 2018 and a right thumb surgery in 2019.

well be futile. When the parties turned to admitting their records into evidence, petitioner's counsel, again concerned only with his witness' schedule, requested to admit the records after the physician's testimony. The Hearing Officer acquiesced, cautioning that any testimony premised upon documents that were not ultimately admitted into evidence would be stricken. At the end of the physician's testimony, petitioner's counsel requested an adjournment to call additional witnesses, including the surgeon who performed petitioner's knee surgery. The Retirement System then admitted its exhibits into evidence; petitioner's counsel asked to wait until the next hearing date to do the same, to see what action disability processing would take.

Prior to the next hearing date, and without any resolution of the request for reconsideration, petitioner's counsel elected to rest his case via email correspondence—having still failed to admit the subject medical records into evidence. On the next hearing day, November 2, 2022, counsel for the Retirement System moved for any testimony of petitioner's physician based upon medical records not otherwise contained in the Retirement System's exhibits to be stricken. Petitioner's counsel made a series of arguments, and accusations, in response that were all but entirely unsupported by the record, and the Hearing Officer granted the application. Petitioner's counsel then requested that the Hearing Officer instead withhold decision for written arguments on “the issue of the medical records,” acknowledging that petitioner's right to due process was being implicated. The Hearing Officer declined to revisit his ruling, and the Retirement System presented its case. The Hearing Officer later issued a decision upholding the denial of petitioner's applications, finding the testimony of the Retirement System's physician regarding petitioner's neck and back injuries to be more persuasive. In the absence of medical evidence regarding petitioner's left knee, wrists or hands, those sites of injury went unaddressed. Respondent accepted the Hearing Officer's findings of fact and conclusions of law and accordingly issued a determination denying petitioner's applications. Petitioner in turn commenced this CPLR article 78 proceeding—notably still represented by the same counsel—who now argues that the Hearing Officer's “exclu[sion]” of the extensive medical records discussed above was arbitrary and capricious.

The multiple and repeated errors by petitioner's counsel in the face of the consistent efforts by the Retirement System and the Hearing Officer to ensure a fair hearing for petitioner pre-

sent this Court with an enigma. Ultimately, counsel's lackadaisical approach and mismanagement of petitioner's case culminated in both derailment of any request for reconsideration and the failure to offer extensive medical records into evidence. Despite multiple adjournments for this very purpose, and extended discussion of these records, petitioner's counsel rested without making the long-anticipated proffer of pertinent medical records. The frustration of the Hearing Officer in this regard is well documented in the record; we agree that counsel's failures were wholly inexplicable. Thus, the argument presented upon appeal by petitioner's counsel concerning the alleged exclusion of the subject evidence is, at best, misleading.

Nonetheless, the administrative record is clearly incomplete, and it again bears emphasizing that all were aware of the existence of the subject records and their subject matter. That incompleteness, while largely attributable to petitioner's counsel, does not right itself by that attribution. Particularly in light of the many additional surgeries to multiple sites of injury not otherwise considered, it appears entirely likely that the omitted records were so foundational to petitioner's applications as to render the determination before us analytically incomplete, and thus arbitrary and capricious (*see* CPLR 7803 [3]). Under these highly unusual circumstances, we would take the unusual step of remitting the matter for further proceedings.

Mackey, J., concurs. Adjudged that the determination is confirmed, without costs, and petition dismissed.

3 In the Matter of the Claim of Nadine Jackson, Appellant, v New York Foundling Hospital et al., Respondents. Workers' Compensation Board, Respondent. [250 NYS3d 709]—

Workers' Compensation—Reopening Case—Untimely Request to Reclassify Claimant to Permanent Total Disability or Total Industrial Disability Due to Extreme Hardship

Powers, J. Appeal from a decision of the Workers' Compensation Board, filed October 4, 2023, which, among other things, denied claimant's request for an extreme hardship redetermination pursuant to Workers' Compensation Law § 35 (3).

Claimant, a case planner and social worker for the employer, established a workers' compensation claim for bilateral carpal tunnel syndrome in 2011 that was subsequently amended to include other ailments. In 2014, claimant was classified with a permanent partial disability and 81% loss of wage-earning capacity, entitling her to 450 weeks of wage loss benefits (*see*

Workers' Compensation Law § 15 [3] [w]). After those benefits ended in June 2022, claimant applied for an extreme hardship redetermination pursuant to Workers' Compensation Law § 35 (3). A Workers' Compensation Law Judge denied the application as untimely. Claimant took an administrative appeal and, separately, applied to either reopen her claim or for a rehearing. The Workers' Compensation Board denied her application for reopening or rehearing and affirmed the denial of her request for an extreme hardship redetermination. Claimant appeals.

We affirm. With regard to claimant's request for reopening or rehearing, that relief is justified "either upon the presentation of evidence that was previously unavailable, where a material change in the claimant's condition has occurred, or where the interest of justice warrants" (*Matter of Mallen v ACE Tinsmith & Bldg. Prods.*, 204 AD3d 1283, 1285 [3d Dept 2022], *lv denied* 39 NY3d 909 [2023]; *see* 12 NYCRR 300.14 [a]; *Matter of Coyle v W & W Steel Erectors LLC*, 238 AD3d 1302, 1303 [3d Dept 2025]). Claimant's application consisted of a brief letter in which she speculated that counsel had neglected her claim and complained both that she had experienced unspecified abuse and that medical documents of unclear relevance had not been filed with the Board and, therefore, failed to offer any detail as to why reopening would be appropriate under any of those categories. Her efforts in her brief to cite additional proof and raise new arguments in support of her application are not properly before us because they were not raised before the Board (*see Matter of Hernandez v AABCO Sheet Metal*, 206 AD3d 1420, 1421 [3d Dept 2022]; *Matter of Hopeck v Al Tech Specialty Steel Corp.*, 205 AD3d 1284, 1285 [3d Dept 2022]). Accordingly, we cannot say that the Board abused its discretion in denying that application (*see Matter of Yi Sun v State Ins. Fund*, 201 AD3d 1157, 1158 [3d Dept 2022]; *Matter of Macareno v Son Yeng Produce*, 305 AD2d 928, 929 [3d Dept 2003]).

As for the denial of claimant's request for an extreme hardship redetermination, Workers' Compensation Law § 35 (3) provides, as is relevant here, that a claimant with a loss of wage-earning capacity greater than 75% may request that relief "within the year prior to the scheduled exhaustion of indemnity benefits" (*see Matter of Yi Sun v State Ins. Fund*, 201 AD3d at 1159). As Workers' Compensation Law § 35 (3) "describes the particular situations in which it is to apply" in specifying the period in which an application for an extreme hardship redetermination can be made, "an irrefutable inference must be drawn [from that description] that what is omit-

ted or not included was intended to be omitted or excluded” (*Patrolmen’s Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208-209 [1976] [internal quotation marks and citation omitted]; accord *Matter of Washington v Vogue Metalcraft*, 91 AD2d 804, 804 [3d Dept 1982]). We therefore agree with the Board that an application made outside the one-year period specified by the statute is untimely and, because claimant’s application was made after that period had expired, “the Board did not err in finding that she was not entitled to a redetermination on the basis of extreme hardship” (*Matter of Yi Sun v State Ins. Fund*, 201 AD3d at 1159). Claimant’s remaining arguments, to the extent that they are properly before us, have been considered and found to lack merit.

Clark, J.P., Pritzker, McShan and Corcoran, JJ., concur. Ordered that the decision is affirmed, without costs.

4 In the Matter of the Claim of Vincent Foster, Appellant, v New York State Office of Children and Family Services et al., Respondents. Workers’ Compensation Board, Respondent. [251 NYS3d 808]—

Workers’ Compensation—Extent of Disability—Work-Related Injuries Amenable to Nonschedule Classification—Substantial Evidence Supported Board Determination That Claimant’s Injuries were Better Classified as Marked Permanent Partial Disability

Reynolds Fitzgerald, J.P. Appeals from a decision and an amended decision of the Workers’ Compensation Board, filed January 5, 2024, and September 13, 2024, which ruled, among other things, that claimant’s work-related injuries were amenable to a nonschedule classification.

In the course of his work as a youth division aide for the employer, claimant sustained injuries to his right knee, right elbow, right index finger, right shoulder and low back in 2015, as well as injuries to both of his elbows, hands, hips, knees, ankles and his right index finger in 2019. His ensuing workers’ compensation claims were established, and the parties were directed to produce permanency reports addressing all established injuries and the question of apportionment. The physicians who examined claimant were deposed after they disagreed, in relevant part, as to whether claimant’s permanent impairments were amenable to a nonschedule classification as opposed to a schedule loss of use award for the various sites of injury. A Workers’ Compensation Law Judge thereafter found that claimant had a 60% loss of wage-earning capacity and classified him as having a permanent partial disability, apportioned equally between the 2015 and 2019 claims, as well

as that he was not entitled to wage loss benefits because he continued to work for pre-injury wages. Claimant sought administrative review and, in a decision filed in January 2024 and an amended decision filed in September 2024, the Workers' Compensation Board affirmed. Claimant appeals from both.

We affirm. “Whether a schedule loss of use award or a nonschedulable permanent partial disability classification is appropriate constitutes a question of fact for the Board’s resolution, and its determination will be upheld if supported by substantial evidence” (*Matter of Lyman v New York State Canal Corp.*, 208 AD3d 1571, 1572 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Matter of Ayars v Navillus Tile Co.*, 219 AD3d 1614, 1615 [3d Dept 2023]; *Matter of Haight v Con Edison*, 78 AD3d 1468, 1468 [3d Dept 2010], *lv denied* 16 NY3d 708 [2011]). In assessing whether substantial evidence supports the Board’s determination of that issue, we are mindful that “[t]he Board is vested with the discretion to resolve conflicting medical opinions, and . . . is free to accept or reject all or part of medical evidence that is offered as well as determine the weight to be given thereto” (*Matter of Ayars v Navillus Tile Co.*, 219 AD3d at 1615-1616 [internal quotation marks and citations omitted]; see *Matter of Olorode v Stream-ingedge Inc.*, 231 AD3d 1245, 1247 [3d Dept 2024]).

Some medical evidence in the record reflected that schedule loss of use awards were appropriate, most notably the reports and deposition testimony of two orthopedic surgeons who conducted medical examinations of claimant, found that he suffered from restricted range of motion at various injury sites that was permanent, and specified schedule losses of use for each affected body part. A third orthopedic surgeon who conducted a medical examination of claimant, Shanker Krishnamurthy, disagreed. Krishnamurthy authored a report in which he noted the discrepancies in the restrictions observed by other physicians and their disagreements over what schedule loss of use awards would be appropriate, as well as the difficulty in reconciling claimant’s continuing “ability to work full time full duty with the ranges of motion that [claimant] demonstrated” during Krishnamurthy’s own examination, and concluded that he could not offer a schedule loss of use opinion for the multiple sites involved and that classification with a permanent partial disability was “more reasonable” under the circumstances. Krishnamurthy reiterated that opinion during his deposition testimony, explaining how it was “very difficult to reconcile” the schedule loss of use percentages assigned to multiple sites of injury by the other physicians with claimant’s

continued ability to work full time, rendering schedule loss of use awards “inappropriate” under the Workers’ Compensation Guidelines for Determining Impairment and warranting a nonschedule classification instead.

The Board credited Krishnamurthy’s opinion over that of the other physicians, specifically agreeing that a nonschedule classification was appropriate because the schedule loss of use awards under the guidelines could not accurately reflect claimant’s overall condition given his continued ability to work without restrictions despite his chronic loss of function in multiple injured extremities (*see e.g.* New York Workers’ Compensation Guidelines for Determining Impairment § 1.6 [1], [2] at 8 [1st ed 2017]). Deferring to that assessment of credibility—and noting that, while the impairment guidelines “provide useful criteria to be used in assessing a claimant’s degree of disability, the ultimate determination rests with the Board”—substantial evidence supports the Board’s determination that claimant’s injuries were better classified as a marked permanent partial disability (*Matter of Ayars v Navillus Tile Co.*, 219 AD3d at 1616 [internal quotation marks and citations omitted]; *see Matter of Lyman v New York State Canal Corp.*, 208 AD3d at 1573; *Matter of Mayewski v Superior Plus Energy Servs.*, 192 AD3d 1312, 1314-1315 [3d Dept 2021]; *Matter of LaClaire v Birds Eye Foods, Inc.*, 128 AD3d 1298, 1299 [3d Dept 2015]; *Matter of Haight v Con Edison*, 78 AD3d at 1469). Claimant’s remaining arguments, to the extent that they have not been addressed by the foregoing, have been considered and found to lack merit.

Ceresia, Fisher, McShan and Mackey, JJ., concur. Ordered that the decision and amended decision are affirmed, without costs.

5 In the Matter of the Claim of Rosemarie Hogan, Claimant, v ABF Freight System, Inc., Appellant. Workers’ Compensation Board, Respondent. [251 NYS3d 803]—

Workers’ Compensation—Injuries Arising out of and in Course of Employment—Contraction of COVID-19 in Workplace

Corcoran, J. Appeal from a decision of the Workers’ Compensation Board, filed August 16, 2024, which ruled, among other things, that decedent’s death was causally related to his employment and established claimant’s claim for workers’ compensation death benefits.

Claimant’s husband (hereinafter decedent) was a truck driver responsible for picking up and delivering freight. On March 27, 2020, decedent began suffering from a fever and flu-

like symptoms and presented to a clinic for a high fever and respiratory distress, whereupon he was transported to a hospital emergency room. On March 28, 2020, decedent tested positive for COVID-19 and was discharged; he was readmitted to the hospital on April 2, 2020, after experiencing a syncopal episode and was found to have myoclonus and presumed anoxic brain injury. On April 3, 2020, decedent died from cardiac arrest due to or as a consequence of respiratory failure and COVID-19. In May 2020, claimant—decedent’s widow—filed the instant claim for compensation in a death case. The employer controverted the claim contending, among other things, that decedent did not sustain a compensable accident. Following hearings and depositions, a Workers’ Compensation Law Judge (hereinafter the WCLJ) established the claim for a work-related injury involving death and awarded benefits. The employer sought administrative review, and, in an August 2024 panel decision, the Workers’ Compensation Board affirmed the decision of the WCLJ establishing the claim.¹ The Board found that decedent sustained an accident arising out of and in the course of his employment that resulted in a causally related death based upon the medical evidence of a positive COVID-19 test result as well as credible testimony about the prevalence of COVID-19 in decedent’s workplace when he contracted the virus. The employer appeals.²

We affirm. “The contraction of COVID-19 in the workplace reasonably qualifies as an unusual hazard, not the natural and unavoidable result of employment and, thus, is compensable under the Workers’ Compensation Law” (*Matter of Martinez v Domino Foods, Inc.*, 234 AD3d 1069, 1070 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]; *accord Matter of Fernandez v New York City Tr. Auth.*, 224 AD3d 1066, 1067 [3d Dept 2024]; *Matter of Leonard v David’s Bridal, Inc.*, 224 AD3d 1063, 1064 [3d Dept 2024], *lv denied* 42 NY3d 913 [2025]; *see Matter of Rotkamp v New York Univ.*, 232 AD3d 1008, 1009 [3d Dept 2024], *lv denied* 43 NY3d 902 [2025]). “Whether a compensable accident has occurred in the first instance is a question of fact to be resolved by the Board, and its determination in this regard will not be disturbed where supported by substantial evidence” (*Matter of Flores v Wellwood Cemetery Assoc. Inc.*, 232 AD3d 1003, 1003 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]). “In

1. The employer also filed a request for further action requesting that claimant produce HIPPA releases. This request was ultimately dismissed by the Board as moot.

2. Claimant did not submit a brief on appeal.

this regard, the claimant bears the burden of establishing that the subject injury arose out of and in the course of his or her employment and, further, must demonstrate, by competent medical evidence, the existence of a causal connection between his or her injury and his or her employment” (*Matter of Miller v Transdev Bus on Demand LLC*, 231 AD3d 1257, 1258 [3d Dept 2024] [internal quotation marks and citations omitted]; see e.g. *Matter of Fernandez v New York City Tr. Auth.*, 224 AD3d at 1067).³ “Consistent with Board guidance and this Court’s recent holdings, a claimant may meet his or her burden to show that an injury arose in the course of employment by demonstrating either a specific exposure to COVID-19 or prevalence of COVID-19 in the work environment so as to present an elevated risk of exposure constituting an extraordinary event; for example, workers with significant contact with the public in communities with high rates of infection or workers in a workplace experiencing high rates of infection” (*Matter of Miller v Transdev Bus on Demand LLC*, 231 AD3d at 1258-1259 [internal quotation marks and citations omitted]; accord *Matter of Angelo v Southwestern Cent. Sch.*, 242 AD3d 1468, 1469-1470 [3d Dept 2025]). “However, a claimant need not pinpoint the exact date on which the incident, i.e., exposure, occurred” (*Matter of Leonard v David’s Bridal, Inc.*, 224 AD3d at 1064 [internal quotation marks and citations omitted]; see *Matter of Pierre v ABF Frgt.*, 211 AD3d 1284, 1285 [3d Dept 2022]). “As the sole arbiter of witness credibility, the Board has broad authority to resolve factual issues based on credibility of witnesses and draw any reasonable inference from the evidence in the record” (*Matter of Miller v Transdev Bus on Demand LLC*, 231 AD3d at 1259 [internal quotation marks and citations omitted]).

Claimant testified that during March 2020, she and her children did not leave their home for work and that decedent was the only one in her household who went anywhere and interacted with others; when she thereafter went out in public, she wore a facemask, gloves, eyeglasses and shield. Testimony from decedent’s coworkers established that in March 2020, claimant regularly and closely interacted with his coworkers at

3. “Although Workers’ Compensation Law § 21 (1) provides a presumption that an accident that occurs in the course of employment also arises out of that employment, the statutory presumption cannot be used to establish that an accident occurred in the first instance, and it does not wholly relieve a claimant of the burden of demonstrating that the accident occurred in the course of, and arose out of, [the subject] employment” (*Matter of Fernandez v New York City Tr. Auth.*, 224 AD3d at 1068 [internal quotation marks and citations omitted]).

the terminal where he was employed in Brooklyn, that he and his coworkers were not using any protective equipment (including masks) and that the terminal was shut down and sanitized from April 2, 2020, to April 10, 2020, due to at least 12 of decedent's coworkers, like decedent, contracting COVID-19 in late March 2020. Although the medical providers who testified could not offer a conclusive medical opinion as to where decedent contracted COVID-19 so as to establish a causal connection between decedent's contraction of COVID-19 and his employment,⁴ the testimony credited by the Board regarding prevalence combined with the statutory presumption sufficiently established that decedent contracted COVID-19 at work from a coworker and that his death was the result of, and arose out of, contracting COVID-19 at work (see *Matter of Flores v Wellwood Cemetery Assoc. Inc.*, 232 AD3d at 1004; *Matter of Leonard v David's Bridal, Inc.*, 224 AD3d at 1066; *Matter of Pierre v ABF Frgt.*, 211 AD3d at 1286; compare *Matter of Angelo v Southwestern Cent. Sch.*, 242 AD3d at 1470-1471; *Matter of Rottkamp v New York Univ.*, 232 AD3d at 1008).

Contrary to the employer's contention, its due process rights were not violated by the Board's purported review of a witness' testimony in another COVID-19 related death benefits claim involving the same employer. Although the WCLJ credited the testimony of one of the employer's witnesses in this matter by comparing that witness' testimony to his prior testimony in the other matter—and then found the testimony to be the same and not biased given the witness' familial relationship with decedent—the Board did not rely on this witness' testimony or any other evidence outside of the record in its decision. In any event, any contention by the employer that its due process rights were violated is specious given that it called this witness and that the employer was also the employer of record in the other death benefits claim (see *Matter of Pierre v ABF Frgt.*, 211 AD3d at 1286; cf. *Matter of Kaplan v New York City Tr. Auth.*, 162 AD3d 1194, 1196 [3d Dept 2018]). To the extent that the employer's remaining contentions have not been rendered academic by our determination, they have been considered and found to be without merit.

Clark, J.P., Pritzker, McShan and Powers, JJ., concur. Ordered that the decision is affirmed, without costs.

4. The Board also found it significant that the employer's consultant, who could not conclude how decedent contracted COVID-19, was not provided with any information regarding the prevalence of COVID-19 at decedent's workplace in March 2020 and could not rule out that decedent contracted COVID-19 while at work.

6 In the Matter of the Claim of Mario Ayars, Appellant, v Navillus Tile Company et al., Respondents. Workers' Compensation Board, Respondent. [251 NYS3d 799]—

Workers' Compensation—Award—Entitlement to 20% Schedule Loss of Use Rather than Permanent Partial Disability Benefits for Right Knee Injury Appropriate—Substantial Evidence

McShan, J. Appeal from a decision of the Workers' Compensation Board, filed August 21, 2024, which ruled, among other things, that claimant was entitled to a schedule loss of use award rather than permanent partial disability benefits for his right knee injury.

The facts of this case are more fully set forth in this Court's prior decision in the matter (219 AD3d 1614 [3d Dept 2023]). Briefly, claimant established a claim for workers' compensation benefits based upon injuries to his right knee. Following a hearing and the submission of medical reports and deposition testimony of the reports' authors, the Workers' Compensation Board found that claimant's injury was amenable to a schedule loss of use (hereinafter SLU) rather than a nonschedule classification. The Board further determined that the SLU opinions of the two physicians who submitted permanency reports were inconsistent with the impairment guidelines and concluded that claimant had a 20% SLU of his right leg. Finding that the Board's decision was based upon an inaccurate assessment of the medical opinions, we reversed the decision and remitted the matter to the Board so that "a proper assessment of the evidence can occur" (*id.* at 1617). We further advised that "the Board, upon remittal, should also, after accurately reviewing the medical evidence before it, determine anew whether the claim is amenable to classification or an SLU award, and then, if the latter, the resulting percentage and degree of disability," and that "[t]he Board may also permit the parties to submit additional evidence on the issues presented herein" (*id.*).

Upon remittal, the Board concluded that the record was complete without the need for further submissions by the parties. Following a review of the record evidence, the Board determined that a SLU award was appropriate, and that claimant was entitled to a 20% SLU award for his right leg. Claimant appeals.

We affirm. Initially, contrary to claimant's contention, inasmuch as both parties had an opportunity to be heard and present evidence on the issues prior to the Board's initial decision, the Board's determination not to allow further development of the record upon remittal was not an abuse of discretion (*see Matter of Bugianishvili v Alliance Refrig. Inc.*, 195

AD3d 1365, 1366 [3d Dept 2021]; *Matter of Prince v Verizon N.Y.*, 153 AD3d 1111, 1111-1112 [3d Dept 2017]).

“Whether a claimant is entitled to nonschedule permanent partial disability classification or an SLU award and, if so, the resulting percentage are factual questions for the Board to resolve and, thus, the Board’s determination will be upheld provided that it is supported by substantial evidence” (*Matter of Ayars v Navillus Tile Co.*, 219 AD3d at 1615 [internal quotation marks, brackets and citations omitted]; see *Matter of Lyman v New York State Canal Corp.*, 208 AD3d 1571, 1572 [3d Dept 2022]). “[T]he Board is vested with the authority to weigh conflicting medical evidence and to credit the opinion of one medical expert over another, and is free to accept or reject portions of a medical expert’s opinion” (*Matter of Harmon v Office of Children & Family Servs.*, 206 AD3d 1214, 1215 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Matter of Lyman v New York State Canal Corp.*, 208 AD3d at 1572). In August 2020, Thomas DiBenedetto, an orthopedic surgeon who examined claimant on behalf of the employer, opined that claimant had reached maximum medical improvement for his right knee and that an SLU award was appropriate. In November 2020, Steven Touliopoulos, claimant’s treating orthopedic surgeon, similarly opined that claimant had reached maximum medical improvement and that an SLU award was appropriate. In a February 2021 addendum, however, Touliopoulos changed his opinion, indicating that claimant’s condition was more amenable to a nonschedule classification. When questioned as to his change of opinion, Touliopoulos testified that it was not based upon a new examination of claimant and that he could not recall what had prompted the addendum. In light of the foregoing, the Board was entitled to credit DiBenedetto’s opinion that claimant’s injuries were amenable to an SLU award over the equivocal opinions expressed by Touliopoulos on this issue. Accordingly, the Board’s finding that claimant’s injuries were amenable to an SLU award is supported by substantial evidence (see *Matter of Raffiani v Allied Sys., Ltd.*, 27 AD3d 983, 984 [3d Dept 2006]).

As to claimant’s challenge to the resulting 20% SLU award, as limited by his brief, we reject his claim that it is not supported by the medical evidence. The Board was free to credit Touliopoulos’ findings as to claimant’s range of motion limitations in his November 2020 permanency report. The report notes a range of motion measurement by use of a goniometer of flexion to 110 degrees for the right knee, which equates to a

20% SLU (New York Workers' Compensation Guidelines for Determining Impairment §§ 7.3, figure 7.3 [1] at 41; 7.4, table 7.4 at 42 [2018]). As claimant does not otherwise contest the balance of the Board's findings, the Board's decision is affirmed.

Reynolds Fitzgerald, J.P., Ceresia, Fisher and Mackey, JJ., concur. Ordered that the decision is affirmed, without costs.

7 In the Matter of the Claim of Vincent Labocetta, Appellant, v Consolidated Edison Co. of New York, Inc., et al., Respondents. Workers' Compensation Board, Respondent. [251 NYS3d 433]—

Workers' Compensation—Award—Claimant Entitled to 20% Schedule Loss of Use for Bilateral Carpal Tunnel Syndrome—Conflicting Orthopedist Opinions

Fisher, J. Appeals (1) from a decision of the Workers' Compensation Board, filed October 29, 2024, which ruled, among other things, that claimant was entitled to a 20% schedule loss of use award for bilateral carpal tunnel syndrome, and (2) from a decision of said Board, filed January 23, 2025, which denied claimant's application for reconsideration and/or full Board review.

Claimant established a workers' compensation claim for bilateral carpal tunnel syndrome stemming from his job as an energy service representative. Following carpal tunnel release surgery performed on each hand, claimant was evaluated for permanency by Daniel Wilen, claimant's attending orthopedic surgeon, who opined that claimant had reached maximum medical improvement (hereinafter MMI) and that, based upon the range of motion (hereinafter ROM) measurements and continued postsurgical pain, tenderness and swelling, that claimant suffered a 30% schedule loss of use (hereinafter SLU) of each wrist. Carl Weiss, the orthopedic consultant for the employer's workers' compensation carrier, also examined claimant for permanency and agreed that MMI had been reached; however, based upon his ROM measurements, conduction of a positive Tinel test and review of claimant's medical records, Weiss concluded that, in accordance with the 2018 New York Workers' Compensation Guidelines for Determining Impairment (hereinafter the impairment guidelines), claimant sustained a 20% SLU of both wrists.

Following a hearing and the submission of deposition testimony from both orthopedic surgeons, the Workers' Compensation Law Judge (hereinafter WCLJ), among other things, credited Wilen's opinion and found that claimant sustained a 30% SLU of both wrists. Upon administrative appeal, the Workers' Compensation Board, in a decision filed

October 29, 2024, found that Wilen’s medical opinion was not supported by the ROM findings and did not properly apply the impairment guidelines. Further, the Board found that Weiss had properly applied the impairment guidelines in reaching an SLU conclusion, credited that opinion and, as such, modified the WCLJ’s decision by, among other things, finding that claimant sustained a 20% SLU of each hand. Claimant’s subsequent application for reconsideration and/or full Board review was denied by the Board in a decision filed January 23, 2025. Claimant appeals from both Board decisions.

We affirm. “Whether a claimant is entitled to an SLU award and, if so, the resulting percentage are factual questions for the Board to resolve, and the Board’s determinations in this regard, if supported by substantial evidence in the record as a whole, will not be disturbed” (*Matter of James v Premier Home Health Care*, 232 AD3d 1017, 1018 [3d Dept 2024] [internal quotation marks and citations omitted]; see *Matter of Brooks v New York City Tr. Auth.*, 234 AD3d 1072, 1074 [3d Dept 2025]). Furthermore, “the Board is vested with the authority to resolve conflicting medical opinions concerning the SLU percentage to be assigned to a specific injury, and, to that end, the Board is free to accept or reject portions of a medical expert’s opinion” (*Matter of Zuhlke v Lake George Cent. Sch. Dist.*, 220 AD3d 1028, 1029 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Matter of Amato v Patchogue Supermarkets LLC*, 232 AD3d 970, 972 [3d Dept 2024]; *Matter of Harmon v Office of Children & Family Servs.*, 206 AD3d 1214, 1215 [3d Dept 2022]).

In crediting Weiss’ medical opinion, the Board found that Weiss properly applied the impairment guidelines in reaching his medical conclusion that claimant sustained a 20% SLU. To that end, the impairment guidelines provide, as is relevant here, that carpal tunnel syndrome is a special consideration that has an enumerated SLU value and, although “[o]ther deficits may be added when specified or when no schedule value is provided . . . , the maximum [SLU] value cannot exceed the value of ankylosis,” except in specific circumstances that are not present here (New York Workers’ Compensation Guidelines for Determining Impairment § 3.5 at 25 [2018]). The impairment guidelines direct that value for carpal tunnel syndrome as a special consideration can be determined with reference to section 10.3 (A) (see New York Workers’ Compensation Guidelines for Determining Impairment § 3.5 [6] at 25 [2018]). Section 10.3 (A) notes that carpal tunnel syndrome relates to the median nerve, which “is the most common of peripheral nerve

entrapment syndromes in the upper limb,” and recognizes that symptoms may include atrophy, tingling and numbness, weakness and positive Tinel’s test (New York Workers’ Compensation Guidelines for Determining Impairment § 10.3 [A] at 56 [2018]). According to the impairment guidelines, carpal tunnel syndrome “with or without decompression [of the median nerve] is usually given a schedule loss of the hand, which usually averages 10-20% loss of use” (New York Workers’ Compensation Guidelines for Determining Impairment § 10.3 [A] at 56 [2018]).

Weiss testified that, upon examination, claimant presented with mild tenderness, positive Tinel’s sign and mild decrease ROM in dorsiflexion, volar flexion and supination in both wrists. No atrophy of claimant’s hands was found by either orthopedic surgeon, however, Weiss testified that claimant reported weakness, numbness and tingling of the wrists. Based upon the foregoing, Weiss testified that a 20% SLU, which is consistent with and at the top of the SLU range provided by the impairment guidelines for carpal tunnel syndrome, was appropriate, and that there were no additional findings warranting an increase or deviation from the SLU set forth by the impairment guidelines.

We are unpersuaded by claimant’s contention that Weiss’ testimony and medical report are inherently inconsistent. Specifically, claimant asserts that the 75% loss of radial lateral ROM documented by Weiss is purportedly inconsistent with his testimony that the loss of ROM was mild. Weiss acknowledged in his testimony that claimant’s radial deviation represents a significant decrease in ROM but explained that it was an “unimportant” ROM measurement in assessing the overall SLU for carpal tunnel syndrome. Moreover, the impairment guidelines specifically provide that deficiencies in the radial-lateral motion are not considered in determining the percentage loss of use of the wrist but may be separately considered if other findings in the wrist are normal (*see* New York Workers’ Compensation Guidelines for Determining Impairment § 3.4 at 24 [2018]). The medical reports from both orthopedic surgeons reflect that the ROM measurements of claimant’s wrists were not normal but revealed various deficits in ROM measurements, which, pursuant to the impairment guidelines, rendered consideration of deficiency in claimant’s radial-lateral motion unnecessary. In rejecting Wilen’s medical opinion, the Board noted that the 30% SLU assessed by Wilen was not supported by the ROM findings or by the proper application of the impairment guidelines for a carpal tunnel syndrome diagnosis. In

view of the foregoing, and contrary to claimant's contention, substantial evidence supports the Board's determination, as the Board was entitled to credit the 20% SLU opinion of Weiss, which was consistent with the proper application of the impairment guidelines for carpal tunnel syndrome (*see Matter of Wright v Elmer W. Davis Inc.*, 231 AD3d 1225, 1229 [3d Dept 2024]; *Matter of Zuhlke v Lake George Cent. Sch. Dist.*, 220 AD3d at 1030).

Finally, we have reviewed claimant's challenge to the denial of his application for reconsideration and/or full Board review and are unpersuaded that the Board failed to consider his challenge to the credibility of the medical opinion and SLU assessment of Weiss and find no abuse of discretion in the Board denying said application (*see Matter of Zuhlke v Lake George Cent. Sch. Dist.*, 220 AD3d at 1030; *Matter of Ward v NYC Tr. Auth.*, 214 AD3d 1277, 1280 [3d Dept 2023]). To the extent that claimant's remaining contentions are not specifically addressed, they are without merit.

Clark, J.P., Aarons, Pritzker and Reynolds Fitzgerald, JJ., concur. Ordered that the decisions are affirmed, without costs.

8 The People of the State of New York, Respondent, v Recep Sandikci, Appellant. [251 NYS3d 431]—

Crimes—Sex Offenders—Sex Offender Registration Act—Guilty Plea to Federal Crimes of Travel with Intent to Engage in Illicit Sexual Conduct and Transfer of Obscene Material to Minors—Upward Departure to Risk Level Two

Mackey, J. Appeal from an order of the County Court of Albany County (William Little, J.), entered April 12, 2024, which classified defendant as a risk level two sex offender pursuant to the Sex Offender Registration Act.

Defendant pleaded guilty to the federal crimes of travel with intent to engage in illicit sexual conduct and transfer of obscene material to minors and, in 2021, was sentenced to 71 months in prison, to be followed by 15 years of postrelease supervision (*see* 18 USC §§ 1470, 2423 [b]). The convictions stemmed from sexually explicit online communications between the 45-year-old defendant and a 13-year-old girl (hereinafter the victim) that began in July 2019. The victim's mother discovered what was going on and alerted the authorities, after which an undercover officer posing as the victim arranged a meeting with defendant in Albany County. Defendant drove from his home in New Jersey to the meetup location on August 6, 2019, and was arrested. After his release to a re-entry facility in 2023, the Board of Examiners of Sex Offenders prepared a risk assessment instrument that presumptively classified defend-

ant as a risk level one sex offender (40 points) pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C) and recommended an upward departure to risk level two. At the ensuing hearing, neither party contested the points assessed by the Board, but the People advocated for an upward departure to risk level three. County Court thereafter determined that an upward departure was appropriate but, noting the People's failure to justify a departure from risk level one to risk level three, classified defendant as a risk level two sex offender. Defendant appeals.

We affirm. "An upward departure from a presumptive risk level classification is justified when an aggravating factor exists that is not otherwise adequately taken into account by the risk assessment guidelines and the court finds that such factor is supported by clear and convincing evidence" (*People v Richardson*, 209 AD3d 1068, 1069 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 39 NY3d 908 [2023]; *see People v Weber*, 40 NY3d 206, 210 [2023]; *People v Newkirk*, 241 AD3d 1683, 1685 [3d Dept 2025]). "In making its determination, the court may consider reliable hearsay evidence such as the case summary, presentence investigation report and risk assessment instrument" (*People v Nash*, 114 AD3d 1008, 1008 [3d Dept 2014] [citations omitted]; *see* Correction Law §§ 168-d [3]; 168-n [3]; *People v Newkirk*, 241 AD3d at 1684).

County Court here relied upon the case summary and the federal presentence report—which included defendant's admissions to investigators, transcripts of his communications with the victim, and a description of the items found in his possession after his arrest and the contents of his cell phone—reflecting that defendant intended to subject the victim to sexual contact when he met her and was only prevented from doing so because the involvement of law enforcement instead resulted in his arrest. The proof further showed that his interaction with the victim was not an isolated incident, as he had engaged in sexually explicit Internet conversations with several other people who claimed to be underage girls prior to his arrest. To be sure, defendant questioned the quality of proof on other issues such as whether he had actually had sex with minors as an adult, and he suggested that his marriage to an adult female, his advancing age and his engagement with treatment while incarcerated were factors mitigating against the need for an upward departure. County Court nevertheless appropriately found from the totality of the circumstances "that the risk assessment instrument did not adequately take into account the

nature of defendant's conduct, and we perceive no abuse of discretion in its classification of defendant as a risk level two sex offender" (*People v Bower*, 127 AD3d 1507, 1508 [3d Dept 2015], *lv denied* 26 NY3d 910 [2015]; see *People v Trovato*, 222 AD3d 673, 675 [2d Dept 2023], *lv denied* 42 NY3d 913 [2025]; *People v Headwell*, 156 AD3d 1263, 1264 [3d Dept 2017], *lv denied* 31 NY3d 902 [2018]; *People v DeDona*, 102 AD3d 58, 69-70 [2d Dept 2012]).

Aarons, J.P., Pritzker, Ceresia and Powers, JJ., concur. Ordered that the order is affirmed, without costs.

9 In the Matter of the Claim of Robert William Hummer, Respondent, v Riccelli Enterprises, Inc., et al., Appellants. Workers' Compensation Board, Respondent. [249 NYS3d 312]—

Workers' Compensation—Causal Relation—Claimant Sustained Ongoing Causally-Related Marked Partial Disability to Lower Back

Powers, J. Appeal from a decision of the Workers' Compensation Board, filed July 9, 2024, which ruled that claimant sustained a temporary causally-related marked partial disability.

Claimant, who had previously injured his back in 2017 while working at a different job, asserted that he sustained a new lower back injury on May 31, 2022, when, in the course of his work as a laborer for the employer, a paving machine ran into him as he was raking asphalt. The employer and its workers' compensation insurance carrier (hereinafter collectively referred to as the carrier) controverted the ensuing workers' compensation claim upon the grounds that the 2022 accident had not occurred and that, even if it had, claimant's symptoms were related to his preexisting back problems. A Workers' Compensation Law Judge subsequently found that claimant sustained a work-related injury to his lower back that was unrelated to the prior injury and awarded benefits. After an orthopedic surgeon conducted a June 2023 independent medical examination and concluded that the injuries claimant sustained in the 2022 accident had resolved and that his continuing symptoms related to his prior injury, the carrier argued that claimant had no further causally-related disability. The Workers' Compensation Law Judge directed that the orthopedic surgeon who conducted that examination and the nurse practitioner who regularly treated claimant be deposed and, thereafter, found that the credible evidence did not establish that claimant suffered from an ongoing causally-related disability. The Workers' Compensation Board disagreed upon administrative review, found that claimant had a causally-

related marked partial disability and awarded ongoing benefits. The carrier appeals.¹

We affirm. The Board is tasked with resolving the factual question of whether a causal relationship exists between a claimant's injury and his or her employment, and its determination will not be disturbed if supported by substantial evidence in the record (*see Matter of Arce v Shear Constr., LLC*, 232 AD3d 1022, 1023 [3d Dept 2024]; *Matter of Bonitto v Vivid Mech. LLC*, 231 AD3d 1222, 1223 [3d Dept 2024]). As the party seeking benefits, it is the claimant who bears the burden of demonstrating the existence of a causal relationship via competent medical evidence (*see Matter of Balseca v Hudson Concrete Inc.*, 238 AD3d 1415, 1415 [3d Dept 2025]; *Matter of Bonitto v Vivid Mech. LLC*, 231 AD3d at 1223). Notably, where there are conflicting medical opinions on the issue of causality, the Board is vested with authority to resolve those conflicts, and we accord great deference to its credibility determinations (*see Matter of Bonitto v Vivid Mech. LLC*, 231 AD3d at 1223; *Matter of Brown v Van Liner Ins. Co.*, 227 AD3d 1331, 1333 [3d Dept 2024]).

Here, the nurse practitioner testified, and claimant's medical records reflected, that he had degenerative changes in his spine that caused symptoms on the left side of his body prior to the 2022 accident but that, with medication and treatment, this did not limit his ability to do his job or other daily activities. Her examinations of claimant led her to conclude that, as a result of the 2022 accident, he sustained a separate "twisting injury and contusion to the . . . right mid-thoracic back" that caused new symptoms on the right side of his body. Indeed, both the orthopedic surgeon who later authored the 2023 medical examination report and other physicians who had examined claimant agreed that he had sustained such a causally-related injury. The nurse practitioner testified that it was these new symptoms on the right side of claimant's body, caused by the 2022 injury, that continued to be disabling in 2023.² The orthopedic surgeon who conducted the 2023 medical examination

1. The employer had requested that the Board substitute Riccelli Northern Contracting, LLC, in its place, and the notice of appeal names that entity as an appealing party rather than the purportedly "[m]isidentified" employer. The Board makes clear in its brief that it has taken no action upon the request for substitution and that the named employer remains unchanged, however, and we proceed accordingly.

2. The carrier suggests that the nurse practitioner's opinion was open to question because she found that claimant had a 100% causally-related disability as opposed to the partial disability found by the Board but, as the Board itself noted, the nurse practitioner clarified in her testimony that

(n. cont'd)

disagreed, opining that the lumbar strain claimant suffered in the 2022 accident was no longer symptomatic by June 2023 and that his continuing symptoms “were more likely due to his preexisting, underlying problem.” Even the orthopedic surgeon acknowledged, however, that it was “difficult to differentiate” between the two and that he could not “say with [100%] accuracy” which was responsible for claimant’s ongoing disability. The Board resolved the credibility question raised by these conflicting opinions by crediting the opinion of the nurse practitioner that claimant’s ongoing disability was connected to the injuries he sustained in the 2022 accident and, deferring to that assessment, substantial evidence in the record supports its finding of a continuing causally-related disability despite proof that could support a different result (*see Matter of Brown v Van Liner Ins. Co.*, 227 AD3d at 1334; *Matter of Dupont v Quality Distrib., Inc.*, 158 AD3d 967, 969-970 [3d Dept 2018]; *Matter of Conyers v Van Rensselaer Manor*, 80 AD3d 914, 916 [3d Dept 2011]). The carrier’s remaining contentions have been examined and rejected.

Garry, P.J., Reynolds Fitzgerald, McShan and Mackey, JJ., concur. Ordered that the decision is affirmed, without costs.

10 In the Matter of the Claim of Rupert Sheodial, Appellant, v Universal Construction Resources Inc. et al., Respondents. Workers’ Compensation Board, Respondent. [251 NYS3d 802]—

Workers’ Compensation—Workers’ Compensation Board—Denial of Application for Reconsideration and/or Full Board Review—Inconsistent Accounts of When and How Claimant was Injured and Failure to Tell Medical Providers Who Linked Back Problems to Prior Work Injury of Previous Treatment for Low Back Pain

Pritzker, J. Appeal from a decision of the Workers’ Compensation Board, filed October 30, 2024, which denied claimant’s application for reconsideration and/or full Board review.

Claimant, a construction supervisor, filed a claim for workers’ compensation benefits alleging that he began developing back pain in April 2021 and, in June 2021, experienced pain in the right side of his lower back and his toes after walking in and out of an excavated area and between the basement and roof at a worksite. Following hearings and the taking of depositions from medical professionals who had either treated claimant or conducted an independent medical examination of him, a Workers’ Compensation Law Judge found that claimant

claimant was unable to return to the work he had been doing as a laborer but could do other work within his physical restrictions.

had suffered a work-related low back injury and established the claim. The Workers' Compensation Board reversed and disallowed the claim in a July 2024 decision, finding that the credible evidence did not establish a causal relationship between claimant's back problems and his work in view of his inconsistent accounts of when and how he was injured and, more significantly, his failure to tell the medical providers who linked his back problems to a 2021 work injury that he had previously been treated for low back pain in 2020. In an October 2024 decision, the Board denied claimant's application for reconsideration and/or full Board review. Claimant appeals from the October 2024 decision.

We affirm. As claimant solely appealed from the October 2024 decision denying his application for reconsideration and/or full Board review, the merits of the Board's July 2024 decision are not properly before us (*see Matter of Lopez v Platoon Constr., Inc.*, 212 AD3d 953, 954 [3d Dept 2023]; *Matter of Pucci v DCH Auto Group*, 90 AD3d 1255, 1255 [3d Dept 2011]). To the extent that claimant raises arguments regarding the October 2024 decision, an applicant for reconsideration and/or full Board review must "demonstrate that newly discovered evidence exists, that there has been a material change in condition, or that the Board improperly failed to consider the issues raised in the application for review in making its initial determination" (*Matter of Serrano v Bay Park Ctr. for Nursing & Rehabilitation*, 236 AD3d 1256, 1258-1259 [3d Dept 2025] [internal quotation marks and citations omitted]). Our review of the record confirms that the Board considered the issues before it in its July 2024 decision and, as claimant failed to produce any new proof or assert a change in his condition, the denial of his application was neither arbitrary and capricious nor an abuse of discretion (*see Matter of Lopez v Platoon Constr., Inc.*, 212 AD3d at 954-955; *Matter of Paivanas v Resource Ctr.*, 77 AD3d 993, 993 [3d Dept 2010], *lv dismissed* 16 NY3d 781 [2011]).

Garry, P.J., Clark, Powers and Corcoran, JJ., concur. Ordered that the decision is affirmed, without costs.

11 In the Matter of Allan Baldwin Cruikshank Jr., an Attorney. (Attorney Registration No. 2980969.) [250 NYS3d 718]—

Attorney and Client—Disciplinary Proceedings—Censure—Neglect of Criminal Appeals—Reciprocal Discipline

Per Curiam. Respondent was admitted to practice by this Court in 1999 and currently practices as a principal at a small firm in the City of Plattsburgh, Clinton County. Respondent's

admission to practice before the US Court of Appeals for the Second Circuit expired in January 2022 and, in March 2024, the Second Circuit barred respondent from seeking readmission until he responded to the inquiries of the Second Circuit's Grievance Panel in connection with the Panel's investigation of respondent's representation of a criminal client before the Second Circuit. We later censured respondent, upon a motion of the Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC), as a consequence of his misconduct before the Second Circuit (230 AD3d 901 [3d Dept 2024]). Respondent has since been publicly reprimanded by the Second Circuit based upon his deficient representation of the same criminal client before that Court, with respondent admitting to that Court that he failed to effectively and timely prosecute the criminal appeal, among other conduct. AGC now therefore moves to impose discipline upon respondent in this state due to the latest finding of misconduct by the Second Circuit (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.13; Rules of App Div, 3d Dept [22 NYCRR] § 806.13). Respondent does not dispute the factual allegations of AGC's motion, but opposes the imposition of any further discipline. Based on respondent's initial submission in response to AGC's motion, we directed him to provide additional information, which he has submitted by supplemental affirmation.

"Upon application by AGC containing proof that an attorney has been disciplined by a foreign jurisdiction, we shall direct that the attorney demonstrate why discipline should not be imposed in New York for the underlying misconduct. In response to AGC's application, the attorney may assert any of the three defenses as provided for in Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.13 (b)" (*Matter of Beckett*, 241 AD3d 1034, 1034-1035 [3d Dept 2025] [internal quotation marks and citations omitted]). AGC avers that respondent's admissions before the Second Circuit that he failed to effectively and timely pursue the criminal appeal constitute proof that he neglected the appeal (*see* Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.3 [b]) and his admissions that he failed to respond to the directives of the Second Circuit likewise constitute conduct prejudicial to the administration of justice (*see* Rules of Prof Conduct [22 NYCRR 1200.0] rule 8.4 [d]). While respondent does not dispute any of the factual allegations in AGC's motion or otherwise raise any of the defenses as provided for in Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.13 (b), we note that, in censuring respondent in August 2024, we concluded that the Second Circuit's order barring respondent from seeking readmission was "a direct

result and consequence of his failure to timely comply with the Grievance Panel's September 2022 directive" and accordingly constituted a violation of Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4 (d) (230 AD3d at 903). The record reveals that, at the time respondent submitted his response to the Grievance Panel's order, there were no additional allegations that respondent had failed to respond to the Second Circuit as he had failed to do previously. Accordingly, we deny AGC's motion to the extent that it seeks the imposition of discipline based on respondent's admissions that he failed to respond to the directives of the Second Circuit (*see* Rules of Prof Conduct [22 NYCRR 1200.0] rule 8.4 [d]), as we have already disciplined respondent for this conduct in our August 2024 order of censure.

Notwithstanding this conclusion, the Second Circuit's order publicly reprimanding respondent details his own admission that he failed to effectively and timely prosecute the criminal appeal, which failure constitutes client neglect in New York (*see* Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.3 [b]) and is misconduct that has routinely resulted in discipline in this state (*see e.g. Matter of D'Amico*, 166 AD3d 1375 [3d Dept 2018]; *Matter of Bailey*, 145 AD3d 1182 [3d Dept 2016]; *see also Matter of Joffe*, 158 AD3d 11 [1st Dept 2018]). Accordingly, we grant AGC's motion, find respondent's misconduct established as to his neglect of the criminal appeal and turn to consideration of the appropriate penalty (*see Matter of Shedlick*, 234 AD3d 1101, 1102-1103 [3d Dept 2025]).

In aggravation, AGC cites several of the aggravating factors also noted by the Second Circuit's public reprimand of respondent, including his substantial years of experience as an attorney, his disciplinary history demonstrating a pattern of similar conduct that he continues to engage in and the fact that his conduct delayed resolution of his client's criminal appeal and the subsequent disciplinary proceeding, resulting in unnecessary expense of time and court resources (*see* ABA Standards for Imposing Lawyer Sanctions standard 9.22 [a], [c], [i]). We also take notice of the Second Circuit's public reprimand of respondent, wherein that Court explicitly concluded that respondent's conduct as to the criminal appeal "likely would have warranted a suspension had he been a member of [that] Court's bar," and likewise found unavailing his vague references to personal "stressors," chiefly because respondent failed to describe when these stressors occurred in relation to the criminal appeal or how they contributed to his misconduct.

As he did before the Second Circuit, respondent, in present-

ing mitigating factors to this Court, admits that he struggles with managing his caseload, as well as with the “mental and emotional stressors” of his work as an attorney (*see* ABA Standards for Imposing Lawyer Sanctions standard 9.32 [c]). Accordingly, we directed respondent to provide specific information concerning his efforts to address these self-identified challenges. Respondent has provided such information in his supplemental affirmation, wherein he references his efforts to ensure proper calendaring of all court appearances, to maintain regular contact with his clients and to reduce the number of cases he is managing at any given time, among other efforts (*see* ABA Standards for Imposing Lawyer Sanctions standard 9.32 [d]). Additionally, respondent expresses remorse for his conduct, noting that he takes his obligations to cooperate with AGC very seriously and that he has represented many clients over the years—both in federal and state court matters—and that the majority have been competently represented and satisfied with the results (*see* ABA Standards for Imposing Lawyer Sanctions standard 9.32 [e], [g], [k], [l]). Given these facts, particularly the assertions made by respondent in his supplemental affirmation, and in order to protect the public, maintain the honor and integrity of the profession and deter others from engaging in similar misconduct, we censure respondent (*see e.g. Matter of Matemu*, 197 AD3d 1433 [3d Dept 2021]; *Matter of Rudrakumaran*, 113 AD3d 107 [1st Dept 2013]).

Garry, P.J., Aarons, Ceresia, McShan and Mackey, JJ., concur. Ordered that the motion of the Attorney Grievance Committee for the Third Judicial Department is granted in part and denied in part, in accordance with this decision; and it is further ordered that respondent is censured.

(February 19, 2026)

1 The People of the State of New York, Respondent, v Theresa Stanley, Appellant. [250 NYS3d 298]—

Crimes—Conspiracy—Sale of Cocaine—Ongoing Supplier Relationship—Sufficiency and Weight of Evidence

Crimes—Endangering Welfare of Child—Defendant Involved Her Children in Events Surrounding Narcotics Transaction—Sufficiency and Weight of Evidence

Crimes—Disclosure—Patrol Officer’s Body-Worn Camera Footage Disclosed after Filing Certificate of Compliance—Due Diligence

Corcoran, J. Appeal from a judgment of the Supreme Court (Roger McDonough, J.), rendered January 27, 2023 in Albany County, upon a verdict convicting defendant of the crimes of

conspiracy in the second degree, criminal possession of a controlled substance in the third degree (two counts) and endangering the welfare of a child (two counts).

During the summer of 2020, the Attorney General's Organized Crime Task Force and the Albany Police Department conducted a joint wiretap investigation into the cocaine distribution operation of Jamar Brayboy. Investigators intercepted numerous cellular telephone calls in which Brayboy, defendant and others discussed obtaining and supplying various quantities of cocaine, culminating in a sweeping indictment against several defendants. Defendant was charged by indictment with conspiracy in the second degree, three counts of criminal possession of a controlled substance in the third degree, one count of criminal possession of a controlled substance in the fourth degree and two counts of endangering the welfare of a child.

Following a jury trial, defendant was acquitted of one count each of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree and convicted of all remaining counts. She was sentenced to an indeterminate term of 4 to 12 years in prison for the conspiracy conviction, concurrent determinate terms of six years in prison, to be followed by two years of post-release supervision, for each of the drug possession convictions, and concurrent one-year definite sentences for the endangering the welfare of a child convictions. Defendant appeals.

Initially, defendant contends that the evidence is legally insufficient to sustain her convictions and that the verdict is against the weight of the evidence. When reviewing a challenge to legal sufficiency, we view the proof in the light most favorable to the People and determine whether there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crimes proven beyond a reasonable doubt (*see People v George*, 242 AD3d 1447, 1448 [3d Dept 2025]). Conversely, when reviewing whether a verdict is against the weight of the evidence, we first determine whether, based on all of the credible evidence, a different finding would have been unreasonable; if not, we consider all of the proof in a neutral light while affording deference to the jury's credibility determinations (*see People v Adams*, 201 AD3d 1031, 1032 [3d Dept 2022], *lv denied* 38 NY3d 948 [2022]).

To establish conspiracy in the second degree, the People were required to prove that defendant entered into an agreement with others to commit a class A felony and committed an overt act in furtherance thereof (*see* Penal Law §§ 105.15, 105.20).

Here, the People alleged that defendant agreed to commit the class A felony of criminal sale of a controlled substance in the second degree, which occurs when a person knowingly and unlawfully sells a narcotic drug having an aggregate weight of one-half ounce or more (*see* Penal Law § 220.41 [1]). As for endangering the welfare of a child, the People were required to prove that defendant knowingly “act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old” (Penal Law § 260.10 [1]).

At trial, the lead task force detective testified that he monitored hundreds of intercepted calls during the investigation, which initially targeted Brayboy. By monitoring Brayboy’s communications, investigators learned defendant was selling drugs on his behalf, and they intercepted defendant’s communications with an additional supplier, referred to in the indictment as UM 7669, who was neither identified nor charged. Drawing on his training and experience in narcotics wiretap investigations, the detective explained the coded terminology commonly used in cocaine trafficking and described defendant’s role in obtaining cocaine from multiple suppliers and redistributing it to her own customers.

Defendant’s communications with UM 7669 reflected an ongoing supplier relationship. For instance, on July 11, 2020, defendant acknowledged that she owed UM 7669 thousands of dollars for prior cocaine purchases and asked him to supply her with additional cocaine because she lacked enough to satisfy a customer’s request for an ounce. On July 13, defendant asked UM 7669 for approximately five grams of cocaine to satisfy a customer request. On July 16, defendant advised UM 7669 that a customer wanted “a whole one,” meaning one ounce of cocaine. Concerned that she only had “10 left,” meaning approximately 10 grams, defendant told him that she lacked sufficient quantity to complete the transaction. The following day, defendant again asked UM 7669 for additional cocaine to fulfill a customer’s request for 14 grams, a common resale quantity, according to the detective.

On August 5, 2020, defendant told UM 7669 that she had approximately 50 grams of cocaine, but her customer wanted three ounces, or approximately 85 grams. UM 7669 arranged to meet defendant at a local restaurant to deliver cocaine to her. Surveillance officers watched defendant arrive at the restaurant, enter briefly while her two young children remained in her car and depart shortly thereafter. Approximately 30 minutes later, the wiretap captured defendant asking a friend to borrow a digital scale.

Based on the intercepted communications, the police planned a coordinated “rip operation,” designed to arrest defendant, seize the cocaine, then employ a ruse to release her and thereby preserve the secrecy of the ongoing investigation. Police conducted a traffic stop, predicated on a purported outstanding warrant, and transported defendant to the precinct. As female police officers began a search of her person, defendant handed them a bag of cocaine weighing more than one-half ounce, which she had concealed in her underwear. After confirming that defendant’s phone was the same device being monitored by wiretap, police released her. Defendant later used the phone to call associates, described the encounter and reported that police had taken “50 grams” or 1.76 ounces of cocaine from her.

Viewed in the light most favorable to the People, this proof was legally sufficient to establish that defendant agreed with others to engage in the sale of cocaine with an aggregate weight of one-half ounce or more and that she committed overt acts in furtherance of that agreement (*see People v Chambers*, 185 AD3d 1141, 1144-1145 [3d Dept 2020], *lv denied* 36 NY3d 1055 [2021]; *People v Johnson*, 172 AD3d 1628, 1632-1633 [3d Dept 2019], *lv denied* 34 NY3d 951 [2019]). Defendant’s contention that she did not necessarily obtain the precise quantities of drugs discussed in the intercepted calls is unavailing, as the jury could reasonably infer from her repeated negotiations and her admitted possession of more than one-half ounce of cocaine on August 5, 2020 that she agreed to participate in a sale of a quantity exceeding the requisite statutory threshold (*see People v Johnson*, 172 AD3d at 1632; *compare People v Adams*, 201 AD3d at 1033). As for the counts of endangering the welfare of a child, the jury was entitled to conclude that defendant involved her children in the events surrounding a narcotics transaction and created a likelihood of injury to their mental or moral welfare, a conclusion reinforced by her recorded statements acknowledging that the children were distressed by the traffic stop and their separation from her at the precinct (*see People v Minwalkulet*, 198 AD3d 1290, 1293 [4th Dept 2021], *lv denied* 37 NY3d 1147 [2021]).

Defendant’s contention that the verdict is against the weight of the evidence largely mirrors her legal sufficiency claims. Although a different verdict would not have been unreasonable had the jury discounted the detective’s testimony about the meaning of certain coded terminology (*see People v Johnson*, 172 AD3d at 1632-1633), when viewing the evidence in a neutral light and according appropriate deference to the jury’s credibility determinations, we conclude that the verdict is not

against the weight of the evidence (*see id.*; *People v Pearson*, 151 AD3d 1455, 1456 [3d Dept 2017], *lv denied* 30 NY3d 982 [2017]; *People v Williams*, 138 AD3d 1233, 1236 [3d Dept 2016], *lv denied* 28 NY3d 939 [2016]).

Next, we consider defendant's argument that she is entitled to reversal or remittal to consider her challenge to the People's certificate of compliance (hereinafter COC) after police body-worn camera footage was disclosed during trial. Specifically, defendant claims that Supreme Court erred when it denied her mistrial motion and instead sanctioned the People with a missing evidence charge without first inquiring about the People's compliance with CPL 245.20 and making record findings of its conclusion. We agree and therefore remit for further proceedings.

The existence of body-worn camera footage was first disclosed during the cross-examination of an Albany Police Department patrol officer, who testified that she was wearing an active body camera during defendant's arrest. Before trial, the People represented that they were unaware that any such body-worn camera footage existed and they had produced all discovery materials received from the Albany Police Department. After belatedly learning of the existence of the video, the People explained that the long-term investigation was conducted by officers who did not use body-worn cameras at the time, and that the prosecution was mistakenly advised that no body-worn camera footage existed. Defendant challenged the initial COC and moved for a mistrial. Supreme Court denied the motion and instead offered remedial relief, including the opportunity for defendant to recall the officer, to play the body-worn camera footage for the jury, or for the court to give a missing evidence jury instruction.

"CPL article 245 imposes automatic disclosure requirements upon the People, and it incentivizes compliance by tying their discovery obligations with their trial readiness" (*People v Contompasis*, 236 AD3d 138, 144 [3d Dept 2025] [citations omitted], *lv denied* 43 NY3d 1007 [2025]). Under the version of the statute in effect at the relevant time, the People were required to automatically disclose "all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" (CPL 245.20 [former (1)]). As relevant here, that obligation included "electronic recordings . . . made or received in connection with the alleged criminal incident" (CPL 245.20 [1] [g]).

Once the People meet their automatic discovery obligations,

they must file a COC affirming that “after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery” (CPL 245.50 [former (1)]). The filing of a COC represents an affirmative assertion that the People exercised due diligence and made reasonable inquiries before declaring readiness. The People’s statement of trial readiness must be accompanied or preceded by a COC filed in good faith; that statement triggers the trial court’s duty to “make inquiry on the record as to [the People’s] actual readiness” (CPL 30.30 [former (5)]). In sum, “CPL 245.50 (3) and CPL 30.30 (5), taken together . . . require that the People file a proper COC reflecting that they have complied with their disclosure obligations before they may be deemed ready for trial” (*People v Bay*, 41 NY3d 200, 213-214 [2023]). Although belated disclosure does not, standing alone, render a statement of readiness illusory (*see People v Graham*, 233 AD3d 1361, 1365 [3d Dept 2024], *lv denied* 43 NY3d 944 [2025]), late disclosure provided in good faith cannot cure a failure to exercise diligence in the first instance (*see People v Bay*, 41 NY3d at 212). The People bear the burden of establishing that they exercised due diligence and made reasonable inquiries prior to filing the COC, and, where they fail to do so, the COC must be “deemed improper, the readiness statement stricken as illusory, and—so long as the time chargeable to the People exceeds the applicable CPL 30.30 period—the case dismissed” (*id.* at 213).

Even assuming that the People’s explanation for the discovery lapse evinced good faith, Supreme Court was required to determine whether the People’s failure to timely disclose the patrol officer’s body-worn camera footage rendered the initial COC illusory (*see People v James*, 229 AD3d 1008, 1011 [3d Dept 2024]). Whether the People exercised due diligence “is not to be examined in a vacuum,” but instead requires “a holistic assessment of the People’s efforts to comply with the automatic discovery provisions, rather than a strict item-by-item test” (*People v Young*, 243 AD3d 1303, 1307 [4th Dept 2025] [internal quotation marks and citation omitted]). Relevant considerations include “the efforts made by the prosecution and the prosecutor’s office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People’s response when apprised of any missing discovery” (*People v Bay*, 41 NY3d at

212). The absence of express findings on these essential factors precludes appellate review on this record. Accordingly, we hold the appeal in abeyance, reserve decision and remit the matter to Supreme Court to determine whether the People exercised due diligence in fulfilling their discovery obligations (*see People v Coffey*, 244 AD3d 1609, 1613 [3d Dept 2025]; *People v Young*, 243 AD3d at 1308; *People v James*, 229 AD3d at 1012).

Garry, P.J., Clark, Pritzker and Powers, JJ., concur. Ordered that the decision is withheld, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

2 In the Matter of Tammy Q., Respondent, v Harold R., Appellant. [252 NYS3d 779]—

Parent, Child and Family—Order of Protection—Extension—Good Cause

Powers, J. Appeal from an order of the Family Court of Cortland County (Julie Campbell, J.), entered February 28, 2024, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 8, for an extension of an order of protection.

Petitioner is the mother of a child (born in 2019). Respondent is the father of that child and is currently serving a lengthy prison term following multiple felony convictions, which include crimes committed against petitioner. Following custody proceedings, petitioner was granted sole custody of the child and respondent was denied any visitation or communication. In addition, petitioner was granted a full stay-away order of protection, in favor of both herself and the child, which was entered on respondent's consent but without an admission of wrongdoing. In advance of the automatic expiration thereof, petitioner commenced this proceeding seeking to extend the order of protection. Following temporary extension and a fact-finding hearing, Family Court extended the order of protection through June 1, 2028, five years from the date of the filing of the request. Respondent appeals.

Family Court "may . . . , upon motion, extend [an] order of protection for a reasonable period of time upon a showing of good cause or consent of the parties. The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order. The court must articulate a basis for its decision on the record" (Family Ct Act § 842). The Second Department has found that "[g]ood cause generally signifies a sound basis or legitimate need to take judicial action, and 'in determining whether good cause has been established, courts should

consider, but are not limited by, the following factors: the nature of the relationship between the parties, taking into account their former relationship, the circumstances leading up to the entry of the initial order of protection, and the state of the relationship at the time of the request for an extension; the frequency of interaction between the parties; any subsequent instances of domestic violence or violations of the existing order of protection; and whether the current circumstances are such that concern for the safety and well-being of the petitioner is reasonable’ ” (*Matter of Jacobs v Jacobs*, 167 AD3d 890, 890-891 [2d Dept 2018], quoting *Matter of Molloy v Molloy*, 137 AD3d 47, 53 [2d Dept 2016]). Notably, in enacting the language in question, the Assembly indicated that “[a]n applicant’s request for an extension should be viewed in the context of the facts of the case, including present circumstances, past abuse by the respondent, threats of abuse by the respondent and relevant information concerning the safety and protection of the protected persons with the primary goal to prevent a recurrence of abuse” (Assembly Mem in Support, Bill Jacket, L 2010, ch 325 at 9).

Family Court’s determination that petitioner established good cause for extension of the order of protection is supported by a sound and substantial basis in the record. First, contrary to respondent’s suggestion, the court appropriately took judicial notice of respondent’s extensive criminal history, including his history of criminal conduct in the presence of the child and his convictions for crimes against petitioner (*see Matter of Molloy v Molloy*, 137 AD3d at 54). Deferring to the court’s credibility assessments, the record demonstrates that respondent has continued to gain access to petitioner even while incarcerated by, among other things, enlisting his mother to contact petitioner on his behalf in violation of the order of protection. As a result, although the parties have had no direct contact since the issuance of the order of protection, respondent has “continued to interfere with . . . petitioner’s peaceful existence and well-being through other means” (*Matter of Jacobs v Jacobs*, 167 AD3d at 891). Thus, considering the facts of this case, good cause existed to extend the order of protection for five years as to both petitioner and the child (*see Matter of Stacey T. v Felix M.*, 177 AD3d 413, 414 [1st Dept 2019]; *Matter of Lashlee v Lashlee*, 169 AD3d 683, 684 [2d Dept 2019], *lv denied* 33 NY3d 902 [2019]; compare *Matter of E.Y.A.-G. v S.B.*, 232 AD3d 463, 463 [1st Dept 2024]).

Garry, P.J., Clark, Pritzker and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

3 In the Matter of Linden L., Appellant, v Justin M., Respondent. (Proceeding No. 1.) In the Matter of Justin M., Respondent, v Linden L., Appellant. (Proceeding No. 2.) (And Another Related Proceeding.) [252 NYS3d 823]—

Parent, Child and Family—Custody—Modification—Relocation with Children to Michigan Not in Their Best Interests—Parental Alienation by Mother

Pritzker, J. Appeal from an order of the Family Court of Clinton County (Brendon Dupree, Ref.), entered April 11, 2024, which, among other things, granted petitioner’s application, in proceeding No. 2 pursuant to Family Ct Act article 6, to modify a prior order of custody.

Linden L. (hereinafter the mother) and Justin M. (hereinafter the father) are the parents of the subject children (born in 2011 and 2014). In September 2018, the mother and the father entered into a custody order upon consent, pursuant to which they shared joint legal and physical custody of the children with, as relevant here, an alternate week rotating schedule. At the time of the 2018 order, both the mother and the father lived in the Town of Plattsburgh, Clinton County. In September 2022, the mother filed a modification petition seeking sole custody of the children and permission to relocate them to St. Albans, Vermont. In October 2022, the father answered the mother’s petition and cross-petitioned for modification of the prior order requesting sole legal and physical custody of the children premised on the mother’s constant efforts to undermine his relationships with the children as well as her inability to coparent. Then, in May 2023, the mother filed another modification petition, this time requesting that the children be allowed to move with her to Michigan, where the mother was relocating with her “life partner” (hereinafter the stepfather) due to his new job assignment.

Following a multiday trial on all three petitions and a *Lincoln* hearing, Family Court denied the mother’s petitions, finding that while there was a change in circumstances, as evidenced by the mother’s move out of state and the deteriorating parental relationship, the mother failed to prove that it would be in the children’s best interests to relocate with her to Michigan. Furthermore, the court granted the father’s petition, finding, among other things, that the mother tended to alienate the father. Thus, the court awarded sole legal and physical custody to the father while fashioning a detailed schedule of

extensive parenting time for the mother with the children in Michigan. The mother appeals.¹

On appeal, the mother does not challenge Family Court's determination that there was a change in circumstances since entry of the prior order based upon, among other things, the mother's relocation to Vermont and then Michigan (*see Matter of Mark JJ. v Stephanie JJ.*, 240 AD3d 1025, 1026 [3d Dept 2025]; *Matter of Carla UU. v Cameron UU.*, 227 AD3d 1257, 1259 [3d Dept 2024]). As such, we turn our focus to the mother's assertion that Family Court's determination that it was in the best interests of the children for the father to have sole legal and physical custody is not supported by a sound and substantial basis in the record. A best interests determination "requires consideration of, among other factors, the quality of the home environments of each parent, the need for stability in the child[ren]'s li[ves], the degree to which each parent has complied with the existing custodial arrangement and whether he or she will promote a positive relationship between the child[ren] and the other parent, as well as each parent's past performance and ability to provide for the child[ren]'s physical, emotional and intellectual well-being" (*Matter of Ronald R. v Natasha FF.*, 217 AD3d 1163, 1164 [3d Dept 2023] [internal quotation marks and citations omitted]; *see Matter of Mary N. v Scott M.*, 218 AD3d 890, 892 [3d Dept 2023]). "Additionally, in instances involving a potential relocation, courts must consider, among other factors, each parent's reasons for seeking or opposing the move, the quality of the relationships between the children and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the children's future contact with the noncustodial parent, the degree to which the custodial parent's and children's lives may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and children through suitable parenting time arrangements" (*Matter of Mark JJ. v Stephanie JJ.*, 240 AD3d at 1027 [internal quotation marks, brackets and citations omitted]; *see Matter of Brian VV. v Heather WW.*, 218 AD3d 860, 861 [3d Dept 2023]). "A custodial determination depends to a great extent upon an assessment of the testimony, character and sincerity of the parties [and,] [f]or this reason, it is well established that, given its superior position to observe the witnesses, deference is ordinarily accorded to Family Court's find-

1. We note that the attorney for the children on this appeal has filed a brief on the children's behalf, which we have carefully considered in reaching our determination.

ings in this respect” (*Matter of Joanna PP. v Ohad PP.*, 230 AD3d 1445, 1447 [3d Dept 2024] [citations omitted]; see *Matter of Robert C. v Katlyn D.*, 230 AD3d 1392, 1394 [3d Dept 2024]).

As to the issue of the mother’s and the father’s respective relationships with the children, testimony made clear that both parents are heavily involved in all aspects of the children’s lives and have taken an active role in providing for their medical, emotional, academic and social well-being. Although, at the time of the hearing, the children appeared to have a greater attachment to the mother and historically trusted her more than the father, especially in medical situations, the father reported that his relationship with the children had vastly improved. Testimony also demonstrated that the children appeared to have good relationships with the stepfather and the father’s wife (hereinafter the stepmother). Despite this, it is clear from several explosive incidents that the mother and the stepmother do not have a good relationship. As to the prospect of the mother’s move to Michigan, she testified that not only would this move provide greater financial opportunities for her and the children, but the children have demonstrated great excitement at the prospect of moving there. Furthermore, through her own research, the mother gathered that the children would attend schools in Michigan which are significantly better than those in Plattsburgh, though the mother was unable to articulate how the Michigan schools are superior. However, other testimony throughout the hearing revealed that the children are currently established in a school district wherein they are thriving academically and socially. Both the children are heavily involved in extracurricular activities, including playing multiple instruments as well as athletics, which further provide them with an established social community. Thus, remaining in this area would provide them greater stability.

The testimony heavily featured the mother’s alleged attempts to alienate the children from the father. As pointed out by the father and the forensic evaluator, these include: directing the children to keep the mother’s last pregnancy a secret until a designated time; making statements to medical personnel and in front of the children that she felt unsafe around the father; and telling the children to write down the negative feelings they had toward the father in their journals to discuss with their counselors. The father and forensic evaluator testified that these various attempts at alienation not only placed great strain on the father’s relationship with the children, but it created an “an unhealthy and unnecessarily artificial barrier be-

tween the two halves of the children's lives," forcing them to hide their positive feelings toward the father while in front of the mother. The forensic evaluator explained that the mother has a negative impact on the children due to her inability to comprehend how her actions, driven by her poor relationship with the father and the stepmother, cause the children to feel the need to protect her, especially as evidenced by the older child's need to call the mother to check on her physical safety on a daily basis. Conversely, the forensic evaluator opined that the father is a positive influence in the children's lives, ensuring critical social development opportunities through their involvement with a wide variety of activities, and he has demonstrated sound basic parenting skills and considerable involvement in all aspects of the children's lives. The father has routinely allowed liberal telephonic contact between the children and the mother, with some limitations when it interferes with their designated family dinner time or the children's sleep.

As indicated by Family Court in its decision, as well as the testimony and written report of the forensic evaluator, neither the mother nor the father are without fault for the breakdown of the parental relationship. Both parties have extensive histories of trauma which have added to their difficult relationship and communication issues. However, testimony revealed that the mother was primarily responsible for the lack of communication. One particular instance which demonstrates this is when the older child was in the emergency room and the mother, rather than keeping the father abreast of the situation, directed him to request the child's hospital records for any information he was seeking. Furthermore, although some purported instances of parental alienation by the mother raised by the forensic evaluator have perhaps rational explanations, it was within the court's discretion to choose to credit the evaluator's opinions on the issue when analyzing the children's best interests (*see Matter of Jessica D. v Michael E.*, 182 AD3d 643, 645 [3d Dept 2020]). Based on the foregoing, in light of the mother's move to Michigan as well as her history of attempting to alienate the father, and affording great deference to the court's credibility determinations (*see Matter of Michelle L. v Steven M.*, 227 AD3d 1159, 1161-1162 [3d Dept 2024]; *Matter of Paul Y. v Patricia Z.*, 190 AD3d 1038, 1041-1042 [3d Dept 2021]), Family's Court's decision to award the father sole legal custody has a sound and substantial basis in the record (*see Matter of Carla UU. v Cameron UU.*, 227 AD3d at 1261; *Matter of Alexis WW. v Adam XX.*, 220 AD3d 1094, 1096-1097 [3d

Dept 2023]).² The father's remaining contentions, to the extent not specifically addressed herein, have been examined and found to be lacking in merit.

Clark, J.P., McShan, Powers and Corcoran, JJ., concur. Ordered that the order is affirmed, without costs.

4 In the Matter of Alexander I., Appellant, v Allison I., Respondent. (Proceeding No. 1.) (And Another Related Proceeding.) In the Matter of Allison I., Respondent, v Alexander I., Appellant. (Proceeding No. 3.) [252 NYS3d 785]—

Parent, Child and Family—Custody—Joint Legal Custody with Final Decision-Making Authority to Mother as Primary Caretaker—Alternating Weekend Visitation to Father Failed to Provide Him with Meaningful Frequent Access to Child—Equitable Division of Transportation Responsibilities between Parties

Parent, Child and Family—Custody—Father Not Deprived of Meaningful Representation

McShan, J. Appeal from an order of the Family Court of Montgomery County (Michael Dayian, J.), entered March 25, 2024, which, among other things, granted petitioner's application, in proceeding No. 3 pursuant to Family Ct Act article 6, for custody of the parties' child.

Alexander I. (hereinafter the father) and Allison I. (hereinafter the mother) are the parents of the subject child (born in 2022). In March 2023, the father filed a petition for an initial custody determination seeking joint legal custody of the child, arguing it was in the child's best interests for both parents to participate equally.¹ The mother filed a cross-petition seeking sole legal and physical custody, arguing that she was the primary caregiver. Family Court issued a temporary order of custody wherein the mother and the father were granted joint legal custody, with the mother having primary physical custody and the father having parenting time on alternating weekends. Following a two-day hearing, Family Court determined that both the mother and the father adequately met the child's basic needs and that it was in the child's best interests for the parents to have modified joint legal custody with the mother having final decision-making authority as well as primary

2. We also note that Family Court included a mutual order provision regarding the prompt sharing of school and medical information.

1. The father filed two petitions for custody—one in Rensselaer County Family Court and one in Montgomery County Family Court. The petition filed in Rensselaer County was transferred to Montgomery County after determining that Montgomery County is the proper venue.

physical custody and the father having parenting time on alternating weekends and shared holidays. The father appeals.²

Where “a parent’s relocation initiates the commencement of a custody proceeding resulting in an initial custody determination, strict application of the relocation factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727 [1996]) is not required” (*Matter of Jesse HH. v Lindsey II.*, 233 AD3d 1410, 1411 [3d Dept 2024], *lvs denied* 43 NY3d 906 [2025], 43 NY3d 906 [2025]; see *Matter of O’Hara v DeMarsh*, 161 AD3d 1271, 1271-1272 [3d Dept 2018]). Rather, in considering the initial custodial determination under these circumstances, Family Court must focus on the relevant factors to the paramount concern in the proceeding, the best interests of the child, which “encompasses a variety of factors, including the quality of the parents’ respective home environments, the need for stability in the child’s life, each parent’s willingness to promote a positive relationship between the child and the other parent and each parent’s past performance, relative fitness and ability to provide for the child’s intellectual and emotional development and overall well-being” (*Matter of Andrew I. v Lizbeth H.*, 230 AD3d 1414, 1414 [3d Dept 2024] [internal quotation marks and citations omitted]; see *Matter of Adam E. v Heather F.*, 151 AD3d 1212, 1213 [3d Dept 2017]). “Parenting time with a noncustodial parent is presumed to be in a child’s best interests. Thus, unless parenting time with the noncustodial parent would be detrimental to the child’s welfare, Family Court is required to fashion a parenting time schedule that affords the noncustodial parent frequent and regular access to the child” (*Matter of Tina X. v Thomas Y.*, 233 AD3d 1272, 1275 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]; see *Matter of C.M. v Z.N.*, 230 AD3d 1409, 1412 [3d Dept 2024]). “This Court accords great deference to Family Court’s factual findings and credibility determinations, and will not disturb its custodial determination if supported by a sound and substantial basis in the record” (*Matter of Barrett LL. v Melissa MM.*, 224 AD3d 942, 943 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 42 NY3d 905 [2024]; see *Matter of Jessica HH. v Sean HH.*, 196 AD3d 750, 753 [3d Dept 2021]).

At the outset, the record clearly demonstrates that both par-

2. At the conclusion of the fact-finding hearing, the attorney for the child advocated, in general, to maintain the custodial arrangement provided in the temporary order with a split in transportation responsibilities between the parties. On appeal, the attorney for the child argues that Family Court properly granted modified joint legal custody to the parties but argues for a more even division of parenting time.

ties are loving parents who desire a meaningful role in raising their child. Although the testimony at the hearing reflects that there is some acrimony between the two and communication has sometimes been poor, “it is clear that their relationship has not deteriorated to such an extent that joint custody is untenable” (*Matter of Brian Q. V Allysa R.*, 244 AD3d 1328, 1330 [3d Dept 2025]). With that in mind, Family Court could properly look to the custodial arrangement that provided the child with stability. The father takes exception to the finding that continuing placement with the mother offered stability, arguing that it resulted solely from the mother relocating with the child (*see generally Matter of Dusten T. v Trisha U.*, 235 AD3d 1215, 1216 [3d Dept 2025]); however, the testimony at the hearing generally established that the mother had been the child’s primary caretaker since birth, having handled the overwhelming majority of childcare duties while previously residing with the father. Moreover, although both parents appear capable, the record reflected that the mother was better equipped to make appropriate decisions for the child’s overall well-being through her continued care and attention to the child’s social and medical needs, thus supporting the decision to grant her primary decision-making authority in the event that the parties cannot agree (*see Matter of Mathena XX. v Brandon YY.*, 189 AD3d 1733, 1737-1738 [3d Dept 2020]; *Matter of Sherrod U. v Sheryl V.*, 181 AD3d 1069, 1071 [3d Dept 2020]). Accordingly, we find no compelling justification to disturb Family Court’s determination to grant the parties joint legal custody with final decision-making authority to the mother.

However, we find that Family Court’s order was unsupported with respect to the father’s parenting time and the related responsibilities with respect to transporting the child. To that, the testimony at the fact-finding hearing reflected that the father had recently changed employment in order to open an additional day for parenting time and that the paternal grandparents were willing to assume greater duties on the family farm where they resided to permit the father to have more time with the child during his parenting time. Although the attorney for the child advanced the argument in summation that, in order to avoid further litigation, a custodial arrangement should anticipate that the child would eventually reach school age, that was not a prominent concern at the time of the hearing and, taking into account the parties’ respective employment arrangements and ability to care for the child, the arrangement providing alternating weekend visitation to the father failed to provide him with meaningful and frequent ac-

cess under the circumstances (see *Matter of Austin v Smith*, 144 AD3d 1467, 1470 [3d Dept 2016]; see also *Matter of Rebekah R. v Richard R.*, 176 AD3d 1340, 1343 [3d Dept 2019]). Moreover, Family Court placed the burden of transporting the child entirely on the father, which curtailed some of his parenting time during the court's set schedule. Family Court's determination on that issue appears predicated on the fact that the mother did not have an adequate means of transportation. The record reflects, however, that the mother had obtained a vehicle as of the last day of the hearing that would allow her to contribute to those duties and, moreover, there is no indication that she was unable to at least provide a financial contribution. Thus, placing the entire burden of transporting the child was in error. Noting the foregoing, although the parties have provided some indication as to the father's current employment arrangement and his availability, the passage of time from the prior order persuades us that it is more prudent to remit the matter to Family Court to hear from the parties with respect to an increase in parenting time—which may consider other provisions such as phone or video contact and additional time during the summer—that serves to promote a healthy and meaningful relationship with the father (see *Matter of Jill Q. v James R.*, 185 AD3d 1106, 1110 [3d Dept 2020]; see also *Matter of Theresa M. v Gaddiel M.*, 228 AD3d 1040, 1041 [3d Dept 2024]). Further, Family Court should equitably divide the transportation responsibilities between the parties, paying adequate consideration to the mother's ability to contribute to that responsibility (compare *Matter of Dusten T. v Trisha U.*, 235 AD3d at 1218; *Matter of Corydon YY. v Laura ZZ.*, 177 AD3d 1116, 1117 [3d Dept 2019]; see also *Matter of Andrea H. v Justin I.*, 202 AD3d 1325, 1326 [3d Dept 2022]).

Lastly, we find no merit to the father's contention that he was deprived of meaningful representation. "Counsel's representation need not be perfect and, as it is not the role of this Court to second-guess counsel's trial strategy or tactics, a party seeking to prevail on an ineffective assistance of counsel claim must do something more than engage in hindsight speculation as to the viability of counsel's strategy" (*Matter of Kyle I. v Kandice K.*, 232 AD3d 1074, 1077 [3d Dept 2024] [internal quotation marks and citation omitted]; see *Matter of Candy II. v Kandice HH.*, 236 AD3d 1156, 1160 [3d Dept 2025]). The record reflects that the father's counsel made appropriate objections, effectively conducted direct, cross and re-cross-examinations and otherwise properly advocated the father's position (see *Matter of Richard CC. v Lacey DD.*, 243 AD3d 1186, 1189-1190 [3d Dept 2025]), and the father's assertions

concerning the existence of certain evidence that was not offered or admitted at the hearing is unspecified and speculative (see *Matter of Kyle I. v Kandice K.*, 232 AD3d at 1077). All told, “[u]pon considering the totality of the representation, we cannot conclude that it was anything less than meaningful” (*Matter of Jehrica K. v Erin J.*, 223 AD3d 1079, 1082 [3d Dept 2024]). We have examined the remainder of the father’s contentions in his pro se supplemental briefing and find them unavailing.

Garry, P.J., Ceresia, Fisher and Mackey, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as provided Alexander I. with parenting time from Friday to Sunday on alternating weekends and directed that he be responsible for all transportation; matter remitted to the Family Court of Montgomery County for further proceedings not inconsistent with this Court’s decision; and, as so modified, affirmed.

5 Federal National Mortgage Association, Respondent, v Lawrence C. Marshall, Appellant. [252 NYS3d 781]—

Statutes—Retroactive Application of Statute—Foreclosure Abuse Prevention Act—No Violation of Takings Clauses of Federal and State Constitutions—Vested Interest in Property Subject to Compensation Not Secured Until Final Judgment of Foreclosure and Sale

Reynolds Fitzgerald, J.P. Appeals from an order and a judgment of the Supreme Court (Daniel Lynch, J.), entered May 3, 2024, in Columbia County, which, among other things, upon renewal, granted plaintiff’s motion for summary judgment.

In May 2007, defendant executed a note for \$343,000 secured by a mortgage on real property located in the City of Hudson, Columbia County. In April 2009, plaintiff’s predecessor in interest, Greenpoint Mortgage Funding Inc., commenced a foreclosure action. That action was voluntarily discontinued by plaintiff in 2013. Plaintiff thereafter commenced this second foreclosure action in May 2018. Defendant joined issue, asserted affirmative defenses, including that the action is time-barred, and interposed a counterclaim for discharge of the mortgage as time-barred. In April 2022, plaintiff moved for summary judgment to dismiss defendant’s answer and counterclaims. Supreme Court (Kowee, J.) granted the motion, struck defendant’s answer with counterclaims and directed plaintiff to submit an order of reference.

Meanwhile, the Legislature passed the Foreclosure Abuse Prevention Act (see L 2022, ch 821 [hereinafter FAPA]), which codified that “the voluntary discontinuance of [a foreclosure] action, whether on motion, order, stipulation or by notice, shall

not, in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim” (CPLR 3217 [e]; *see* 203 [h]). In January 2024, plaintiff moved to confirm the referee’s report and for summary judgment granting a judgment of foreclosure and sale. Defendant cross-moved, in light of the enactment of FAPA, to vacate Supreme Court’s 2022 decision granting plaintiff summary judgment, to dismiss the complaint as time-barred and to cancel and discharge the mortgage pursuant to RPAPL 1501 (4). Supreme Court (D. Lynch, J.) granted defendant’s cross-motion, vacated the 2022 order, retroactively applied FAPA and thereafter determined that FAPA, when applied retroactively, violates the Contract Clause of the US Constitution and the Takings Clauses of the US and NY Constitutions.* Thus, the court granted plaintiff summary judgment and denied defendant’s cross-motion to cancel and discharge the mortgage. Defendant appeals.

Defendant contends that Supreme Court erred in its finding. During the pendency of this appeal, the Court of Appeals decided *Article 13 LLC v Ponce De Leon Fed. Bank* (— NY3d —, 2025 NY Slip Op 06536 [2025]) and *Van Dyke v U.S. Bank, N.A.* (— NY3d —, 2025 NY Slip Op 06537 [2025]), finding that FAPA applies retroactively to foreclosure actions commenced before the statute’s enactment and, as relevant here, that retroactive application of FAPA does not violate substantive or procedural due process claims (*see Article 13 LLC v Ponce De Leon Fed. Bank*, — NY3d at —, 2025 NY Slip Op 06536, *2-3, *5; *Van Dyke v U.S. Bank, N.A.*, — NY3d at —, 2025 NY Slip Op 06537, *5, *6-7). The Court further found that said application did not violate the Contract Clause of the US Constitution as “the provisions are sensibly tailored to the specific litigation practices that the [L]egislature saw fit to curb via FAPA’s enactment: they narrowly bar successive, collateral challenges to certain prior loan accelerations and curtail noteholders’ ability to unilaterally reset the limitations period to foreclose. . . . [T]he provisions also sensibly advance the strong public policy favoring finality, predictability, fairness and repose. What is more, the provisions operate in the highly regulated landscape of mortgage foreclosure litigation—an area long wrought with competing interests and complex policy judgments and in which the allocation of economic benefits and burdens has always been subject to adjustment” (*Van Dyke v U.S. Bank, N.A.*, — NY3d at —, 2025 NY Slip Op 06537, *8 [internal quotation marks and citations omitted]).

* Conversely, Supreme Court found that retroactive application did not violate due process.

Thus, this appeal distills to whether FAPA's retroactive application violates the Takings Clauses of the US Constitution and NY Constitution. For the following reasons, we find that FAPA's retroactive application does not violate the Takings Clauses. "The Takings Clause of the Fifth Amendment of the US Constitution, made applicable to the States through the Fourteenth Amendment, provides that private property shall not be taken for public use, without just compensation. The [NY] Constitution similarly provides that private property shall not be taken for public use without just compensation. The threshold step in any Takings Clause analysis is to determine whether a *vested property interest* has been identified" (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 155 [2017] [internal quotation marks, ellipsis, brackets and citations omitted; emphasis added], *cert denied* 584 US 1013 [2018]; see *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d 1065, 1071 [2d Dept 2024]). "A vested right . . . is an immediate fixed right of present or future enjoyment" (*Gleason v Gleason*, 26 NY2d 28, 40 [1970] [internal quotation marks and citation omitted]). "The vested rights doctrine recognizes that a judgment, after it becomes final, may not be affected by subsequent legislation. Once all avenues of appeal have been exhausted, under this doctrine a judgment becomes an inviolable property right which thereafter may not constitutionally be abridged by subsequent legislation" (*Matter of Hodes v Axelrod*, 70 NY2d 364, 370 [1987] [internal quotation marks and citations omitted]). Here, Supreme Court determined that the retroactive application of FAPA is an unconstitutional taking because it has the effect of depriving plaintiff of its entire interest—i.e., plaintiff's vested interest—in the property without just compensation. However, plaintiff does not obtain a vested interest, subject to compensation, until it secures a final judgment of foreclosure and sale. This did not occur in the prior action or in this action, as the judgment is subject to this appeal (see *Deutsche Bank Natl. Trust Co. v Vista Holding, LLC*, 239 AD3d 830, 834 [2d Dept 2025]; *Deutsche Bank Natl. Trust Co. v Dagrín*, 233 AD3d at 1071; *Weininger v Deutsche Bank Natl. Trust Co.*, 83 Misc 3d 1202[A], 2024 NY Slip Op 50644[U], *1, *10-11 [Sup Ct, Westchester County 2024]).

Notwithstanding the foregoing, plaintiff argues that it has a vested property interest in its right of action to foreclose the mortgage under pre-FAPA law and that the retroactive application of FAPA to this action would have a severe economic impact on it and will substantially interfere with its reasonable investment backed expectations. Assuming, arguendo, that a vested interest of any sort exists, we remain unpersuaded

by plaintiff's argument. "A party challenging governmental action as an unconstitutional taking bears a substantial burden, and evaluating whether an action is a 'taking' requires a court to consider the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action" (*James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 247 [2013] [internal quotation marks, brackets and citation omitted]). "Those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end" (*Connolly v Pension Benefit Guaranty Corporation*, 475 US 211, 227 [1986] [internal quotation marks and citations omitted]).

Here, plaintiff operates "in the highly regulated landscape of mortgage foreclosure litigation—an area long wrought with competing interests and complex policy judgments and in which the allocation of economic benefits and burdens has always been subject to adjustment" (*Van Dyke v U.S. Bank, N.A.*, — NY3d at —, 2025 NY Slip Op 06537, *8 [internal quotation marks and citation omitted]). As plaintiff undertook its business and its investment strategy with the knowledge that it was subject to the mortgage enforcement industry, "its general investment expectations included the knowledge that it was subject to extensive regulation" (*Rochester Gas & Elec. Corp. v Public Serv. Commn. of State of N.Y.*, 71 NY2d 313, 325 [1988]). Furthermore, there is no "vested right in the [L]egislature's lack of legislation on a particular subject or in any rule of law or legislative policy that entitles the person to have such law or policy remain unaltered for their benefit. In other words, a vested right is something more than a mere expectation based upon an anticipated continuance of the existing law" (*Article 13 LLC v Ponce De Leon Fed. Bank*, — NY3d at —, 2025 NY Slip Op 06536, *4 [internal quotation marks and citations omitted]). Accordingly, the retroactive application of FAPA does not violate the Takings Clauses (*see Deutsche Bank Natl. Trust Co. v Testa*, 243 AD3d 1255, 1258 [4th Dept 2025]; *US Bank N.A. v Levy*, 239 AD3d 789, 790 [2d Dept 2025]; *Ditech Fin. LLC v Naidu*, 82 Misc 3d 452, 462-463 [Sup Ct, Queens County 2023], *affd* 244 AD3d 1067 [2d Dept 2025]).

Ceresia, Fisher, McShan and Mackey, JJ., concur. Ordered that the order and the judgment are reversed, on the law, without costs, plaintiff's motion for summary judgment, to confirm the referee's report and for a judgment of foreclosure and sale is denied and defendant's cross-motion for summary judgment canceling and discharging the subject mortgage is granted.

6 In the Matter of the Acquisition of Real Property by the City of Albany Industrial Development Agency. PSC, LLC, Respondent; City of Albany Industrial Development Agency, Appellant. [253 NYS3d 321]—

Eminent Domain—Valuation—Properties’ Highest and Best Use at Time of Taking Not Commercial Development But Rather Continued Use as Surface Parking

Taxation—Assessment—Employment of Income Capitalization Method for 10 Parking Lot Parcels That were Generating Income under Surface Parking Lease in Determining Damages

Mackey, J. Appeals (1) from an order of the Supreme Court (Peter Lynch, J.), entered June 24, 2024 in Albany County, which, in a proceeding pursuant to EDPL article 5, determined the compensation due claimant as a result of the acquisition of real property, and (2) from a judgment entered thereon.

The underlying acquisition in this EDPL article 5 matter is familiar to this Court, having been the subject of a prior appeal (*Matter of PSC, LLC v City of Albany Indus. Dev. Agency*, 200 AD3d 1282 [3d Dept 2021], *lv denied* 38 NY3d 909 [2022]). By way of background, in 2019, Capitalize Albany Corporation (hereinafter CAC), a municipal corporation serving as the City of Albany’s economic development arm, secured a grant to acquire and redevelop eight acres of land in a blighted area of the City known as Liberty Square. Claimant owned 0.88 acres therein, consisting of 11 parcels, 10 of which were leased for use as surface parking and one of which was overgrown. CAC was able to acquire all of the properties within the subject area, other than claimant’s, through private transactions. Following unsuccessful negotiations with claimant, CAC applied to respondent to exercise its eminent domain powers to condemn claimant’s property. Respondent approved the condemnation, and this Court confirmed respondent’s determination (*id.* at 1289).

Following this Court’s decision, respondent commenced a proceeding pursuant to EDPL article 4 to condemn the property, which petition was granted without opposition by Supreme Court (McDonough, J.), and the property was condemned in October 2022. Meanwhile, claimant accepted respondent’s advance offer of \$2,650,000 in just compensation for the subject properties, which amount was deposited with the court, with claimant reserving the right to seek additional compensation.¹ Claimant thereafter commenced this EDPL article 5 proceeding seeking just compensation totaling

1. Claimant obtained release of \$2,611,077.94 of these funds as partial payment.

\$7,200,000, plus interest, and respondent joined issue. Following a nonjury trial, Supreme Court (P. Lynch, J.) determined that claimant was entitled to a total of \$5,393,000 in just compensation based upon its finding that the properties' highest and best use was commercial development, resulting in \$2,743,000 in additional compensation beyond that already paid by respondent, plus interest. Respondent appeals from the order and the resulting judgment.

The crux of respondent's arguments on appeal is that Supreme Court erroneously determined that the subject properties' highest and best use was commercial development, as such use was not reasonably probable to occur at or near the time of taking and, thus, that the potential for redevelopment of the area should not have been considered in determining damages. "[W]hen private property is appropriated for public use, just compensation must be paid, which requires that the owner be placed in the financial position that he or she would have occupied had the property not been taken" (*Matter of State of New York [KKS Props., LLC]*, 187 AD3d 1459, 1460 [3d Dept 2020] [internal quotation marks and citations omitted], *lv denied* 36 NY3d 912 [2021]; *see* US Const 5th Amend; NY Const, art I, § 7 [a]). Just compensation "must be measured based upon the fair market value of the property as if it were being put to its highest and best use on the date of the appropriation, whether or not the property was being used in such manner at that time" (*Matter of County of Warren [Forest Enters. Mgt., Inc.]*, 182 AD3d 729, 731 [3d Dept 2020] [internal quotation marks and citations omitted]; *see DiGiacomo v State of New York*, 182 AD3d 977, 978 [3d Dept 2020]). Nevertheless, "it must be established as reasonably probable that the asserted highest and best use could or would have been made of the subject property in the near future" and "[a] use which is no more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award" (*Matter of City of New York [Rudnick]*, 25 NY2d 146, 149 [1969]; *see Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d 535, 536 [1974]; *DiGiacomo v State of New York*, 182 AD3d at 979). In this regard, "claimant bears the burden to show that the alleged highest and best use is capable of being accomplished 'within the reasonably near future'" (*DiGiacomo v State of New York*, 182 AD3d at 979, quoting *Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d at 536).

At trial, claimant presented the opinion of licensed appraiser Bruce Bauer. Bauer concluded that the highest and best use of

the subject parcels was commercial development and that such was “reasonably probable” because the subject properties’ zoning district permitted commercial development, it was reasonable to consolidate the parcels for inclusion in a unified redevelopment project, and commercial development was “potentially financially feasible.” To his point, Bauer noted that development for the area had been “talked about for many years.” Upon this basis, Bauer asserted that he would apply the sales comparison approach in determining damages because, in his view, the use of the subject properties to generate income from surface parking constituted merely an “interim use” and not the properties’ highest and best use. Notwithstanding, Bauer conceded that there had not been any commercial development on the property sites in 30 years and that the 10 parking lot parcels could, at the time of the taking, still be used as such for another roughly 16 years under their ongoing lease. Nevertheless, he reiterated that, because the value of prospective commercial development “far exceeded” the value of continued use of the parcels for parking, he chose to apply only the sales comparison approach, yielding the properties’ estimated value at \$5,582,000.

Notably, however, respondent submitted letters prepared by Bauer for claimant’s counsel in 2018, wherein he accepted an assignment to prepare an appraisal report for the subject properties for purposes of “confidential negotiations associated with a potential threatened condemnation proceeding.” At that time, Bauer found the properties’ “Net Present Value,” according to a range of capitalization rates, to be between \$2,175,000 and \$2,900,000. Alternatively, using a sales comparison approach, he valued the properties between \$1,435,000 and \$2,050,000. In explanation, Bauer testified that his earlier assessment was an “analysis or scenario” and not a “full appraisal,” but rather “just for [claimant’s counsel’s] internal decision making purposes and analysis.”

Reaching a different conclusion, respondent’s licensed appraiser, Darrel Lloyd Jr., identified the highest and best use for the subject properties to be continued use as a surface parking lot and, for the overgrown parcel, related assemblage. Lloyd agreed with Bauer that the highest and best use may be defined as “[t]he reasonably probable use of property that results in the highest value,” as determined by evaluating whether it is “physically possible, legally permissible, financially feasible and [economically] maximally productive” (internal quotation marks omitted). He further agreed that the parcels’ zoning classification made “a variety of uses” legally

permissible and that the parcels were physically “developable” for a number of uses. However, he concluded that their distance from the main business district and other factors made commercial development of the parcels unlikely. In considering the possibility of residential and mixed-use development, Lloyd similarly concluded that the costs of assembling and purchasing nearby property toward this purpose would likely exceed any rental income generated. Having thus determined that continued use of the parcels for parking and for assemblage for parking was their highest and best use, Lloyd explained that, because the 10 parking lot parcels were generating income under a long-term surface parking lease, the income capitalization approach was “most appropriate” for determining their value. Lloyd found the direct sales comparison approach to be “most reliable” for the remaining parcel, as it was not generating income. He ultimately reached a total value of \$2,660,000 for the subject properties.

Lloyd acknowledged that there was discussion of development in the surrounding area at the time he appraised the property but explained that, in his view, the discussions were directed at public rehabilitation rather than private commercial development, and public condemnation of the property would not necessarily lead to future commercial development. Said differently, conceding that the surrounding area was a “prime candidate” for development, Lloyd explained that favorability did not necessarily translate to demand. In point of fact, Lloyd detailed the history of the subject properties, noting that they had been retained as surplus property for a proposed convention center development before being opened up to private development in 2015. Bids had been solicited at that time, but “[n]o legitimate proposals” were received.

Upon this record, we agree with respondent that claimant failed to sustain its burden to show that there was a reasonable probability that pretaking use of the subject properties for commercial development “could or would have been made within the reasonably near future” (*DiGiacomo v State of New York*, 182 AD3d at 981; see *Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d at 536; compare *Matter of County of Warren [Forest Enters. Mgt., Inc.]*, 182 AD3d at 734). Despite the potential for the future commercial development of the area, and even acknowledging that such could generate greater income than as yet achieved for the subject properties, nothing in the record supports finding that any such use was “reasonably probable . . . in the near future” at the time of the taking (*Matter of City of New York [Rudnick]*, 25 NY2d at 149;

see *Matter of County of Warren [Forest Enters. Mgt., Inc.]*, 182 AD3d at 731-732; compare *Matter of City of Long Beach v Sun NLF Ltd. Partnership*, 124 AD3d 651, 652-653 [2d Dept 2015], *lv denied* 26 NY3d 902 [2015]). In point of fact, both appraisers agreed that recent decades had yielded no legitimate proposals to commercially develop the area. Claimant's unsupported assertion that commercial development of the area in the near future was nevertheless probable at the time of the taking amounts to mere speculation and, thus, may not provide the basis for an award (see *Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d at 536; *Matter of City of New York [Rudnick]*, 25 NY2d at 149; *DiGiacomo v State of New York*, 182 AD3d at 979; *J.W. Mays, Inc. v State of New York*, 300 AD2d 545, 546-547 [2d Dept 2002], *lv denied* 99 NY2d 511 [2003]).²

Respondent's taking of the properties with the hope to facilitate and thereby incentivize commercial developers to consider the area in the future does not necessitate a different conclusion, as "condemned properties must be valued as of the date of the taking" (*Matter of City of Long Beach v Sun NLF Ltd. Partnership*, 124 AD3d at 653; see *Matter of Queens W. Dev. Corp. [Nixbot Realty Assoc.]*, 139 AD3d 863, 865 [2d Dept 2016], *lv denied* 28 NY3d 901 [2016]; see also *Peter Kiewit Sons' Co. v State of New York*, 31 NY2d 944, 945-946 [1972]; *Latham Holding Co. v State of New York*, 16 NY2d 41, 47 [1965]), and it is well settled that "[a] condemnee may not receive an enhanced value for its property where the enhancement is due to the property's inclusion within a redevelopment plan" as "a condemnee is only entitled to compensation for what it has lost, not for what the condemnor has gained" (*Matter of Queens W. Dev. Corp. [Nixbot Realty Assoc.]*, 139 AD3d at 865 [internal quotation marks, brackets and citations omitted]; see *Matter of Village of Port Chester [Bologna]*, 95 AD3d 895, 897 [2d Dept 2012], *lv denied* 20 NY3d 852 [2012]; see also *Peter Kiewit Sons' Co. v State of New York*, 31 NY2d at 945-946; *Latham Holding Co. v State of New York*, 16 NY2d at 47; *Matter of Village of Johnson City [Waldo's, Inc.]*, 215 AD2d 917, 919 [3d Dept 1995]).

Supreme Court found that the record supports a highest and best use of commercial development because "the land necessary for the development of Liberty Park has now been assembled," making commercial development in the near future

2. With the benefit of hindsight, we note that in the intervening 3½ years since the taking, it does not appear that any potential redevelopment plans for the area have been moved forward.

probable. That, however, was error, as the effect of the Liberty Square redevelopment project on the likelihood of future commercial development was an improper consideration. The Supreme Court of the United States has explained that a landowner whose condemned property was included within a “public project *from the beginning* . . . should not be allowed an increased value for his [or her] lands’ ” resulting from the project itself (*United States v Reynolds*, 397 US 14, 17 [1970] [emphasis added], quoting *United States v Miller*, 317 US 369, 376-377 [1943]).³ As there is no dispute that claimant’s lands were included in the Liberty Square redevelopment project from the beginning, the effect of the project itself on the likelihood of future commercial development may not be considered.

Accordingly, the record does not support Supreme Court’s finding that the highest and best use of the subject properties was commercial development; rather, given the dubious possibility of commercial development in the near future and as more than 15 years remained on the ground leases for 10 of the 11 parcels, the record supports respondent’s position that the properties’ highest and best use at the time of taking was continued use as surface parking.

Turning to the determination of appropriate damages, findings in this regard “must either be within the range of the expert testimony, or be supported by other evidence and adequately explained by the court” (*DiGiacomo v State of New York*, 182 AD3d at 979 [internal quotation marks and citations omitted]). “[W]here the parties offer inconsistent highest and best uses and their experts appraise only their own proposed uses, the award must be based upon the evidence offered by the party prevailing on the use question with such adjustments as the evidence will support” (*Matter of County of Warren [Forest Enters. Mgt., Inc.]*, 182 AD3d at 735 [internal quotation marks, brackets and citations omitted]; see *Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d 1087, 1089 [2d Dept 2016]). Having determined that the record does not support finding that the properties’ highest and best use is commercial development, but continued surface parking, Supreme Court improperly rejected respondent’s expert’s appraisal (compare *Matter of 730 Equity Corp. v New York State Urban Dev. Corp.*, 142 AD3d at 1090-1091).

3. The Court distinguished this from a situation where the government later takes a nearby property that was not included in the original project. In such a case, the newly added property would benefit from an “increase in market value due to the proximity of the public improvement” (*United States v Reynolds*, 397 US at 17 [internal quotation marks and citation omitted]).

In reaching his appraisal determination, Lloyd employed the income capitalization method for the 10 parking lot parcels that were generating income under the surface parking lease. This method is “recognized to be the best indicator of value with respect to income-producing property” (*Matter of Center Albany Assoc. LP v Board of Assessment Review of the City of Troy*, 151 AD3d 1420, 1422 [3d Dept 2017] [internal quotation marks and citation omitted]), and may be assessed based upon estimating the market rent for the subject property (see *Matter of Colonie Ctr. v Town of Colonie*, 209 AD3d 1214, 1216-1217 [3d Dept 2022], *lv denied* 39 NY3d 916 [2023]). In contrast, Lloyd averred that the sales comparison approach was “most reliable” for the remaining parcel, as it was not generating income (see generally *Matter of Johnstown Comrie Assoc., LLC v Assessor for the City of Johnstown*, 234 AD3d 1085, 1087-1088 [3d Dept 2025]). Applying these approaches, he calculated a direct sales comparison value of \$1,753,000 and an income capitalization value of \$2,763,000—the latter figure being reached in consideration of the parking lot parcels’ existing lease.⁴ Lloyd then reconciled the two values in detail by, among other considerations, affording them each relative weight to reflect “how investors would analyze the property,” ultimately arriving at a total value of \$2,660,000. Based upon the foregoing, we assess damages due claimant in the total amount of \$2,660,000. Prior payments actually paid to claimant should be deducted from this amount (see *Matter of County of Warren [Forest Enters. Mgt., Inc.]*, 182 AD3d at 738). The parties’ remaining contentions need not be reached in light of our determination, or have been found to be without merit.

Aarons, J.P., Pritzker, Ceresia and Powers, JJ., concur. Ordered that the order and the judgment are modified, on the law and the facts, without costs, by decreasing the damages awarded to claimant to \$2,660,000, and, as so modified, affirmed.

4. Lloyd disclosed that his research did not reveal more than a few comparable private parking lot leases in the market area and, because the rents charged under those leases were similar to or less than the rents charged under the subject properties’ 1988 lease, he made the extraordinary assumption that the rental rate under the 1988 lease was equivalent to market rent. Despite claimant taking issue with this approach, it did not offer any competing income capitalization valuation or other rent rate examples in the market area. To be sure, “[i]n most circumstances, actual income is the best indicator of value” (*Matter of Center Albany Assoc. LP v Board of Assessment Review of the City of Troy*, 151 AD3d at 1423 [internal quotation marks and citation omitted]; see *Matter of Colonie Ctr. v Town of Colonie*, 209 AD3d at 1217), and there is nothing in the record to contradict Lloyd’s approach (compare *Matter of Eagle Cr. Land Resources, LLC [Woodstone Lake Dev., LLC]*, 149 AD3d 1324, 1329 [3d Dept 2017], *lv denied* 29 NY3d 916 [2017]).

7 In the Matter of the Claim of Kimberly Siddon, Appellant, v Advance Energy Technologies et al., Respondents. Workers' Compensation Board, Respondent. [252 NYS3d 796]—

Workers' Compensation—Reopening Case—Modification of Prior Schedule Loss of Use for Claimant's Left Leg—Decreased Range of Motion Proof of Material Change in Condition—Denial of Request to Reopen Abuse of Discretion

Garry, P.J. Appeal from a decision of the Workers' Compensation Board, filed July 25, 2024, which denied claimant's application to reopen her workers' compensation claim.

In May 2006, claimant sustained a work-related injury to her left knee resulting in arthroscopic surgery. Claimant established a workers' compensation claim in April 2008, as a Workers' Compensation Law Judge (hereinafter WCLJ) found that claimant had sustained a 12% schedule loss of use (hereinafter SLU) of her left leg. After a second arthroscopic left knee surgery in March 2009, a WCLJ issued another decision in December 2009, finding, as per a stipulation of the parties, that claimant now had a 20% SLU of her left leg. Following dispute of a medical bill by the employer's workers' compensation carrier and a related hearing in 2013, a WCLJ transferred liability to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a, effective July 2011.

In November 2022, claimant retained Kevin Scott, an orthopedic surgeon, to perform an additional medical examination regarding continued pain and decreased range of motion with respect to her left knee. Scott opined that claimant had a 35% SLU of her left knee, representing a 15% overall increase, based upon a worsening of her range of motion. Claimant accordingly filed a request with the Workers' Compensation Board for further action. The Board provided notice to the Special Fund, via an EC-81.7, regarding a possible award, advising the Special Fund to take one of four actions within 75 days: advise that it accepted Scott's opinion as to the severity of disability; obtain its own permanency examination; depose Scott; or submit written arguments contesting the sufficiency and/or credibility of Scott's opinion. In response, the Special Fund requested a hearing, contending that claimant had not established a change in condition to warrant an increase in the SLU with respect to claimant's injury. The Special Fund was informed by the Board that the request was not properly completed and certified, and the Special Fund never resubmitted the form. Following an additional request for further action by claimant after the Special Fund's time to respond to the Board had lapsed, a hearing was held, at which point the Special Fund requested to depose Scott. A WCLJ found that

the Special Fund had waived its opportunity to contest Scott's opinion by failing to comply with the EC-81.7, and, accepting Scott's report, the WCLJ found that claimant had sustained an overall 35% SLU of the left knee. Upon the Special Fund's administrative appeal, the Board rescinded the 15% increase in SLU for claimant's left leg, finding that claimant did not demonstrate a change in condition to warrant reopening of the claim to modify the prior SLU. Claimant appeals.

As relevant here, a request for reopening of a claim must "set forth sufficient facts to establish that a material change in the claimant's condition has occurred" (*Matter of Yi Sun v State Ins. Fund*, 201 AD3d 1157, 1158 [3d Dept 2022]; see 12 NYCRR 300.14 [a] [2]). The decision whether to reopen a case lies within the Board's discretion, and that decision will only be overturned if that discretion has been abused (see *Matter of Cush v Tully Constr. Co. Inc.*, 217 AD3d 1017, 1020 [3d Dept 2023]; *Matter of Kingston v New York City Fire Dept.*, 211 AD3d 1246, 1247 [3d Dept 2022]).

At the outset, we note that the Board failed to address whether the Special Fund waived its opportunity to contest Scott's opinion, impeding both administrative and judicial review of that issue (see *Matter of Ippolito v NYC Tr. Auth.*, 203 AD3d 1360, 1361 [3d Dept 2022]). Further, although we recognize that "the Board is free to reject the opinion of an expert where it finds such to be unconvincing or incredible," it is equally settled that the Board "may not reject an uncontradicted opinion that is properly rendered" (*Matter of Visic v O'Nero & Sons Constr. Co.*, 115 AD3d 1082, 1082 [3d Dept 2014] [citations omitted]; accord *Matter of Taylor v Buffalo Psychiatric Ctr.*, 199 AD3d 1110, 1112 [3d Dept 2021]). Scott's November 2022 verified medical report reflects that he had reviewed claimant's prior medical records, conducted a physical examination of her that included obtaining repeat range-of-motion measurements by goniometer and found that she was experiencing measurable range of motion decline with respect to her left knee, which he attributed to a worsening of her underlying condition (see 12 NYCRR 300.14 [b]). The Board summarily dismissed this numerical range-of-motion evidence, deeming it mere subjective proof of change in condition. That rejection is inconsistent with the Board's own impairment guidelines, which identify the use of a goniometer as the preferred method for obtaining range-of-motion measurements (see New York Workers' Compensation Guidelines for Determining Impairment § 1.3 at 7 [2018]). In light of the Special Fund's failure to properly contest claimant's proof and Scott's adherence to the

applicable guidelines in the aforementioned respect, the Board's stated rationale for denying reopening cannot be upheld (*see Matter of Taylor v Buffalo Psychiatric Ctr.*, 199 AD3d at 1111-1112; *Matter of Visic v O'Nero & Sons Constr. Co.*, 115 AD3d at 1082-1083; *compare Matter of Yi Sun v State Ins. Fund*, 201 AD3d at 1158; *Matter of Gallagher v Hines Interests Ltd. Partnership*, 188 AD3d 1395, 1396-1397 [3d Dept 2020]).

Reynolds Fitzgerald, McShan, Powers and Mackey, JJ., concur. Ordered that the decision is reversed, without costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

8 In the Matter of the Claim of Bonnie C. Blake, Appellant, v Niagara Wheatfield Central School District, Respondent, and FCS Administrators et al., Respondents. Workers' Compensation Board, Respondent. (And Another Related Claim.) [253 NYS3d 337]—

Workers' Compensation—Voluntary Withdrawal from Labor Market—Ongoing Attachment to Labor Market Not Required for Permanent Partial Disability Indemnity Benefits

Ceresia, J. Appeal from an amended decision of the Workers' Compensation Board, filed July 24, 2024, which ruled, among other things, that claimant was required to demonstrate an ongoing attachment to the labor market.

In 2000, claimant was injured at work, and her subsequent claim (hereinafter Claim No. 1) for workers' compensation benefits was established for injuries to the neck and shoulder. In 2009, awards were made up to August 3, 2009, with no direction for continuing awards because claimant had returned to work at an average weekly wage in excess of the average weekly wage that was previously established. In 2011, claimant was classified with a permanent partial disability; however, no award was made because claimant was working and, therefore, there were no causally-related lost earnings at that time (*see* Workers' Compensation Law § 15 [3] [w]).¹ In 2013, the workers' compensation carrier was discharged from liability, and liability was transferred to the Special Fund for Reopened Cases (hereinafter Special Fund) pursuant to Workers' Compensation Law § 25-a.

In October 2017, claimant was injured while working as a bus driver, and her ensuing claim (hereinafter Claim No. 2) for workers' compensation benefits was established for injuries to her neck and back with temporary indemnity benefits awarded.

1. Due to claimant's return to work in 2009, there were also no awards made for lost time from August 3, 2009, to January 11, 2011.

Following a February 2020 hearing, a Workers' Compensation Law Judge (hereinafter WCLJ), among other things, continued temporary indemnity benefits at a temporary partial disability rate and found that apportionment between the two cases was appropriate, with 50% to each claim. In July 2023, the workers' compensation carrier in Claim No. 2 raised the issue of claimant's attachment to the labor market, and claimant was directed to provide evidence of her ongoing labor market attachment. Following an August 2023 hearing to address, among other things, the issue of claimant's attachment to the labor market as well as permanency, the WCLJ, in Claim No. 2, classified claimant with a permanent partial disability, found that claimant had sustained a 65% loss of wage-earning capacity and determined that claimant was capable of sedentary work. The WCLJ also found that claimant had demonstrated her attachment to the labor market based upon her search efforts within her medical restrictions. Upon administrative review sought by the workers' compensation carrier relative to Claim No. 2, the Workers' Compensation Board, as relevant here, modified the decision of the WCLJ, finding that claimant was unattached to the labor market, effective April 17, 2023, and rescinded any awards made after that date as a result thereof. Upon reviewing and considering claimant's subsequent application for reconsideration and/or full Board review, the Board issued an amended Board panel decision in July 2024 finding that full Board review was not warranted but added in its determination that claimant was also not attached to the labor market in Claim No. 1. In so ruling, the Board reasoned that—because claimant was working at or above preinjury wages in 2011 when she was classified with a permanent partial disability and therefore did not receive any awards for lost time or reduced earnings—“claimant does not receive the benefit of the [Workers' Compensation Law] § 15 [3] [w] amendment and must prove an [ongoing] attachment to the labor market in order to be entitled to benefits.” Claimant appeals.²

We begin with claimant's argument raising procedural due process concerns regarding the Special Fund's lack of notice and participation in the underlying proceedings that addressed, among other things, labor market attachment (*see generally*

2. Claimant does not challenge the Board's determination that she failed to produce sufficient evidence of her attachment and/or reattachment to the labor market in Claim No. 2. Rather, claimant's argument is limited to her position that the Board's amended decision in Claim No. 2 on labor market attachment was incorrectly applied to Claim No. 1. Claimant further represents that Claim No. 2 has been resolved under a settlement agreement made pursuant to a Workers' Compensation Law § 32 agreement.

Matter of Kigin v State of N.Y. Workers' Compensation Bd., 24 NY3d 459, 469 [2014]; *Matter of Sheikh v White & Blue Group Corp.*, 168 AD3d 1196, 1199 [3d Dept 2019]). At the August 2023 hearing, the WCLJ reiterated, as previously directed, that Claim No. 1 was ordered to travel with Claim No. 2 as a “closed reference.” As a result, it is true that neither the Special Fund nor its third-party administrator were notified of, or appeared at, the underlying hearing addressing labor market attachment. These concerns, however, were not raised below and were therefore not properly preserved by claimant (*see* 12 NYCRR 300.13 [b] [4] [v]; *Matter of Alzate v Quality Bldg. Servs. Corp.*, 238 AD3d 1437, 1440 [3d Dept 2025], *lv denied* 44 NY3d 910 [2026]). In any event, were claimant’s due process concerns properly before us, we would note that the Special Fund was not aggrieved by the Board’s determination below regarding labor market attachment (*see Matter of Talarico v Niagara County Dept. of Social Servs.*, 225 AD3d 1061, 1062 [3d Dept 2024]), and we agree with the Special Fund that only it possesses the requisite standing to interpose an objection to an alleged violation of its own procedural due process rights.

Turning to the issue of labor market attachment, the gravamen of claimant’s argument here is that, by operation of the amendment in Workers’ Compensation Law § 15 (3) (w), she is not required to show an ongoing labor market attachment because, when she was classified with a permanent partial disability in 2011, she had returned to full-time employment and was therefore attached to the labor market, notwithstanding the absence of a specific determination by the Board in 2011 on this point. In 2017, Workers’ Compensation Law § 15 (3) (w) was amended to provide, in relevant part, that, in certain cases of permanent partial disability, “compensation . . . shall be payable during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market” (L 2017, ch 59, § 1, part NNN, § 1, subpart A, § 1). “For the amended statute to relieve a claimant from the burden of demonstrating ongoing attachment, ‘the claimant must have been classified initially as permanently partially disabled and found to be entitled to a loss of wage earnings compensation award’ ” (*Matter of Digbasanis v Pelham Bay Donuts Inc.*, 224 AD3d 1047, 1048 [3d Dept 2024], quoting *Matter of O'Donnell v Erie County*, 35 NY3d 14, 21 [2020]; *see Matter of Scott v Visiting Nurses Home Care*, 172 AD3d 1868, 1872 [3d Dept 2019], *lv dismissed* 34 NY3d 1011 [2019]). “[T]he amendment to Workers’ Compensation Law § 15 (3) (w) does not overrule the requirement that a

claimant must show attachment to the labor market at the time of classification” before receiving any indemnity benefits pursuant to a nonschedule award (*Matter of Ryan v City of Albany Water Dept.*, 244 AD3d 1475, 1476 [3d Dept 2025] [internal quotation marks, ellipsis and citation omitted]; see *Matter of O’Donnell v Erie County*, 35 NY3d at 21; *Matter of Delk v Orange & Rockland*, 191 AD3d 1067, 1070 [3d Dept 2021]). Concerning the retroactivity of the amendment, “it is clear that the 2017 amendment applies to claimants who had been classified as permanently partially disabled prior to the amendment’s effective date” (*Matter of Scott v Visiting Nurses Home Care*, 172 AD3d at 1870).³ Further, we have previously held that, in cases where there is no finding at the time of classification that a claimant has voluntarily withdrawn from the labor market and there is also no subsequent finding by the Board of voluntary withdrawal at any time prior to the 2017 amendment, “the 2017 amendment applies retroactively to the claim and obviates the need for claimant to demonstrate an attachment to the labor market” (*Matter of Ireland v Cattaraugus County Dept. of Nursing Homes-Olean Pines*, 182 AD3d 956, 958 [3d Dept 2020]; see *Matter of Wilber v Hamister Group, LLC*, 214 AD3d 1280, 1281-1282 [3d Dept 2023], *lv denied* 40 NY3d 903 [2023]; cf. *Matter of Georges v Zotos Intl. Inc.*, 198 AD3d 1047, 1050 [3d Dept 2021]).

Here, in 2011, claimant was classified as permanently partially disabled but was not awarded any indemnity benefits at that time because she returned to full-time employment at preinjury wages. Thus, there can be, and is, no dispute that claimant was attached to the labor market at the time that she was classified with a permanent partial disability. Moreover, although she was not awarded any benefits at that time,

3. “This does not mean, however, that there is no limit to retroactive application of the amendment, as there are different degrees of retroactivity[, and] . . . the amendment does not necessarily retroactively apply to all claimants previously classified as permanently partially disabled, relieving them of the obligation to show labor market attachment regardless of the procedural posture of their claim” (*Matter of Scott v Visiting Nurses Home Care*, 172 AD3d at 1871 [internal quotation marks, emphasis and citations omitted]). Where, for example, there is a finding prior to the amendment that a claimant had voluntarily withdrawn from the labor market, or otherwise failed to show attachment when required to do so, the Board may properly decline to retroactively apply the amendment to relieve a claimant of the obligation of demonstrating ongoing labor market attachment (see *Matter of Digbasanis v Pelham Bay Donuts Inc.*, 224 AD3d at 1048; *Matter of Santos v Brickens Constr. Inc.*, 175 AD3d 1742, 1743 [3d Dept 2019]; *Matter of Pryer v Incorporated Vil. of Hempstead*, 175 AD3d 1663, 1665 [3d Dept 2019]; *Matter of Scott v Visiting Nurses Home Care*, 172 AD3d at 1872).

“[t]here was no finding that claimant voluntarily withdrew from the labor market at the time of classification” (*Matter of Georges v Zotos Intl. Inc.*, 198 AD3d at 1050) or evidence in the record that, prior to the 2017 amendment, the Special Fund raised the issue of claimant’s attachment to the labor market (see *id.* at 1051). Thus, we have little difficulty in concluding that Workers’ Compensation Law § 15 (3) (w) applies retroactively here to relieve claimant of the burden of demonstrating ongoing attachment to the labor market following her 2011 classification in Claim No. 1 in order to be entitled to indemnity benefits (see *Matter of Wilber v Hamister Group, LLC*, 214 AD3d at 1281-1282; *Matter of Georges v Zotos Intl. Inc.*, 198 AD3d at 1050-1051; *Matter of Ireland v Cattaraugus County Dept. of Nursing Homes-Olean Pines*, 182 AD3d at 958; compare *Matter of Pryer v Incorporated Vil. of Hempstead*, 175 AD3d at 1665; *Matter of Scott v Visiting Nurses Home Care*, 172 AD3d at 1871-1872). To the extent that we have not addressed any of claimant’s remaining contentions, they have been considered and found to be without merit or are academic in light of our determination. Consequently, we reverse that portion of the amended decision finding that claimant was obligated to show attachment to the labor market in Claim No. 1 and remit for further proceedings consistent with our decision.

Garry, P.J., Fisher, McShan and Mackey, JJ., concur. Ordered that the amended decision is modified, without costs, by reversing so much thereof as found that claimant was required to demonstrate an ongoing attachment to the labor market in WCB No. 80016443; matter remitted to the Workers’ Compensation Board for further proceedings not inconsistent with this Court’s decision; and, as so modified, affirmed.

9 In the Matter of the Claim of Albert Belcher, Appellant, v Dominican Village Inc. et al., Respondents. Workers’ Compensation Board, Respondent. [252 NYS3d 810]—

Workers’ Compensation—Disqualification for False Representation—Failure to Inform Treating Orthopedic Surgeon or Carrier’s Medical Examiner Regarding Work Performed Following Retirement—Work Status Material in Assessing Degree of Disability

Workers’ Compensation—Disqualification for False Representation—Imposition of Discretionary Penalty Permanently Precluding Claimant from Receiving Future Wage Replacement Benefits Disproportionate to Offense

Clark, J.P. Appeal from a decision of the Workers’ Compensation Board, filed July 30, 2024, which ruled, among other things, that claimant violated Workers’ Compensation Law § 114-a.

Claimant, a security director, sustained a work-related injury

to his lower back stemming from a June 2022 work-related accident. Claimant continued to work for the employer following the accident, albeit with certain restrictions and accommodations. In November 2022, after the employer denied his request for an additional reduction in his work schedule, claimant submitted a letter to the employer indicating his intent to retire in December 2022. Following the establishment of the workers' compensation claim, the employer and its workers' compensation insurance carrier (hereinafter collectively referred to as the carrier) raised issues of unrelated retirement and voluntary withdrawal from the labor market. At the ensuing hearing on these issues and claimant's claim for indemnity benefits, the carrier raised a Workers' Compensation Law § 114-a violation based upon claimant's testimony regarding his work activity related to his private investigation business, which work activity was not disclosed during any of his medical examinations. At the conclusion of the hearings, the Workers' Compensation Law Judge (hereinafter WCLJ) ruled that claimant violated Workers' Compensation Law § 114-a by knowingly making a material misrepresentation as to his disability by failing to inform his treating orthopedic surgeon or the carrier's medical examiner during an independent medical examination about his work status following his retirement. The WCLJ imposed the mandatory penalty, as well as the discretionary penalty of permanent disqualification from indemnity benefits, finding the material misrepresentation regarding his work status and disability to be egregious. Upon administrative appeal, the Workers' Compensation Board affirmed. Claimant appeals.

"Workers' Compensation Law § 114-a (1) provides, in relevant part, that a claimant who, for the purpose of obtaining workers' compensation benefits or influencing any determination relative thereto, knowingly makes a false statement or representation as to a material fact shall be disqualified from receiving any compensation directly attributable to such false statement or representation" (*Matter of Nappi v Verizon N.Y.*, 205 AD3d 1181, 1182 [3d Dept 2022] [internal quotation marks, ellipsis and citations omitted]; accord *Matter of Linane v Gristede's Food Inc.*, 231 AD3d 1219, 1220 [3d Dept 2024]). A material fact is one that "is significant or essential to the issue or matter at hand, and an omission of material information may constitute a knowing false statement or misrepresentation" (*Matter of Brown v Van Liner Ins. Co.*, 227 AD3d 1331, 1335 [3d Dept 2024] [internal quotation marks and citations omitted]; see *Matter of Linane v Gristede's Food Inc.*, 231 AD3d at 1220). "Whether a claimant has violated the statute lies

within the province of the Board, which is the sole arbiter of witness credibility, and its decision will not be disturbed if supported by substantial evidence” (*Matter of Koratzanis v U.S. Concrete, Inc.*, 209 AD3d 1075, 1076-1077 [3d Dept 2022] [internal quotation marks and citations omitted]; *accord Matter of Yolas v New York City Tr. Auth.*, 224 AD3d 1112, 1113 [3d Dept 2024]).

Contrary to claimant’s contention, the record supports the Board’s finding that claimant violated Workers’ Compensation Law § 114-a by failing to disclose to either his treating orthopedic surgeon or the carrier’s medical examiner that he had performed work following his retirement. In that regard, claimant’s orthopedic surgeon opined in multiple medical reports that claimant was totally temporarily disabled, specifically noting that claimant had not returned to work. The orthopedic surgeon testified that information regarding claimant’s work activities would have impacted her opinion as to claimant’s degree of disability. Further, the carrier’s medical examiner, who opined that claimant had a mild degree of disability, noted that “per . . . claimant,” claimant has been out of work since December 2022. The Board discredited claimant’s self-serving testimony that counsel advised him that he could return to work, as there was no indication that counsel advised that such information regarding his work activities did not need to be disclosed during his medical examinations. In view of the foregoing, the Board’s determination that claimant violated Workers’ Compensation Law § 114-a by making a material misrepresentation of failing to disclose his work status, which was material in assessing claimant’s degree of disability, is supported by substantial evidence (*see Matter of Yolas v New York City Tr. Auth.*, 224 AD3d at 1114-1115; *Matter of Giglia v SUNY Buffalo-Union*, 204 AD3d 1287, 1288-1289 [3d Dept 2022]; *Matter of Young v Acranom Masonary Inc.*, 193 AD3d 1315, 1317 [3d Dept 2021]).

Turning to claimant’s challenge to the imposition of a discretionary penalty, we agree with claimant that the imposition of permanently precluding him from receiving future wage replacement benefits is disproportionate to the offense. “[I]t is well settled that judicial review of an administrative penalty is limited to whether the penalty constitutes an abuse of discretion as a matter of law and, as such, a penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one’s sense of fairness, thus constituting an abuse of discretion as a matter of law” (*Matter of Alzate v Quality Bldg. Servs. Corp.*, 238 AD3d 1437, 1440 [3d Dept 2025] [internal quotation

marks and citations omitted], *lv denied* 44 NY3d 910 [2026]; *see Matter of Losurdo v Asbestos Free*, 1 NY3d 258, 267 [2003]). A discretionary penalty of permanent disqualification is typically reserved for situations where “the underlying deception has been deemed egregious or severe, or there was a lack of mitigating circumstances” (*Matter of Conliffe v Darden Rest.*, 187 AD3d 1398, 1401 [3d Dept 2020] [internal quotation marks and citations omitted]; *accord Matter of Kennedy v 3rd Track Constructors*, 213 AD3d 1005, 1009 [3d Dept 2023]).

Here, although claimant failed to disclose his work activities during his medical examinations, the record establishes that he disclosed his work activities in connection with his private investigation business, of his own accord, to the Board. He also disclosed such activities during the hearing and prior to any awards being made. Further, claimant forthrightly answered questions during his testimony regarding his private investigation work, introduced evidence of his search for other employment following his retirement and complied with the WCLJ’s directive to submit his 2022 business tax returns. Our review of the record, as well as our review of other matters involving similar circumstances, leads us to conclude that there is inadequate support for the Board’s determination that claimant’s acts were “sufficiently egregious” to warrant the onerous penalty of total disqualification from future wage loss benefits (*see Matter of Kennedy v 3rd Track Constructors*, 213 AD3d at 1009; *Matter of Conliffe v Darden Rest.*, 187 AD3d at 1401; *compare Matter of DeBryne v Pittsford Mercury, Inc.*, 236 AD3d 1165, 1166-1167 [3d Dept 2025], *Matter of Koratzanis v U.S. Concrete, Inc.*, 209 AD3d at 1078 [no effort to affirmatively disguise his writing and publishing endeavors, such as adopting a pen name, and was readily forthcoming about his activities when questioned], *and Matter of Sausto v Wildlife Conservation Socy.*, 208 AD3d 1565, 1567-1568 [3d Dept 2022] [record supported the Board’s finding that a discretionary penalty was not warranted as claimant disclosed the existence of his business and the income derived therefrom and, when questioned, he was forthcoming and testified consistent with the conclusions reached in the carrier’s investigative report], *with Matter of Tirado v Symphony Space, Inc.*, 236 AD3d 1250, 1253-1254 [3d Dept 2025] [surveillance videos recorded over three years], *Matter of Carpenter v Albany Dialysis Ctr.*, 235 AD3d 1048, 1051 [3d Dept 2025] [misrepresentation to physician as to disability and wholly inconsistent surveillance video], *Matter of Giesselmann v Rotterdam Steel, LLC*, 233 AD3d 1243, 1245-1246 [3d Dept 2024] [misrepresentation uncovered by surveillance video], *Matter of Deliso v New York City Tr. Auth.*, 225

AD3d 1010, 1012-1013 [3d Dept 2024] [misrepresentation uncovered by surveillance video], *Matter of Yolas v New York City Tr. Auth.*, 224 AD3d at 1115 [downplayed activities and provided misleading testimony], *Matter of Rodriguez v American Bridge Co.*, 213 AD3d 1118, 1121-1122 [3d Dept 2023] [false testimony, eventual disclosure but remained vague and deceptive], *Matter of Koratzanis v U.S. Concrete, Inc.*, 209 AD3d at 1078 [repeated denials of prior injuries, including while testifying under oath], *Matter of Arena v Upstate Niagara Coop. Inc.*, 208 AD3d 1400, 1401-1403 [3d Dept 2022] [inconsistencies between claimant's testimony and the activities depicted on the surveillance videos], *Matter of Strohschein v Safespan Platform Sys. Inc.*, 207 AD3d 818, 822 [3d Dept 2022] [misrepresented and exaggerated his physical limitations as depicted on surveillance video], *lv denied* 39 NY3d 915 [2023], *Matter of Ali v New York City Dept. of Corr.*, 205 AD3d 1247, 1250 [3d Dept 2022] [lack of candor regarding prior injuries], *Matter of Nappi v Verizon N.Y.*, 205 AD3d at 1184 [lack of candor regarding prior injuries], *Matter of Giglia v SUNY Buffalo-Union*, 204 AD3d at 1289 [failure to report his work activity was “‘ongoing and egregious’” in that it resulted in awards being paid at a higher rate], *Matter of Reyes v H & L Iron Works Corp.*, 203 AD3d 1426, 1427-1428 [3d Dept 2022] [surveillance video of the claimant working and lifting], *Matter of Ortiz v Calvin Maintenance*, 199 AD3d 1211, 1213-1214 [3d Dept 2021] [nondisclosure of prior injury], and *Matter of Lopez v Clean Air Quality Servs. Inc.*, 198 AD3d 1038, 1039-1040 [3d Dept 2021] [failed to disclose prior accident and wife falsely testified about claimant's condition]; *see also Employer: Northern Manhattan Nursing*, 2021 WL 233079, *3 [WCB No. G281 2739, Jan. 20, 2021]; *Employer: Ossining Sch. Dist.*, 2020 WL 4259461, *3, 2020 NY Wrk Comp LEXIS 8768, *5-7 [WCB No. 3070 8079, July 16, 2020]). As, under the circumstances, the imposition of the discretionary penalty is disproportionate to the misrepresentation, it is reversed.

Pritzker, McShan, Powers and Corcoran, JJ., concur. Ordered that the decision is modified, without costs, by reversing so much thereof as disqualified claimant from receiving all future wage replacement benefits, and, as so modified, affirmed.

10 Stephen Keller, Plaintiff, v Cheryl Keller, Appellant. [251 NYS3d 436]—

Contempt—Civil Contempt—Husband Failed to Either Purchase Wife's Equity Interest in Marital Residence or List it for Sale—Actual Knowledge of Clear and Unequivocal Order

Corcoran, J. Appeal from an order of the Supreme Court

(James Ferreira, J.), entered July 23, 2024, in Schoharie County, which partially denied defendant's motion to, among other things, hold plaintiff in contempt.

Plaintiff (hereinafter the husband) and defendant (hereinafter the wife) were divorced in October 2017. The judgment of divorce incorporated, but did not merge, the parties' oral stipulation placed on the record in June 2017 requiring the husband to either purchase the wife's interest in the marital home for \$48,500 or list it for sale within 120 days of the judgment. After the husband failed to comply, Supreme Court ordered him to allow the wife to retrieve certain personal property and to immediately list the residence for sale. In November 2020, the wife moved to hold the husband in contempt, alleging that he both failed to return her property and list the home for sale. In August 2021, Supreme Court adjudged the husband in civil contempt and fined him in the amount of \$48,828.71, representing the value of the wife's equity in the home, plus nominal amounts for interfering with her attempt to obtain personal items, wasted moving expenses and reasonable counsel fees. Following other fruitless attempts to obtain the husband's compliance, the wife moved in September 2023 for an order pursuant to Judiciary Law §§ 753 and 756 holding the husband in civil contempt for, among other things, failing to pay the \$48,828.71 fine. Following a hearing, the court issued an oral decision denying the wife's request to hold the husband in contempt and to incarcerate him. The wife appeals.*

Where a spouse defaults in paying any sum required by a divorce judgment or order, the aggrieved spouse may move under Judiciary Law § 756 for an order to punish by fine or commitment without first applying "for enforcement [of the monetary obligation] by any other means" (Domestic Relations Law § 245). Following its amendment in 2016, Domestic Relations Law § 245 no longer requires that a party demonstrate that there is no other adequate remedy at law before seeking contempt (*see* Domestic Relations Law § 245, as amended by L 2016, ch 365, § 1; *Vicedomine v LaRose-Vicedomine*, 174 AD3d 1174, 1175 n 2 [3d Dept 2019]; *Holsberger v Holsberger*, 154 AD3d 1208, 1210 n 1 [3d Dept 2017]). Accordingly, Supreme Court erred in determining that contempt relief was unavailable based upon the wife's purported failure to establish that less drastic enforcement measures, including those available under CPLR article 52, had been exhausted or would be ineffectual.

Additionally, Supreme Court erred when it denied the wife's

* The husband did not participate in this appeal.

motion to hold the husband in contempt. To sustain a finding of civil contempt for violation of the terms of an order, the movant must “establish by clear and convincing evidence that the party charged with contempt had actual knowledge of a lawful, clear and unequivocal order, that the charged party . . . disobeyed that order, and that this conduct prejudiced the opposing party’s rights” (*Matter of Michelle L. v Steven M.*, 227 AD3d 1159, 1163-1164 [3d Dept 2024] [internal quotation marks and citations omitted]; accord *Matter of Brett J. v Julie K.*, 209 AD3d 1141, 1145 [3d Dept 2022]; see Judiciary Law § 753). A court’s determination whether to hold a party in civil contempt is reviewed only for an abuse of discretion (see *DeCrescenzo v Suslak*, 238 AD3d 1406, 1411 [3d Dept 2025], *lv dismissed* 44 NY3d 1004 [2025]; *Seale v Seale*, 154 AD3d 1190, 1192 [3d Dept 2017]). Where the alleged contemnor asserts as a defense his or her inability to pay a sum due under a court mandate, he or she must present a specific showing of his or her financial status and may not rely upon a vague or conclusory denial (see *El-Dehdan v El-Dehdan*, 26 NY3d 19, 36 [2015]).

Here, the wife established by clear and convincing evidence that the husband had actual knowledge of Supreme Court’s clear and unequivocal August 2021 order, that he failed to comply with its mandate by not paying the \$48,828.71 fine and that his noncompliance prejudiced the wife by depriving her of her equity in the marital home. She also established that the husband allowed the marital home to be sold at a tax foreclosure sale, and that he liquidated a retirement account and spent the \$50,000 proceeds despite his actual knowledge that he had been ordered to pay the wife \$48,828.71. Thus, a finding of civil contempt was amply justified on this record. Supreme Court did not expressly determine whether the husband satisfied his burden of establishing an inability to pay the fine, and the present record is insufficient to evaluate the merits of that defense. We therefore remit to Supreme Court for further proceedings, including a determination of whether the husband established any defense, and to consider appropriate penalties and purge conditions (see *Carver Fed. Sav. Bank v Shaker Gardens, Inc.*, 167 AD3d 1337, 1343-1344 [3d Dept 2018]; *Barlette v Barlette*, 95 AD3d 1624, 1625 [3d Dept 2012]).

Garry, P.J., Clark, Pritzker and Powers, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied defendant’s motion to hold plaintiff in contempt; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court’s decision; and, as so modified, affirmed.

11 USL Marina, LLC, Appellant, v Adirondack Wild: Friends of the Forest Preserve et al., Respondents. [252 NYS3d 790]—

Civil Rights—Strategic Lawsuits against Public Participation—Substantial Basis in Law

Libel and Slander—Opinions—Statement Advocated against Owner/Operator of Commercial Marina’s Proposed Expansion and Encouraged Public to Contact Adirondack Park Agency and Oppose Project—Defendant Publishers Not Categorically Excluded from Protections of Anti-SLAPP Law

Ceresia, J. Appeal from an order of the Supreme Court (John Ellis, J.), entered August 23, 2024, in Franklin County, which, among other things, partially granted defendants’ motions to dismiss the complaint.

In 1992, New York enacted legislation to provide protection from a strategic lawsuit against public participation (hereinafter SLAPP suit)—that is, a lawsuit characterized as having little merit, brought in retaliation for making public comment on matters of civic significance (*see* Civil Rights Law §§ 70-a, 76-a; *Abbey Family Trust No. Four v Matthews*, 217 AD3d 1158, 1162 [3d Dept 2023]). The anti-SLAPP law, which was significantly expanded in 2020 (*see* L 2020, ch 250), accomplishes its protective goal by providing expedited processes for a defendant to obtain dismissal of a SLAPP suit (*see* CPLR 3211 [g]; 3212 [h]) and by allowing awards of counsel fees and damages to a defendant targeted by a such a lawsuit (*see* Civil Rights Law § 70-a). When a defendant moves to dismiss a complaint under CPLR 3211 (g), it is the defendant’s initial burden to show that the lawsuit is indeed a SLAPP suit (*see Reeves v Associated Newspapers, Ltd.*, 232 AD3d 10, 18 [1st Dept 2024], *lv dismissed* 44 NY3d 990 [2025]). If that burden is met, the motion to dismiss must be granted unless the plaintiff can demonstrate that its action has “a substantial basis in law, which requires such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact” (*Smartmatic USA Corp. v Fox Corp.*, 213 AD3d 512, 512 [1st Dept 2023] [internal quotation marks and citation omitted]; *see* CPLR 3211 [g] [1]; *Reeves v Associated Newspapers, Ltd.*, 232 AD3d at 18-19). Under this unique framework, “which is, in effect, an accelerated summary judgment procedure” (*Reeves v Associated Newspapers, Ltd.*, 232 AD3d at 18), a court is required to consider the pleadings as well as affidavits submitted by the parties setting forth the relevant facts (*see* CPLR 3211 [g] [2]).

Against that backdrop, we turn to the factual and procedural history of this case. Plaintiff, the owner and operator of a commercial marina located in the Town of Santa Clara, Franklin County, applied to the Adirondack Park Agency for permits to

expand the existing marina. Defendant Adirondack Wild: Friends of the Forest Preserve (hereinafter Adirondack Wild) is a nonprofit environmental advocacy organization, and defendant Adirondack Explorer, Inc. (hereinafter Explorer) is a nonprofit media company that publishes on a variety of platforms, including a printed and digital magazine, a website and newsletters. In 2023, Adirondack Wild authored, and Explorer published, a full-page statement, headlined “Off the Scale: Big Development on a Small Pond.” The statement advocated against plaintiff’s proposed marina expansion and encouraged the public to contact the Adirondack Park Agency and oppose the project.

After the statement was published, plaintiff commenced this defamation action against defendants, who each moved pre-answer to dismiss the complaint, as relevant here, pursuant to CPLR 3211 (g). In so moving, defendants argued that this action is a SLAPP suit and that plaintiff could not meet its shifted burden of showing a substantial basis in law, because each of the claims made in the published statement were either true or nonactionable expressions of opinion. Defendants further sought an award of costs, counsel fees and compensatory and punitive damages under Civil Rights Law § 70-a. Plaintiff opposed both motions and cross-moved for discovery. Supreme Court granted defendants’ motions to dismiss and awarded costs and counsel fees to defendants, while declining their requests for compensatory and punitive damages. The court also denied plaintiff’s cross-motion in its entirety. Plaintiff appeals.

As for the question of whether the instant action constitutes a SLAPP suit, we find that it does. To that end, we note that, contrary to the position advanced by plaintiff both during motion practice below and in its appellate brief, plaintiff’s counsel conceded as much at oral argument with respect to Adirondack Wild. However, plaintiff maintains that the protections of the anti-SLAPP law should not apply to Explorer because it did not edit or otherwise contribute to the content of Adirondack Wild’s statement. We are unpersuaded. The law—focused on communications about issues of public interest—is directed toward the subject matter of the speech, not any particular speaker, and does not draw distinctions between the authors and the publishers of those communications (*see* Civil Rights Law § 76-a [1] [a]; *VIP Pet Grooming Studio, Inc. v Sproule*, 224 AD3d 78, 84 [2d Dept 2024]; *see also* NY St Bar Assn, Comm on Media Law Mem in Support, Bill Jacket, L 2020, ch 250 at 17 [advocating for the expanded anti-SLAPP law as

providing “improved protection for the free speech rights of all New Yorkers, including entertainment companies and the news media”]). Accordingly, we decline plaintiff’s invitation to categorically exclude publishers from the protections of the anti-SLAPP law.

Moving on, the burden shifted to plaintiff to demonstrate that its defamation claim had a substantial basis in law. In an effort to satisfy this burden, plaintiff asserted that five of the claims contained within the published statement were false. Supreme Court disagreed, siding with defendants’ position that each of the contested claims was either truthful or a nonactionable expression of opinion. We concur with the court relative to all but one of the claims. A portion of the statement indicated that plaintiff “wants to replace 8,600 square feet of dock . . . with 34,000 feet of commercial marina for 93 motorized boat slips. That’s a four-fold increase.” However, the record reveals that, in arriving at those figures, Adirondack Wild used inconsistent measurements. That is, in citing to the existing “8,600 square feet of dock,” this figure was reached by measuring only the dock surfaces, without including any of the areas of open water between the docks where boats are moored. By contrast, in describing the purported “34,000 feet of commercial marina” that would result from the planned expansion, this figure was attained by measuring both the planned 9,800 square feet of new docking as well as the open water located between those docks. Had the measurements been taken in the same manner, the discrepancy between the respective figures would have been less, such that it would not have lent itself to a conclusion that a “four-fold increase” was going to occur. Under these circumstances, we are satisfied that plaintiff met its corresponding burden of establishing that part of its defamation claim had a substantial basis in law, and as a result defendants’ motions to dismiss should have been denied to the extent of allowing the defamation claim to proceed as to that one statement. Given that Supreme Court awarded mandatory costs and counsel fees based upon its dismissal of the complaint (*see* Civil Rights Law § 70-a [1] [a]), that aspect of the court’s ruling was also in error. Finally, because plaintiff did not establish that specified discovery was necessary for it to oppose the motions (*see* CPLR 3211 [g] [3]), its cross-motion was properly denied.

Garry, P.J., McShan and Mackey, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as granted defendants’ motions to dismiss the complaint and awarded costs and counsel fees; said motions

denied to the extent that plaintiff's defamation allegations are based on the statement that plaintiff "wants to replace 8,600 square feet of dock . . . with 34,000 feet of commercial marina for 93 motorized boat slips. That's a four-fold increase"; and, as so modified, affirmed.

12 In the Matter of Janey B., Respondent, v Jill C., Appellant, et al., Respondent. [252 NYS3d 794]—

Parent, Child and Family—Visitation—Oldest Child Estranged from Mother Due to Acrimonious Relationship Seeking Visitation with Sibling—Mother's Appeal Dismissed as Untimely
Appeal—Notice of Appeal—Not Timely Filed or Served

Fisher, J. Appeal from an order of the Family Court of Broome County (Brett Noonan, J.), entered August 29, 2024, which granted petitioner's application, in a proceeding pursuant to Domestic Relations Law article 6, for visitation with respondents' child.

Respondent Jill C. (hereinafter the mother) and respondent Christopher C. (hereinafter the father) are the parents of two children (born in 2000 and 2011). Petitioner (hereinafter the sister) is the oldest child of the father and the mother. The sister has not lived in the family home since 2018 and is estranged from the mother due to their acrimonious relationship. After the parents divorced in 2022, the father moved out of the family home where the mother and youngest child continued to reside. In June 2023, the sister filed a petition seeking visitation on a biweekly basis with the youngest child. The mother opposed the petition. Following a fact-finding hearing and a *Lincoln* hearing, Family Court granted the sister certain visitation time with the youngest child. The mother appeals.¹

As raised by the sister, the mother's appeal must be dismissed as untimely.² "An appeal is taken from a Family Court order by filing an 'original notice of appeal with the clerk of the family court in which the order was made and from which the appeal is taken,' then serving that notice upon 'any adverse party as provided for in CPLR 5515 (1) and upon the child's attorney, if any,' within the time allowed by Family Ct Act § 1113" (*Matter of Washington County Dept. of Social Servs. v Oudekerk*, 205 AD3d 1108, 1109 [3d Dept 2022] [brackets and ellipsis omitted], quoting Family Ct Act § 1115). Where, like here, the order sought to be appealed from was mailed by the clerk of the fam-

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1. The father has taken no part in this appeal.
 2. The submission from the attorney for the child does not address timeliness.

ily court, an appellant must complete both steps within 35 days from such mailing (see Family Ct Act § 1113; *Matter of Washington County Dept. of Social Servs. v Oudekerk*, 205 AD3d at 1109). The record reflects that the order appealed from was mailed to the mother and emailed to the mother's counsel on the same day it was entered, August 29, 2024. As such, her last day to take an appeal was October 3, 2024. Although the mother's notice of appeal was dated October 2, 2024, the affirmation of service reveals that the notice of appeal was served on October 4, 2024—the same day it was filed with the clerk of Family Court. Given that this was beyond the 35-day period, “the mother's appeal is untimely and, as the applicable statutory time bar is absolute and not subject to extension, this Court lacks jurisdiction to entertain it” (*Matter of Carrie X. [Amber Y.]*, 230 AD3d 1397, 1398 [3d Dept 2024] [internal quotation marks and citation omitted], *lv denied* 42 NY3d 910 [2024]; see *Matter of Richard HH. v Saratoga County Dept. of Social Servs.*, 163 AD3d 1082, 1083 n 2 [3d Dept 2018], *lv denied* 32 NY3d 911 [2018]).

Garry, P.J., Ceresia, McShan and Mackey, JJ., concur. Ordered that the appeal is dismissed, without costs.

13 In the *Matter of Aiden E. and Others, Alleged to be Permanently Neglected Children*. St. Lawrence County Department of Social Services, Respondent; Tiffany D., Appellant. (Proceeding No. 1.) In the *Matter of Aiden E. and Others, Alleged to be Permanently Neglected Children*. St. Lawrence County Department of Social Services, Respondent; David E., Appellant. (Proceeding No. 2.) [252 NYS3d 828]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Continued Use of Illicit Drugs—Failure to Plan for Future of Children

Garry, P.J. Appeal from an order of the Family Court of St. Lawrence County (Andrew Moses, J.), entered September 17, 2024, which granted petitioner's applications, in two proceedings pursuant to Social Services Law § 384-b, to adjudicate the subject children to be permanently neglected, and terminated respondents' parental rights.

Respondent Tiffany D. (hereinafter the mother) and respondent David E. (hereinafter the father) are the parents of three children (born in 2012, 2014, and 2020). In October 2020, the children were removed from the parents' custody, on consent, and placed in the custody of petitioner after the youngest child was born testing positive for suboxone and methamphet-

amines.¹ The parents subsequently made admissions of neglect as to the youngest child and derivative neglect as to the elder children, and, following a dispositional hearing, the children's placement with petitioner was continued. In or around August 2021, the children began living with the mother's cousin (hereinafter the foster mother) and her spouse. The subject permanent neglect petitions followed in January 2022, alleging that the parents' continued use of illicit drugs and failure to engage in required services amounted to a failure to plan for the children. The parents again elected to forgo fact-finding and consented to findings of permanent neglect with respect to the children. Following a dispositional hearing, Family Court terminated the parents' parental rights. The parents appeal, contending that a suspended judgment was in the best interests of the children.²

"Following an adjudication of permanent neglect, the sole concern at a dispositional hearing is the best interests of the child, and there is no presumption that any particular disposition, including the return of a child to a parent, promotes such interests" (*Matter of Y. SS. [E. SS.]*, 243 AD3d 1131, 1133 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]; see *Matter of Macayla N. [Sheena N.]*, 240 AD3d 976, 981 [3d Dept 2025], *lv denied* 44 NY3d 910 [2026]). Although "the court may decide to issue a suspended judgment rather than terminating parental rights, a suspended judgment is only appropriate where a parent has made significant progress[,] such that a brief grace period would allow him or her to demonstrate the ability to be a fit parent, and such delay is consistent with the child's best interests" (*Matter of Carmela D. [Shameeka G.]*, 232 AD3d 1126, 1131 [3d Dept 2024] [internal quotation marks, brackets and citation omitted], *lvs denied* 43 NY3d 903 [2025], 43 NY3d 903 [2025]; see Family Ct Act § 633; *Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

The parties stipulated that the operative period for the dispositional hearing would be June 2022 through June 2023. It is undisputed that neither parent visited the children from

1. Evidence admitted at the dispositional hearing shows that all three children were born with positive toxicology.

2. In July 2025, the assigned appellate attorney for the eldest child successfully moved to vacate the dispositional order as to him, arguing that he was denied the effective assistance of counsel. A new dispositional hearing was later held, and the parents' parental rights as to that child were again terminated in October 2025. This appeal is thus moot with respect to the eldest child (see *Matter of Adonis I. [Steve I.]*, 222 AD3d 1240, 1241 [3d Dept 2023]). We note that appeals from the foregoing orders are pending perfection before this Court.

June 2022 through January 2023. Although it appears that the parents experienced the loss of the maternal grandmother during that time, the parents' reasons for failing to visit the children were largely homelessness, transportation issues and admitted illicit drug use.³ Supervised visitation, however, was scheduled to take place at a visitation center, rendering any housing instability largely irrelevant, and the credited evidence revealed that the parents failed to avail themselves of more than one form of transportation assistance offered by petitioner. As noted, the evidence revealed ongoing drug use during the relevant period, with positive drug screens into March 2023, coupled with inconsistent engagement in related services, other than medication-assisted treatment. While the mother appears to have made occasional inquiries regarding the provision of gifts to the children during her absence, no gifts were provided, and neither parent sent letters or otherwise maintained contact with the children during the prolonged period of nonvisitation. The parents resumed supervised visitation in February 2023 and continued to exercise parenting time through June 2023. The middle child, however, refused to participate in the majority of those visits. Although petitioner's progress notes reveal that visits with the children toward the end of the relevant period were generally appropriate and positive, the credited testimony also established that the children experienced violent behavioral changes and/or developmental regressions following parental visits. Ultimately, the parents never progressed beyond fully supervised contact with the children. Both parents also testified that they were unemployed throughout the relevant period. Apparently in late June 2023, the parents did obtain more permanent housing, residing in the house of a relative.

Although we acknowledge that the foster mother expressed some hesitation when asked to commit to being an adoptive resource for the children,⁴ that consideration is not dispositive (*see generally Matter of Arianna I. [Roger I.]*, 100 AD3d 1281, 1283-1284 [3d Dept 2012]). According due deference to Family Court's credibility determinations and factual findings regarding the parents' repeated failure to visit the children, continued illicit drug use and minimal engagement in—or tangible bene-

3. The parents were required to submit to drug screenings prior to their visits.

4. Subsequent permanency orders available to this Court reflect that the foster mother and her spouse have proceeded with the preadoption process. The record also suggests that any such expression of hesitancy was related to the eldest child, based upon his stated desire not to be adopted. As noted above, the eldest child is no longer a subject of this appeal.

fit derived from—required services, the record provides a sound and substantial basis for the court’s determination that termination of parental rights was in the children’s best interests (*see Matter of Daimeon MM. [Laurie MM.]*, 230 AD3d 1416, 1419-1420 [3d Dept 2024], *lv denied* 42 NY3d 910 [2025]; *Matter of Cordell M. [Cheryl O.]*, 150 AD3d 1424, 1425-1426 [3d Dept 2017]).

Reynolds Fitzgerald, McShan, Powers and Mackey, JJ., concur. Ordered that the order, as modified by Family Court’s July 9, 2025 order, is affirmed, without costs.

14 In the Matter of Alisha SS., Alleged to be a Permanently Neglected Child. Schenectady County Department of Social Services, Respondent; Zuhra SS., Appellant. (Proceeding No. 1.) In the Matter of Alisha SS., Alleged to be a Permanently Neglected Child. Schenectady County Department of Social Services, Respondent; Micky TT., Respondent. (Proceeding No. 2.) [252 NYS3d 804]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Diligent Efforts of Agency to Encourage and Strengthen Parental Relationship—Mother Failed to Substantially Plan for Child’s Future

Fisher, J. Appeal from an order of the Family Court of Schenectady County (Kevin Burke, J.), entered August 8, 2024, which granted petitioner’s applications, in two proceedings pursuant to Social Services Law § 384-b, to adjudicate the subject child to be permanently neglected, and terminated respondents’ parental rights.

Respondent Zuhra SS. (hereinafter the mother) is the mother of the subject child (born in 2018). In October 2018, the child was removed from the mother’s home and placed into the care and custody of petitioner—ultimately being placed and remaining with a foster family since November 2018. The basis for the child’s removal involved, among other things, incidents of domestic violence between the mother and the child’s biological father, as well as parenting and safety concerns involving the mother which led to a finding of neglect against her in 2019. Petitioner filed the instant permanent neglect petition in August 2022, seeking to terminate the mother’s parental rights. Following a fact-finding hearing, Family Court adjudicated the child to be a permanently neglected child and, after a dispositional hearing, terminated the mother’s parental rights and freed the child for adoption. The mother appeals.*

We affirm. “A permanently neglected child is one who is in

* Family Court concurrently determined that the father had also permanently neglected the child alongside the mother. Although the

the care of an authorized agency and whose parent has failed, for at least one year or for 15 out of the most recent 22 months, to substantially and continuously or repeatedly plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child" (*Matter of Gabriel J. [Christina I.]*, 232 AD3d 1093, 1094 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 43 NY3d 901 [2025]). The petitioning agency "must first establish, by clear and convincing evidence, that it has made diligent efforts to encourage and strengthen the parent's relationship with the child, meaning practical and reasonable efforts to ameliorate the problems preventing reunification and strengthen the family relationship by such means as assisting the parent with visitation, providing information on the child's progress and development, and offering counseling and other appropriate educational and therapeutic programs and services" (*Matter of Colby R. [David Q.]*, 199 AD3d 1192, 1194 [3d Dept 2021] [internal quotation marks, brackets and citations omitted]).

Here, the record supports Family Court's determination that petitioner made diligent efforts to encourage and strengthen the mother's relationship with the child. Petitioner regularly conducted service plan reviews to evaluate the mother's progress toward the permanency goals and to address problems that arose which could prevent the child's return to her care. In assisting the mother, petitioner provided her with various types of educational programming and counseling services for parenting, safety, domestic violence and mental health. Such services evolved over time to conform to the mother's needs, which included increasing supervised visitation to a weekly schedule in an attempt to bond the mother with the child, and then adding pre-visit parenting classes with a parent educator who would assist the mother during her visits. Based on further observations by caseworkers during a visit, petitioner provided additional services and aid for ongoing domestic violence against the mother, including assistance with temporary housing and further counseling. Petitioner also coordinated and facilitated interdisciplinary meetings between the

subsequent termination of his parental rights derived from the same order which the mother now appeals, the father has not appealed such order and, therefore, may not be granted any affirmative relief (see *Matter of Drey L. [Katrina M.]*, 227 AD3d 1134, 1135 n [3d Dept 2024]). Accordingly, we consider the brief submitted by the father on this appeal to be limited to supporting the mother's contentions only.

mother and various therapists and providers involved with the child's educational and medical needs. Based on the foregoing, we are satisfied that Family Court properly determined that petitioner met its burden of establishing diligent efforts to encourage and strengthen the mother's relationship with the child (see *Matter of Macayla N. [Sheena N.]*, 240 AD3d 976, 978 [3d Dept 2025], *lv denied* 44 NY3d 910 [2026]; *Matter of Gabriel J. [Christina I.]*, 232 AD3d at 1095; *Matter of Makayla I. [Sheena K.]*, 201 AD3d 1145, 1147-1148 [3d Dept 2022], *lvs denied* 38 NY3d 903 [2022], 38 NY3d 903 [2022]).

Next, we find ample support in the record for Family Court's determination that the mother failed to substantially plan for the child's future despite being able to do so. In order to substantially plan for the future of the child, "a parent must, at a minimum, take meaningful steps to correct the conditions that led to the child's initial removal. The parent's plan must be realistic and feasible, and his or her good faith effort, alone, is not enough" (*Matter of Jase M. [Holly N.]*, 190 AD3d 1238, 1241 [3d Dept 2021] [internal quotation marks, brackets and citations omitted], *lvs denied* 37 NY3d 901 [2021], 37 NY3d 901 [2021]). When performing the relevant inquiry, "court[s] may consider [a parent's] failure to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available" (*Matter of Zaiden P. [Ashley Q.]*, 211 AD3d 1348, 1354 [3d Dept 2022] [internal quotation marks, ellipsis and citation omitted], *lvs denied* 39 NY3d 911 [2023], 39 NY3d 911 [2023]). Notably, "[t]he petitioning agency will be deemed to have fulfilled that obligation if appropriate services are offered but the parent refuses to engage in them or does not progress" (*Matter of Drey L. [Katrina M.]*, 227 AD3d 1134, 1136 [3d Dept 2024] [internal quotation marks and citations omitted]).

Although the mother initially demonstrated a willingness to receive certain assistance and was successful in completing some programming, each of petitioner's witnesses who had the opportunity to observe and work with the mother testified that she had not benefitted from the services she engaged in. Testimonial evidence revealed that the mother was on her cell phone or not participating with the educator during parenting sessions, would become "adversarial" with staff which made sessions "very tough," and had at times come unprepared for visits without food or toiletry items for the child. In terms of the mother's ability to safely and effectively parent the child, each of petitioner's witnesses reported that the mother displayed inconsistent growth or no progress and did not imple-

ment the skills taught in the parenting sessions. To this point, petitioner's caseworker testified that her multiple observations of the mother's residence also revealed a lack of food and personal hygiene products, as well as other safety concerns such as the temperature being approximately 45 degrees in her residence during March 2022 and the presence of insects living on the floor/carpeting. Relating to ongoing domestic violence issues involving the mother, her relatives and the father, each of petitioner's witnesses also expressed deep concern with the mother's failure to appreciate and properly respond to the seriousness of these threats and physical abuse—particularly when the mother wanted to drop an order of protection issued in her favor against the father so that they could resume coparenting after the father had brandished a firearm and threatened to kill both the mother and the child. The caseworker expressed more concern after the mother subsequently reported being in a new relationship with an individual who had been previously involved in a physical altercation with the father. Moreover, despite engaging in mental health counseling in 2020 and 2021, the treatment notes indicated that the mother was not substantially engaging in treatment. During this same time period, the caseworker testified that the mother missed nine supervised visits with the child and, in just 2021, missed 17 interdisciplinary meetings relating to the child's education and care needs. In view of the foregoing, and deferring to Family Court's credibility determinations, we conclude that petitioner proved by clear and convincing evidence that the mother failed to plan for the child's future, therefore Family Court's finding of permanent neglect as to her will not be disturbed (*see Matter of Gabriel J. [Christina I.]*, 232 AD3d at 1096; *Matter of Nikole V. [Norman V.]*, 224 AD3d 1102, 1105 [3d Dept 2024], *lv denied* 41 NY3d 909 [2024]; *Matter of Zaiden P. [Ashley Q.]*, 211 AD3d at 1354; *see also Matter of Macayla N. [Sheena N.]*, 240 AD3d at 979; *Matter of Konner N. [Justin O.]*, 235 AD3d 1112, 1116 [3d Dept 2025]).

As to the disposition, the mother contends that Family Court's determination to terminate her parental rights, as opposed to granting a suspended judgment, was not in the best interests of the child. We disagree. Following an adjudication of permanent neglect, "Family Court's only concern is the best interests of the child, without any presumption in favor of reunification, and a suspended judgment is only appropriate where a parent has made significant progress such that a brief grace period would allow him or her to demonstrate the ability to be a fit parent, and such delay is consistent with the child's best interests" (*Matter of Gabriel J. [Christina I.]*, 232 AD3d at

1097 [internal quotation marks, brackets and citation omitted]; see Family Ct Act § 631). The evidence presented at the dispositional hearing demonstrated that the child had been with the same foster family for essentially the child's entire life, developing a strong bond with both foster parents who were very responsive to the child's educational and care needs. Although, in the early stages of these proceedings, the child showed some interest with the mother during visits, this waned over time and by December 2021 the child began to express opposition to visits with the mother. After supervised visitation was suspended in September 2022, the mother had continued to inquire about the child's welfare but had not contacted the child's school or doctors when given the means to do so. The mother had also not taken steps to strengthen the bond between her and the child, and ceased participating in programming or counseling for parenting, prevention/safety and domestic violence. Contrary to the father's contentions, this conduct by the mother does not demonstrate an eagerness to improve her fitness as a parent and, although the mother is correct that she had maintained stable employment throughout these proceedings, the record fails to reveal progress in addressing the causes for the child's initial removal over five years later—a point highlighted by the appellate attorney for the child. Moreover, the mother refused to acknowledge the child's medical conditions and needs, claiming they were not a “problem” but essentially a product of too many therapists being involved in their lives. Considering the record in its entirety, and according deference to Family Court's factual findings and choice among dispositional alternatives, we discern no basis to disturb the conclusion that the mother failed to make meaningful progress in overcoming the barriers preventing reunification. Accordingly, termination of the mother's parental rights, rather than issuing a suspended judgment, served the best interests of the child (see *Matter of Nevaeh N. [Heidi O.]*, 220 AD3d 1070, 1072-1073 [3d Dept 2023], *lv denied* 41 NY3d 903 [2024]; *Matter of Jase M. [Holly N.]*, 190 AD3d at 1242; see also *Matter of Macayla N. [Sheena N.]*, 240 AD3d at 982; *Matter of Makayla I. [Sheena K.]*, 201 AD3d at 1152). We have examined the mother's remaining contentions and have found them to be unavailing.

Reynolds Fitzgerald, J.P., Ceresia, McShan and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

15 In the Matter of Jayden G., a Neglected Child. Ulster County Department of Social Services, Respondent; Debra F., Appellant. [252 NYS3d 815]—

Parent, Child and Family—Abused or Neglected Child—Continued Placement of Special Needs Child in Foster Care with Permanency Goal of Reunification with Paternal Grandmother Who Tested Positive for Nonprescribed Oxycodone

Pritzker, J. Appeal from an order of the Family Court of Ulster County (Keri Savona, J.), entered October 9, 2024, which, in a proceeding pursuant to Family Ct Act articles 10 and 10-A, continued the placement of the subject child.

Respondent (hereinafter the grandmother) is the paternal grandmother of the subject child (born in 2010). The grandmother has raised the child since he was two months old. In October 2023, the grandmother consented to the temporary removal of the child after petitioner filed an emergency application seeking to remove the child from the grandmother's care. The child was placed with a foster family located in Ulster County. Around this same time, after the child's removal, the grandmother moved to Oswego County. Meanwhile, petitioner filed a neglect petition against the grandmother alleging, among other things, that, while she was the sole caretaker of the child, who has special needs, the grandmother tested positive for nonprescribed oxycodone and has not engaged in substance abuse treatment. Ultimately, a finding of neglect was entered on consent, the grandmother was placed under a one-year order of supervision and a one-year order of protection against her was put in place.

A permanency hearing order was entered in April 2024 which continued the permanency goal of reunifying the grandmother and the child and continued the child's placement in foster care. In June 2024, the grandmother filed a motion seeking to modify the April 2024 permanency hearing order and to have the child discharged from petitioner's care to her custody. Following a fact-finding hearing, Family Court denied the grandmother's motion and entered a permanency hearing order continuing the child's placement as well as the permanency goal of reunification. The grandmother appeals from the permanency hearing order.

The grandmother's appeal from the October 2024 permanency hearing order has been rendered moot by the issuance of two subsequent permanency hearing orders, both of which continue the child's placement and the permanency goal of reunification (*see Matter of Kimberly G. [Natasha G.]*, 203 AD3d 1418, 1419 [3d Dept 2022]; *Matter of Jihad N. [Devine N.]*, 180

AD3d 1164, 1165 [3d Dept 2020]).* Under the circumstances of this case, the exception to the mootness doctrine does not apply (see *Matter of Tyler I. [Shawn I.]*, 219 AD3d 1097, 1099 [3d Dept 2023]; *Matter of Cheyenne E. [Scott E.]*, 154 AD3d 1206, 1207 [3d Dept 2017]).

Clark, J.P., McShan, Powers and Corcoran, JJ., concur. Ordered that the appeal is dismissed, as moot, without costs.

16 In the Matter of Jasic UU. and Another, Alleged to be Neglected Children. Tioga County Department of Social Services, Respondent; Natasha UU., Appellant. [252 NYS3d 798]—

Parent, Child and Family—Abused or Neglected Child—Mother Failed to Undergo Requested Drug Screens and Mental Health Evaluations—Mother Denied Access to Younger Child after Suspected Babysitter Sexual Abuse and Asked That Agency Take Custody of Older Child Rather than Utilizing Offered Services

Powers, J. Appeal from an order of the Family Court of Tioga County (Adam Schumacher, J.), entered December 31, 2024, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 10, to adjudicate the subject children to be neglected.

Respondent (hereinafter the mother) is the mother of the subject children (born in 2009 and 2018; hereinafter the older child and the younger child, respectively).¹ In May 2023, petitioner attempted to commence an investigation after receiving a report that the mother had brought the younger child to the hospital with the suspicion that she had been sexually abused by an unnamed babysitter. However, the mother refused to allow the younger child to be interviewed. Petitioner continued to be in contact with the mother over the ensuing months regarding several other issues, and, in September 2023, the children were protectively removed and placed in foster care pursuant to Family Ct Act § 1024. Petitioner then commenced this neglect proceeding alleging that the mother was suffering from an unknown mental health or substance abuse condition causing paranoia, was under the influence of drugs while caring for the children and, as a result, is not able to comprehend the needs of the children. On these grounds, petitioner requested continued placement of the children. Following a fact-finding hearing, Family Court adjudicated the children to be neglected and, after a subsequent dispositional

* We also note that neither of these subsequent orders have been appealed.

1. The older child's father is deceased; the younger child's father is not a party to this proceeding.

hearing, placement of the children in petitioner's care was continued. The mother appeals.²

"A party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Matter of Raquel ZZ. [Angel ZZ.]*, 216 AD3d 1242, 1243-1244 [3d Dept 2023] [internal quotation marks and citations omitted]; see Family Ct Act § 1012 [f] [i]). "[N]eglect occurs when an individual behaves in a manner at odds with that of a reasonable and prudent parent under the circumstances, and that behavior results in actual harm or an imminent threat of danger to the children that is near or impending, not merely possible" (*Matter of Caylin T. [Christine T.]*, 229 AD3d 859, 861 [3d Dept 2024] [internal quotation marks and citations omitted]; see *Matter of Hakeem S. [Sarah U.]*, 206 AD3d 1537, 1538 [3d Dept 2022], *lv denied* 39 NY3d 904 [2022]). "[A] finding of neglect requires only an imminent threat of injury or impairment, not actual injury or impairment, and such threat may be established through a single incident or circumstance" (*Matter of Kingston V. [Javon V.]*, 234 AD3d 1056, 1057 [3d Dept 2025] [internal quotation marks and citation omitted], *lv dismissed* 43 NY3d 951 [2025]).

The evidence presented by petitioner at the fact-finding hearing consisted of testimony from two of petitioner's employees, including the assigned caseworker, as well as multiple law enforcement witnesses. The caseworker explained that petitioner received a report related to allegations of sexual abuse of the younger child. Yet, to the caseworker's knowledge, the younger child was never examined because the mother left the hospital with that child before an examination could occur. The mother later made allegations that the older child had stolen and sold her prescription medication, threatened to bring him to the police and requested that petitioner take custody of that child. As a result of these allegations, the caseworker recom-

2. The mother's notice of appeal purports to appeal from Family Court's June 2024 and November 2024 decisions. Inasmuch as no appeal lies therefrom (see CPLR 5512 [a]; Family Ct Act § 1112 [a]; *Matter of Samantha E. v Nicholas F.*, 233 AD3d 1295, 1296 n 1 [3d Dept 2024]), we exercise our discretion to overlook this error and treat the appeal as being validly taken from the court's ultimate December 2024 order (see CPLR 5520 [c]; *Matter of Tyrell FF. [Jaquasisa GG.]*, 166 AD3d 1331, 1332 n [3d Dept 2018], *appeal dismissed* 33 NY3d 1063 [2019]).

mended a person in need of supervision (hereinafter PINS) diversion intake occur for the older child, but the mother ultimately declined. Instead, to apparently prevent the older child from stealing and selling her medication, the mother began to carry her medication, balled up and wrapped in plastic wrap, on her person. When asked to provide the original packaging to that medication, the mother was unable to do so. The caseworker opined that there were no indications that the older child had been illicitly selling the mother's prescription medication, as it did not appear that he had extra funds. The caseworker further clarified that the drug testing undertaken by the mother was not a substance abuse evaluation and only determined the levels of her prescription medications. Notably, the caseworker opined that the mother acted unreasonably in many respects during the relevant time, including by denying access to the younger child after suspected sexual abuse and asking that petitioner take custody of the older child rather than utilizing offered services.

In their respective testimonies, law enforcement officers described multiple interactions they had with the mother and the children. These included when the mother reported the older child missing on two separate occasions. Officers opined that during these interactions the mother appeared to be more concerned with informing them that she believed the older child had tampered with her cellphone than determining his whereabouts. Additionally, the mother instructed officers not to bring the older child home because of her belief that he had stolen her medication. On one of these occasions, she did not retrieve the older child when his whereabouts were determined, despite being directed to do so. It was also explained that the mother called police to her home previously because she believed there to be a child locked in a vehicle in front of her home but, when they arrived shortly thereafter, there was no child in the vehicle. During another interaction, the mother informed officers that someone had stolen her refrigerator but, upon inspection, it was evident that such an item could not fit through the window she claimed the thieves utilized. An officer opined that, based upon his training, the mother's actions were suggestive of drug use. The mother testified on her own behalf, explaining that there was no indication that the younger child had been sexually abused, though conceding that an examination did not occur. Additionally, she denied having refused to speak to the caseworker regarding the incident. As to the older child, the mother informed petitioner of her suspicions that he was stealing her medication because she was seeking services that would benefit him, however, she ultimately declined PINS

intervention because it was not the specific services she was seeking. When asked if she had any proof that the older child was stealing her medication, the mother confirmed that she did not and that it was only her suspicion. The mother admitted that she has a prescription for Percocet as a result of a prior back injury, but she specifically denied abusing drugs and claimed that she was drug tested by her primary care physician. The mother denied numerous aspects of testimony proffered during petitioner's case-in-chief.

As the mother's actions were not those of a reasonably prudent parent and placed the children in imminent danger, there is a sound and substantial basis in the record to support the finding of neglect here (*see generally* Family Ct Act § 1012 [f] [i]). Petitioner's proof established that the mother was unduly paranoid, as demonstrated by her accusations—which she admitted lacked proof—that the older child stole her medication and hacked her cellphone, as well as her linked statements that he was not welcome to return home and requesting petitioner to take custody over him rather than utilize offered services. This behavior, in combination with her refusal to allow petitioner to speak with the younger child, despite her own concern that the younger child had been sexually abused, and her continued inability to recognize how these actions impacted the children, were not actions of a reasonably prudent parent (*see Matter of Caylin T. [Christine T.]*, 229 AD3d at 862). The root cause of the mother's behavior, be it mental health or drug related, is not borne out by the record. However, what the record does demonstrate is an impaired level of parental judgment which created a substantial risk of harm to the children, evidenced by, among other things, the older child's expression of an intent to self-harm, which resulted in him being taken to a psychiatric hospital (*see Matter of Asiah S. [Nancy S.]*, 212 AD3d 1062, 1063 [3d Dept 2023], *lv denied* 39 NY3d 913 [2023]; *Matter of Jacklynn BB. [Donna CC.]*, 155 AD3d 1363, 1364 [3d Dept 2017]; *see also Matter of Asiah S. [Nancy S.]*, 228 AD3d 1034, 1035 [3d Dept 2024], *lv denied* 42 NY3d 907 [2024]). Giving due deference to its factual findings and credibility determinations, Family Court properly determined that the mother failed to exercise a minimum degree of care which exposed the children to an imminent risk of harm (*see Matter of Kingston V. [Javon V.]*, 234 AD3d at 1060; *Matter of Alexisana PP. [Beverly PP.]*, 136 AD3d 1170, 1172 [3d Dept 2016]). Accordingly, the mother was properly found to have neglected the children.

The mother next takes issue with Family Court's determina-

tion that it was not in the children's best interests to return them to her care. "[A] dispositional order in a neglect proceeding must reflect a resolution consistent with the best interests of the child[ren] after consideration of all relevant facts and circumstances, . . . includ[ing] the parent's capacity to properly supervise the child[ren], based on current information and the potential threat of future neglect" (*Matter of Joseph GG. [Chrystal FF.]*, 227 AD3d 1238, 1241-1242 [3d Dept 2024] [internal quotation marks, brackets and citations omitted]; see *Matter of Ava OO. [Michael NN.]*, 235 AD3d 1135, 1137 [3d Dept 2025]). The testimony taken during the dispositional hearing reveals that the mother's behaviors had not improved following the neglect adjudication. In fact, the mother made concerning statements during visits with the children which caused them anxiety and stress. The mother also failed to undergo requested drug screens and mental health evaluations. Based upon this, the court's determination that the children's best interests were served by continued placement in petitioner's care, rather than return to the mother's custody, has a sound and substantial basis in the record (see *Matter of Jaylin XX. [Jamie YY.]*, 216 AD3d 1224, 1229 [3d Dept 2023]; *Matter of Asiah S. [Nancy S.]*, 212 AD3d at 1064).

Finally, the mother asserts that the children were deprived of their right to effective assistance of counsel by, among other things, the attorney for the children's (hereinafter AFC) failure to advocate for the children's wishes. However, the mother did not seek to remove the AFC before Family Court, nor did she allege that the AFC was improperly substituting judgment. As a result, this contention is unpreserved for our review (see *Matter of Olivia RR. [Paul RR.]*, 207 AD3d 822, 824 [3d Dept 2022]; see also *Matter of Marina C. v Dario D.*, 228 AD3d 1016, 1019 [3d Dept 2024], *lv denied* 42 NY3d 909 [2024]). Nevertheless, even if it were properly before us, we would find it to be without merit as we are satisfied that the children were afforded meaningful representation (see generally *Matter of Alyson J. [Laurie J.]*, 88 AD3d 1201, 1203 [3d Dept 2011], *lv denied* 18 NY3d 803 [2012]). The mother's remaining contentions, to the extent not directly addressed herein, have been reviewed and found to be lacking in merit.

Garry, P.J., Reynolds Fitzgerald, McShan and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

17 In the Matter of Natalie F., Appellant, v Nicholas G., Respondent. [252 NYS3d 819]—

Definite Parenting Time Schedule for Mother

McShan, J. Appeal from an order of the Family Court of Delaware County (Gary Rosa, J.), entered December 3, 2024, which partially granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody and visitation.

Petitioner (hereinafter the mother) and respondent (hereinafter the father) are the parents of the subject child (born in 2016). Pursuant to a 2021 order entered upon consent, the father had sole custody of the child with parenting time to the mother on alternate weekends and other delineated times. In January 2024, the mother commenced this Family Ct Act article 6 proceeding to modify the prior order to afford her additional and more definite parenting time, particularly on the child's birthday and holidays, citing a breakdown in communication, the father's move to a new home and the father's refusal to abide by the holiday parenting time provisions of the prior order. Following a three-day fact-finding hearing and a *Lincoln* hearing, Family Court granted the mother's petition to the extent of establishing a new parenting time schedule that provided her with an additional weekend, time during the child's summer break from school, definite times on Christmas, Thanksgiving, Mother's Day and Father's Day, and "such further, other, and different parenting time as the parties may agree." The order did not address any other holidays, school breaks or the child's birthday. Further, Family Court ordered that "neither [the] mother nor [the] father shall remove [the] child from New York State without written consent of the other parent." The mother appeals.

We turn first to the mother's primary argument on appeal, which she directs at the absence of parenting time provisions in Family Court's order for certain holidays. On that, the mother notes that her petition sought greater clarity on a number of holidays and, although Family Court obliged on certain holidays, the exclusion of other holidays and important milestones was in error.* Based on the tenor and substance of the parties' testimony and evidence of their prior communications submitted at the fact-finding hearing, we agree.

To begin, the parties do not dispute that there was a change

* During the proceedings before Family Court, the attorney for the child argued alongside the mother that the father had impeded the mother's ability to have meaningful parenting time with the child and, in that respect, argued that a more definitive parenting time schedule was warranted. On appeal, however, the attorney for the child contends that Family Court's order is supported by a sound and substantial basis.

in circumstances, thus distilling our inquiry to what custodial arrangement is in the best interests of the child (*see Matter of Amy K. v Jeffrey L.*, 241 AD3d 1632, 1632-1633 [3d Dept 2025], *lv denied* 44 NY3d 909 [2026]; *see Matter of Jason VV. v Brittany XX.*, 230 AD3d 1398, 1400 [3d Dept 2024]). “Factors generally considered in a best interests analysis include the quality of the home environment of each parent, the need for stability in the children’s lives, the past performance of the parents and their ability to provide for the children, the wishes of the children and the degree to which each parent is willing to foster a positive relationship between the children and the other parent” (*Matter of Mark JJ. v Stephanie JJ.*, 240 AD3d 1025, 1027 [3d Dept 2025] [internal quotation marks and citation omitted]; *see Matter of Robert C. v Katlyn D.*, 230 AD3d 1392, 1394 [3d Dept 2024]). “In addition, although not determinative, the expressed wishes of the children are some indication of what is in their best interests, considering their age, maturity and potential to be influenced” (*Matter of Sheena PP. v Edward QQ.*, 238 AD3d 1417, 1418 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]; *accord Matter of Ann T. v James U.*, 241 AD3d 1662, 1664 [3d Dept 2025]). “Family Court has broad discretion to develop a parenting time schedule in the best interests of the child, and [this Court] will not disturb such determination unless it lacks a sound and substantial basis in the record” (*Matter of Carin R. v Seth R.*, 196 AD3d 776, 777 [3d Dept 2021] [internal quotation marks and citations omitted]; *see Matter of Tina X. v Thomas Y.*, 233 AD3d 1272, 1275 [3d Dept 2024]).

Family Court granted the mother some of the relief she requested by expanding her parenting time in comparison to the prior order. However, in modifying the relevant provisions of the prior order, Family Court omitted various holidays and time periods that were previously addressed. To that end, the unfortunate reality borne out by the record is that the parties would routinely engage in disputes over parenting time on holidays and demonstrated an inability to agree on the simplest changes to their parenting time schedule. As credited by Family Court, the father would routinely attempt to exercise “unilateral[]” control over the mother’s parenting time and the mother would belatedly cancel visits, creating an untenable situation with respect to the other specific parenting time periods. In turn, by omitting the previously identified periods of parenting time delineated in the prior order, Family Court’s order, in effect, invites more of the same disagreements at the expense of the child.

We note our agreement with Family Court’s advisement that

the parties would do better to find common ground for the child's sake and that neither parent is without fault with respect to their failures in amicably communicating with each other with respect to the child. Nevertheless, under the circumstances presented, any order dealing with parenting time must unfortunately be all-encompassing and specific so as to avoid further acrimony between the parties and provide the child with meaningful time with both parents on the important dates as acknowledged by the parties themselves (*see Matter of Henry CC. v Antoinette DD.*, 222 AD3d 1231, 1235 [3d Dept 2023]). Accordingly, rather than modifying the order that is now more than one year old, we find it prudent to remit the matter back to Family Court to craft a definitive parenting time schedule that encompasses the holidays and time periods that the parties identified as meaningful and in dispute in order to ensure that they are divided in accordance with the child's best interests (*see Matter of Michelle EE. v John EE.*, 235 AD3d 1121, 1124 [3d Dept 2025]; *Matter of Cornielle v Rosado*, 231 AD3d 824, 828 [2d Dept 2024]; *Matter of Henry CC. v Antoinette DD.*, 222 AD3d at 1235; *Matter of Sabrina B. v Jeffrey B.*, 179 AD3d 1339, 1343 [3d Dept 2020]; *Matter of Alvarado v Cordova*, 158 AD3d 794, 795 [2d Dept 2018]; *see also Matter of Michael M. v Makiko M.*, 238 AD3d 1304, 1307 [3d Dept 2025]).

In addition, the parties' inability to agree on parenting time provisions supports our disagreement with Family Court's inclusion of a provision in its order that requires each party to obtain the other's consent before traveling out of state with the child. This aspect of the mother's request was born of her stated desire to travel to Florida with the child to visit with her maternal relatives. There is no indication that the mother presented a threat of absconding with the child and, based upon the acrimony between the parties, imposing a condition requiring consent to travel is unfeasible and, as relevant to this appeal, would likely impede the child's ability to maintain a relationship with her maternal relatives (*see Matter of Alvarado v Cordova*, 158 AD3d at 795; *Matter of Aly T. v Francisco B.*, 146 AD3d 425, 426 [1st Dept 2017]; *see also Matter of Kimberly J. v Benjamin G.*, 227 AD3d 471, 472 [1st Dept 2024]). However, we reject the mother's contention that Family Court should have granted her two weeks of uninterrupted parenting time to effectuate such travel. Family Court's order meaningfully expanded the mother's parenting time, and we discern no justification for the mother's contention that the time allotted was insufficient to accommodate her intended travel (*see Matter of Dusten T. v Trisha U.*, 235 AD3d 1215, 1217-1218 [3d

Dept 2025]; *Matter of Michelle EE. v John EE.*, 235 AD3d at 1124; *Matter of Jesse HH. v Lindsey II.*, 233 AD3d 1410, 1413 [3d Dept 2024], *lv denied* 43 NY3d 906 [2025]).

Reynolds Fitzgerald, J.P., Ceresia, Fisher and Mackey, JJ., concur. Ordered that the order is modified, on the law and the facts, without costs, by reversing so much thereof as ordered that neither petitioner nor respondent be permitted to remove the child from New York State without the written consent of the other parent; matter remitted to the Family Court of Delaware County for a determination as to petitioner's parenting time in accordance with this Court's decision; and, as so modified, affirmed.

18 In the Matter of Stacy H., Appellant, v Jessica T. et al., Respondents, and William V., Respondent. [252 NYS3d 816]—

Parent, Child and Family—Custody—Standing of Nonparent—Grandparent Failed to Prove Extraordinary Circumstances

Reynolds Fitzgerald, J. Appeal from an order of the Family Court of Delaware County (Gary Rosa, J.), entered February 13, 2025, which dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, for custody of the subject child.

Respondent Jessica T. (hereinafter the mother) and respondent Emmanuel T. (hereinafter the father) are the parents of a daughter (hereinafter the daughter, born in 2016). The mother and respondent William V. (hereinafter the former boyfriend) began a relationship in approximately 2018, have a son in common and resided together as a family unit with both children until approximately 2023. In July 2024, the Department of Social Services, Child Protective Services (hereinafter CPS) placed the daughter in the former boyfriend's physical custody. Thereafter, the former boyfriend filed a custody petition seeking custody of the daughter. Also in July 2024, petitioner (hereinafter the grandmother) sought custody of the daughter. In December 2024, Family Court entered an order on consent under the former boyfriend's proceeding granting joint legal custody of the daughter to the mother and the former boyfriend, residential custody to the former boyfriend and awarding the mother parenting time as the parties agreed. Shortly thereafter, Family Court added the former boyfriend as a respondent to the grandmother's custody petition. Following a fact-finding hearing,¹ the court dismissed the grandmother's custody petition finding that the grandmother failed to prove extraordinary

1. The mother and the father both defaulted by failing to appear at the hearing and have not appeared on this appeal.

circumstances sufficient to establish standing, thus a best interests of the child analysis was not required. The grandmother appeals, and we affirm.

Where a parent makes a voluntary custodial arrangement for his or her child, a court may not permit a nonparent to interfere with that arrangement, absent the nonparent demonstrating extraordinary circumstances (*see Matter of Leslie LL. v Robert NN.*, 208 AD3d 1479, 1481 [3d Dept 2022]; *Matter of Lawrence v Lawrence*, 275 AD2d 985, 985 [4th Dept 2000]). “An extraordinary circumstances inquiry involves consideration of the cumulative effect of all issues present in a given case and requires the nonparent to establish that there has been surrender, abandonment, persistent neglect, unfitness, an extended disruption of custody or other like circumstances” (*Matter of Leslie LL. v Robert NN.*, 208 AD3d at 1481 [internal quotation marks and citations omitted]; *see Matter of Lisa F. v Thomas E.*, 211 AD3d 1367, 1368 [3d Dept 2022]). “A nonparent bears the heavy burden of establishing that there are extraordinary circumstances and, thus, that he or she has standing to seek custody of another person’s child” (*Matter of Donna SS. v Amy TT.*, 149 AD3d 1211, 1212 [3d Dept 2017] [citations omitted]; *see Matter of Tamika B. v Pamela C.*, 187 AD3d 1332, 1335 [3d Dept 2020]). “A finding of extraordinary circumstances is rare, and the circumstances must be such that they drastically affect the welfare of the child” (*Matter of Thompson v Bray*, 148 AD3d 1364, 1365 [3d Dept 2017] [internal quotation marks and citations omitted]). “If, and only if, the nonparent establishes extraordinary circumstances may a court then consider what custodial arrangement serves the best interests of the child” (*Matter of Hawkins v O’Dell*, 166 AD3d 1438, 1440 [3d Dept 2018] [internal quotation marks, brackets and citations omitted]; *see Matter of Jared MM. v Mark KK.*, 205 AD3d 1084, 1087 [3d Dept 2022]). “Family Court’s determination will not be disturbed if it is supported by a sound and substantial basis in the record” (*Matter of Amber B. v Scott C.*, 207 AD3d 847, 848 [3d Dept 2022] [citations omitted]).

The grandmother testified at the hearing that she had custody of the daughter for approximately one and a half years when the child was very young and has remained very involved in her life and has a room in her apartment for the daughter. “We note that extraordinary circumstances may not be established merely by showing that the child has bonded psychologically with the nonparent” (*Matter of Pettaway v Savage*, 87 AD3d 796, 797 [3d Dept 2011] [internal quotation marks

and citation omitted], *lv denied* 18 NY3d 801 [2011]; *see Matter of Amber B. v Scott C.*, 207 AD3d at 849). She further stated that she has many concerns regarding the mother and the former boyfriend; however, she could not articulate with specificity any of these concerns, except that she believes the former boyfriend is an alcoholic. On cross-examination, the grandmother relayed that she does not have a good relationship with the mother; however, she did not contact the police, CPS or seek custody of the child during the time that the mother and the former boyfriend lived together with the daughter. The grandmother confirmed that she recently has repeatedly contacted CPS concerning the former boyfriend but does not know the results of these calls.

The former boyfriend testified that he lived with the daughter and the mother for approximately five and a half years and he became a father figure to the daughter. After he and the mother separated, he remained in contact with the daughter and frequently took her on visitations. The former boyfriend stated that he voluntarily sought treatment for alcoholism in 2016 and denied being an alcoholic, although he admitted he had a conviction in 2019 for driving under the influence. He relayed that he received physical custody of the daughter when CPS gave him protective custody on July 5, 2024. He stated that he has a two-bedroom apartment, in which the daughter has a separate bedroom, that was inspected and approved by CPS. Additionally, he stated that he does not have any indicated CPS reports. Deferring to Family Court's factual findings and credibility determinations, we find that there is a sound and substantial basis in the record to conclude that the grandmother failed to meet her heavy burden of demonstrating extraordinary circumstances (*see Matter of Leslie LL. v Robert NN.*, 208 AD3d at 1482; *Matter of Amber B. v Scott C.*, 207 AD3d at 849).²

Garry, P.J., McShan, Powers and Mackey, JJ., concur. Ordered that the order is affirmed, without costs.

(February 26, 2026)

1 The People of the State of New York, Respondent, v Stephen Lerario, Appellant. [250 NYS3d 305]—

Crimes—Murder—Attempt—Weight of Evidence—Victim Shot in Face during

2. Although certainly not dispositive, it is important to recognize that the attorneys for the daughter have not supported the grandmother's position.

Domestic Incident**Crimes—Confession—Suppression of Statements Made at Emergency Wing of Hospital Prior to Administration of *Miranda* Warnings****Crimes—Right to Counsel—Effective Representation—Failure to Call Expert Witness—Intoxication Defense—Domestic Violence Incident**

Pritzker, J. Appeals (1) from a judgment of the Supreme Court (Frank Milano, J.), rendered May 3, 2019, in Saratoga County, upon a verdict convicting defendant of the crimes of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the third degree and criminal possession of weapon in the fourth degree, and (2) by permission, from an order of the County Court of Saratoga County (Chad Brown, J.), entered August 28, 2023, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, without a hearing.

Defendant was convicted, after a jury trial, of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth degree stemming from an April 2018 domestic incident during which defendant shot the victim in the face with a shotgun.¹ Defendant was thereafter sentenced by Supreme Court (Milano, J.), as a second felony offender, to prison terms of 25 years, to be followed by five years of postrelease supervision, for the attempted murder and first-degree assault convictions, a prison term of 3½ to 7 years for the criminal possession of a weapon in the third degree conviction and one year of incarceration for the criminal possession of a weapon in the fourth degree conviction, all to run concurrently. Defendant later moved to vacate his conviction pursuant to CPL 440.10, arguing that he was denied his constitutional right to the effective assistance of counsel. County Court (Brown, J.) denied his motion without a hearing. Defendant now appeals from the judgment of conviction and, by permission, the denial of his CPL 440.10 motion.

Defendant contends that the verdict is not supported by legally sufficient evidence and is against the weight of the evidence. However, “[d]efendant’s general motion to dismiss at trial was not specifically directed at any of the errors now raised upon appeal; thus, his legal sufficiency claims are unpreserved for appellate review” (*People v Baber*, 182 AD3d 794, 795 [3d Dept 2020] [internal quotation marks, footnote and citations omitted], *lv denied* 35 NY3d 1064 [2020]). “Nev-

1. Defendant was also indicted for three counts of criminal contempt in the second degree. One of these counts was dismissed as a result of defendant’s trial order of dismissal; defendant was acquitted of the remaining two counts at trial.

ertheless, in the course of reviewing defendant's weight of the evidence challenge, this Court necessarily evaluates whether all elements of the charged crimes were proven beyond a reasonable doubt" (*People v Ashe*, 208 AD3d 1500, 1501 [3d Dept 2022] [citations omitted], *lv denied* 39 NY3d 961 [2022]). "In a weight of the evidence analysis, [this Court must] first determine whether, based upon all of the credible evidence, a different finding would have been unreasonable and, if not, we then weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence" (*People v Alger*, 206 AD3d 1049, 1050-1051 [3d Dept 2022] [internal quotation marks and citations omitted], *lv denied* 38 NY3d 1148 [2022]). When undertaking this analysis, "[we] must view the evidence in a neutral light and defer to the jury's credibility determinations" (*People v Ashe*, 208 AD3d at 1501).

As relevant here, "[a] person is guilty of attempted murder in the second degree when he or she acts with intent to cause the death of another person" (*People v Pica-Torres*, 230 AD3d 855, 856 [3d Dept 2024], *lv denied* 42 NY3d 1054 [2024], citing Penal Law §§ 110.00, 125.25 [1]). "A person is guilty of assault in the first degree when . . . [w]ith intent to cause serious physical injury to another person, he [or she] causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument" (Penal Law § 120.10 [1]). "A person is guilty of criminal possession of a weapon in the third degree when . . . [s]uch person [possesses a dangerous or deadly weapon with the intent to use the same unlawfully against another] . . . and has been previously convicted of any crime" (Penal Law § 265.02 [1]). Finally, "[a] person is guilty of criminal possession of a weapon in the fourth degree when . . . [h]e [or she] possesses a . . . shotgun . . . and has been convicted of a felony or serious offense" (Penal Law § 265.01 [4]).²

The evidence at trial demonstrated that, on the night of the incident, defendant and the victim were the only two people at the victim's residence. After a verbal dispute ensued, defendant went into the bedroom and came back holding the victim's 12 gauge shotgun, which she had stored under the dresser in their bedroom. The victim testified that while she was crouched in between the counter and stove in the kitchen crying, defend-

2. Notably, defendant admitted to allegations set forth in a predicate statement which established his prior convictions, satisfying the final element of the latter two charges without the need to introduce evidence of his prior convictions at trial.

ant screamed at her and pointed the shotgun downward at the victim, right between her eyes. The victim grabbed the barrel of the shotgun and defendant backed away. The victim explained that everything then calmed down, the gun disappeared and the victim smoked a cigarette, but then the two began fighting again. The victim explained that she hit defendant, knocking off his glasses. The next thing she knew, the victim thought that defendant had punched her in the face. The victim felt “warmness” all over her face and knew that she was bleeding heavily. She covered her face with a towel, felt nauseous, and recalled vomiting repeatedly into a trash can. Neighbors testified that, at the time of the incident, several “bangs” were heard coming from the victim’s residence. Additionally, law enforcement recovered the shotgun from the victim’s residence, as well as shotgun casings, and testing revealed that defendant’s fingerprints were on both items. Defendant then drove the victim to the hospital, where she underwent surgery. Ultimately, the victim lost her right eye.

Defendant’s arguments on appeal focus on whether or not the People established that he had the requisite intent. To that end, a different verdict as to the attempted murder in the second degree and assault in the first degree convictions would not have been unreasonable had the jury found that defendant lacked the requisite intent given that the only eyewitness to the shooting was the victim, who admitted to having memory issues, the testimony of several police officers who indicated that defendant said the shooting was an accident and the evidence from multiple witnesses that defendant had been drinking on the night of the shooting. However, there was testimony from multiple neighbors who heard arguing and saw defendant acting erratically outside of the home around the time the shooting occurred. The victim also testified that she and defendant were arguing when defendant procured the shotgun and proceeded to point it, from close range, right between her eyes. There were no other individuals in the home that night and the victim was shot in the head. The jury had the opportunity to consider each witness’ testimony, found the victim to be credible despite her acknowledged memory issues and did not credit defendant’s defense of intoxication. Additionally, Supreme Court, upon the People’s request, provided the jury with an expanded charge on intent and, at defendant’s request, provided the jury with an intoxication charge. As such, the jury had the appropriate basis to understand their responsibility in determining whether defendant had the intent to commit the crimes charged and, viewing the evidence in a neutral light and deferring to their credibility determinations, the verdict is

supported by the weight of the evidence (*see People v Hall*, 243 AD3d 1070, 1072 [3d Dept 2025]; *People v Scott*, 47 AD3d 1016, 1018-1019 [3d Dept 2008], *lv denied* 10 NY3d 870 [2008]).

We have reviewed defendant's contention, in his pro se brief, that statements he made at the emergency wing of the hospital prior to the administration of *Miranda* warnings should have been suppressed. We agree. A review of the video of the encounter demonstrates that defendant, who was standing or sitting with a wall behind him, was surrounded by three to four uniformed police officers. Although officers at the *Huntley* hearing testified that defendant's movements were not restricted, he was prevented from leaving the hospital to retrieve his cell phone and was told on multiple occasions to sit down if he stood up. Additionally, while the questions asked by the police officers may have started in a more investigatory fashion, as the encounter continued the questions became more accusatory in tone, including one officer asking defendant repeatedly if he shot the victim. "With the benefit of viewing the interaction between the police and defendant, and considering all the circumstances involved, we cannot say that a reasonable person would have felt free to leave" (*People v Abdullah*, 206 AD3d 1340, 1346 [3d Dept 2022], *lv denied* 39 NY3d 939 [2022]; *see People v Burry*, 52 AD3d 856, 859 [3d Dept 2008], *lv dismissed* 10 NY3d 956 [2008]). However, given the overwhelming proof of defendant's guilt and the fact that defendant did not make any explicitly incriminating statements during the video, "there is no reasonable possibility that the error might have contributed to defendant's conviction," thus this error is harmless beyond a reasonable doubt (*People v Slivienski*, 204 AD3d 1228, 1236 [3d Dept 2022], *lv denied* 38 NY3d 1136 [2022]; *see People v Robinson*, — NY3d —, —, 2025 NY Slip Op 05871, *4 [2025]; *People v Dorvil*, 234 AD3d 1106, 1113-1114 [3d Dept 2025], *lv denied* 44 NY3d 982 [2025]). Additionally, as to defendant's remaining arguments on direct appeal, his contentions regarding jury selection are unpreserved as he failed to object to any of the asserted errors (*see generally People v Lancaster*, 143 AD3d 1046, 1054 [3d Dept 2016], *lv denied* 28 NY3d 1147 [2017]; *People v Mosher*, 94 AD3d 1231, 1233 [3d Dept 2012], *lv denied* 19 NY3d 999 [2012]).

Finally, we turn to defendant's claim, raised in both his CPL article 440 motion and on direct appeal, that he was deprived of the effective assistance of counsel.³ Defendant focuses his argument on counsel's asserted failure to present expert wit-

3. In his pro se supplemental brief, defendant also argues that his counsel on the CPL 440.10 motion was ineffective "for failing to establish a factual

(n. cont'd)

ness testimony at trial to explain issues of intoxication and ballistics evidence. Pursuant to CPL 440.10, “[a]t any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that . . . [t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States” (CPL 440.10 [1] [h]). “To demonstrate the existence of questions of fact requiring a hearing, a defendant is obliged to show that the nonrecord facts sought to be established are material and would entitle him or her to relief, and a court may deny a vacatur motion without a hearing if it is based on the defendant’s self-serving claims that are contradicted by the record or unsupported by any other evidence” (*People v James*, 215 AD3d 1176, 1178 [3d Dept 2023] [internal quotation marks and citations omitted], *lv denied* 40 NY3d 935 [2023]). A court’s denial of a defendant’s motion to vacate a judgment of conviction without a hearing will be upheld absent an abuse of discretion (*see People v Wright*, 27 NY3d 516, 520 [2016]; *People v Bellamy*, 187 AD3d 1421, 1422 [3d Dept 2020], *lv denied* 36 NY3d 1049 [2021]). As relevant here, “the constitutional requirement of effective assistance of counsel is satisfied ‘so long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation’ ” (*People v Ramey*, 123 AD3d 1290, 1290 [3d Dept 2014] [brackets omitted], *lv denied* 25 NY3d 953 [2015], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]). “To prevail on an ineffective assistance claim, a defendant bears the burden of demonstrating that trial counsel deprived him or her of a fair trial by providing less than meaningful representation. A defendant cannot meet this burden unless he or she proves that no strategic or other legit-

predicate within [the] moving papers sufficient to trigger plenary review of the issues raised” therein. Although this Court recently held that a defendant is entitled to effective representation within the context of a CPL 440.10 motion (*see People v Nelson*, 243 AD3d 958, 962 [3d Dept 2025]), defendant’s argument in this respect is unavailing. Defendant’s CPL 440.10 counsel presented a rational argument, even attempting to contact defendant’s trial counsel to inquire about his initial efforts, or lack thereof, to consult expert witnesses. Defendant further claims that his CPL 440.10 counsel was ineffective for failing to consult an expert to provide an affidavit discussing what expert testimony in support of his intoxication defense could have entailed. As discussed in more detail herein, this does not, alone, constitute ineffective assistance of counsel and, upon viewing the totality of the representation, defendant’s CPL 440.10 counsel was not ineffective (*see People v King*, 124 AD3d 1064, 1067 [3d Dept 2015], *lv denied* 25 NY3d 1073 [2015]; *People v Muller*, 57 AD3d 1113, 1114 [3d Dept 2008], *lv denied* 12 NY3d 761 [2009]).

imate explanations existed to justify counsel's perceived inadequacies" (*People v Starnes*, 206 AD3d 1133, 1142-1143 [3d Dept 2022] [internal quotation marks, brackets and citations omitted], *lv denied* 38 NY3d 1153 [2022]).

A careful review of the record establishes that defendant received meaningful representation. "It is well settled that the failure to call a particular witness does not necessarily amount to ineffective assistance of counsel" and that "[t]his is particularly true where, as here, expert testimony was not required to prove the intoxication defense" (*People v Muller*, 57 AD3d 1113, 1114 [3d Dept 2008] [citations omitted], *lv denied* 12 NY3d 761 [2009]; see *People v King*, 124 AD3d 1064, 1067 [3d Dept 2015], *lv denied* 25 NY3d 1073 [2015]). As to defendant's intoxication defense, there was no evidence submitted to establish that defendant was in fact intoxicated and, therefore, an expert witness discussing the effects of intoxication would not have advanced the defense.⁴ Although defendant's counsel elicited testimony from witnesses who smelled alcohol on defendant's breath, no one testified that they observed defendant consume any substances. As such, there was nothing presented to the jury to suggest that defendant consumed enough alcohol or other substances to render him intoxicated. Defendant, seemingly the only individual who knew what substances he consumed and how they may have affected him, elected not to testify in his own defense—a tactical decision. What is more, "defendant now offers little more than speculative assertions that an expert's testimony would have supported" his intoxication defense (*People v Muller*, 57 AD3d at 1114; compare *People v Cassala*, 130 AD3d 1252, 1255 [3d Dept 2015], *lv denied* 27 NY3d 994 [2016]). Indeed, he failed to illustrate to what exactly an expert witness would have testified. In that regard, "[d]epending on . . . the jury's familiarity with [alcohol], eliciting further details about [it] could have [actually] belied the claim of intoxication and, at the least, would have given the People the opportunity to present expert testimony to the contrary" (*People v Muller*, 57 AD3d at 1114-1115; see *People v Martin*, 207 AD3d 403, 403 [1st Dept 2022], *lv denied* 38 NY3d 1189 [2022]). All things considered, "counsel's decision[s] reflected an objectively reasonable and legitimate trial strategy under the circumstances" (*People v Njoku*, 218 AD3d 1047,

4. Similarly, to the extent that defendant argues that a ballistics expert should have been called to explain the discrepancy in the victim's testimony—that defendant pointed the gun at her at a 45-degree angle—and the testimony of the state trooper—that the gun was held at a 96-degree angle when fired—he makes no effort to explain how this would have aided in his defense.

1052-1053 [3d Dept 2023] [internal quotation marks and citations omitted], *lv denied* 40 NY3d 1093 [2024]; *see People v Cole*, 217 AD3d 1185, 1186-1187 [3d Dept 2023]). Accordingly, defendant received meaningful representation and, given his failure to raise any nonrecord support entitling him to a hearing on his CPL 440.10 motion, County Court did not abuse its discretion in denying said motion without a hearing (*see People v Cole*, 217 AD3d at 1185-1188; *People v White-Span*, 182 AD3d 909, 916 [3d Dept 2020], *lv denied* 35 NY3d 1071 [2020]). To the extent not expressly addressed, defendant's remaining arguments have been considered and found to be without merit.

Clark, J.P., Aarons, Reynolds Fitzgerald and Fisher, JJ., concur. Ordered that the judgment and the order are affirmed.

2 The People of the State of New York, Respondent, v Adam M. Mowry, Appellant. [250 NYS3d 722]—

Motor Vehicles—Operating Vehicle while Under Influence of Alcohol or Drugs—Operation of All-Terrain Vehicle on Public Highway in Intoxicated Condition—Sufficiency and Weight of Evidence

Crimes—Vacatur of Judgment of Conviction—Meaningful Representation—Coherent Defense Theory Based on Existent Facts and Appropriate Motion Practice—Defendant Advised of Risks of Testifying in Case Involving Substantial Proof of Both Intoxication and Operation of All-Terrain Vehicle on Public Highway

Garry, P.J. Appeals (1) from a judgment of the County Court of Schuyler County (Matthew Hayden, J.), rendered October 21, 2021, upon a verdict convicting defendant of the crime of driving while intoxicated, and (2) by permission, from an order of said court, entered December 3, 2024, which denied defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction, after a hearing.

In 2020, defendant was charged by indictment with one count of driving while intoxicated as a felony for operating an all-terrain vehicle (hereinafter ATV) on a public highway in an intoxicated condition. Following a jury trial, he was convicted as charged, and he was later sentenced to a prison term of 1 to 3 years, with a recommendation that he be allowed to participate in a shock incarceration program. Defendant's subsequent CPL article 440 motion to vacate the judgment of conviction upon the ground of ineffective assistance of counsel was denied. Defendant appeals from the judgment of conviction and, with this Court's permission, from the denial of his motion.

To begin, the verdict is supported by legally sufficient evidence and is not against the weight of the evidence. As charged here, a person is guilty of driving while intoxicated when he or she "operate[s] a motor vehicle while in an intoxicated condi-

tion” (Vehicle and Traffic Law § 1192 [3]; *see* § 1193 [1] [c] [i]).¹ A driver is intoxicated when he or she “has voluntarily consumed alcohol to the extent that he [or she] is incapable of employing the physical and mental abilities [that] he [or she] is expected to possess in order to operate a vehicle as a reasonable and prudent driver” (*People v Cruz*, 48 NY2d 419, 428 [1979], *appeal dismissed* 446 US 901 [1980]; *accord People v Erfurt*, 234 AD3d 1120, 1121 [3d Dept 2025], *lv denied* 43 NY3d 1008 [2025]; *People v Farnsworth*, 134 AD3d 1302, 1304 [3d Dept 2015], *lv denied* 27 NY3d 1068 [2016]).

The People’s proof demonstrated that, in the late hours of one Friday in February 2020, two unknown snowmobilers found defendant lying in the middle of a public highway, without a helmet, with an ATV and affixed plow approximately 200 feet away on the downhill slope. Three young men in a truck came upon the scene to witness the snowmobilers assisting defendant back onto his ATV. Those witnesses testified and described defendant as moving slowly, swaying, having slow slurred speech, stumbling and falling, and they noticed a heavy odor of alcohol coming from him, even without exiting their truck. The snowmobilers left, and the three men in the truck observed defendant start the ATV and rapidly speed away from the scene, swerving from side to side over several roads. They followed him, concerned for his safety and the safety of others, until he stopped in the middle of the highway about a quarter of a mile away. The men stayed nearby, turning on their flashers to warn others of the dangerous traffic condition created by defendant, and another passerby offered to call 911.

Law enforcement arrived approximately 45 minutes later. The responding sergeant, with 10 years of experience and training in recognizing the signs of intoxication, testified that he observed defendant sitting on the ATV, seemingly asleep, and immediately perceived a strong odor of alcohol emanating from him. Upon waking him, the sergeant observed that defendant had glossy eyes, swayed while seated, was generally sluggish and slow to respond and was unable to report where he was. However, once advised that he was the subject of an intoxicated driving investigation, defendant attempted to start the ATV to flee the scene. It was later determined that the ATV had sufficient fuel and was operable. Defendant belligerently refused

1. Defendant stipulated to the fact that he had been convicted of the requisite prior offense (*see* Vehicle and Traffic Law § 1193 [1] [c] [i]), and there is no dispute that the subject ATV was a motor vehicle (*see* Vehicle and Traffic Law § 2404 [5]) or that the subject roadway was a public highway (*see* Vehicle and Traffic Law § 1192 [7]).

to submit to field sobriety tests and, after sufficient warnings, chemical tests. He was generally combative with law enforcement during and after his arrest, although that behavior began to improve as the evening wore on. The jury was able to observe some of such behavior firsthand, as well as defendant's demeanor generally, via body camera footage of him at the station. Once at the station, defendant explained to law enforcement that he had been plowing on the ATV all day, that he had "cabin fever," likes to "let loose" on Fridays and that he had consumed alcohol at a local bar and restaurant that evening. Following his release, defendant messaged two friends affiliated with law enforcement, inquiring as to one, "[h]ow much trouble am I in" if "[I] wasn't driving it when the sheriff[] got there," and reporting to the other, "I know I f . . . ed up."

For his part, defendant proffered the testimony of one witness, the neighbor who lent him the ATV. The neighbor testified that he saw defendant at the aforementioned bar and restaurant at some point "middle evening" and, after a brief conversation, suggested that defendant should take the ATV back to the house because it was cold, dark and snowy. That neighbor had "no idea" if defendant had been drinking at that establishment or otherwise. At some point not long after defendant's departure, some younger gentlemen arrived at the restaurant on snowmobiles.

Initially, defendant's legal sufficiency argument is preserved only to the extent that he challenges the element of intoxication, not operation (*see People v Gray*, 86 NY2d 10, 20 [1995]; *People v Farnsworth*, 134 AD3d at 1303). Viewing the facts in a light most favorable to the People, the testimony of both law enforcement and disinterested witnesses regarding defendant's appearance, odor and actions, coupled with his refusal to submit to a chemical test, provided a valid line of reasoning and permissible inferences from which a rational jury could conclude that defendant was intoxicated beyond a reasonable doubt (*see Vehicle and Traffic Law* § 1194 [2] [f]; *People v Beyer*, 21 AD3d 592, 594-595 [3d Dept 2005], *lv denied* 6 NY3d 752 [2005]; *see generally People v Danielson*, 9 NY3d 342, 349 [2007]). As for defendant's weight of the evidence challenge, given the evidence that could suggest defendant was in an ATV accident and inferentially suffering from some injury that caused his aberrant behavior, another verdict would not have been unreasonable (*see People v McRobbie*, 97 AD3d 970, 971-972 [3d Dept 2012], *lv denied* 20 NY3d 934 [2012]; *People v Johnson*, 70 AD3d 1188, 1189-1190 [3d Dept 2010]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). However,

when we weigh the relative strength of conflicting inferences that may be drawn from the evidence, we readily find that defendant's conviction is supported by the weight of the credible evidence (*see* Vehicle and Traffic Law § 1194 [2] [f]; *People v McRobbie*, 97 AD3d at 971-972; *People v Johnson*, 70 AD3d at 1189-1190; *People v Bowers*, 201 AD2d 830, 830 [3d Dept 1994], *lv denied* 83 NY2d 909 [1994]; *see also* *People v Erfurt*, 234 AD3d at 1121-1123; *People v Olson*, 126 AD3d 1139, 1140-1141 [3d Dept 2015], *lv denied* 25 NY3d 1169 [2015]; *see generally* *People v Romero*, 7 NY3d 633, 643-644 [2006]).

Neither of defendant's evidentiary challenges are properly before us. As noted, defendant reached out to friends affiliated with law enforcement following the incident and made a number of statements to them concerning the subject incident. Although defendant moved, pretrial, to preclude those exchanges on the ground that the messages were belatedly disclosed in general, as well as ambiguous and highly prejudicial, he lodged a CPL 710.30 notice argument regarding same for the first time in the midst of trial. Instead of holding a midtrial hearing on the applicability of the notice requirement (*see generally* CPL 710.30 [1] [a]), County Court fashioned a compromise whereby only those limited messages that defendant agreed were not subject to CPL 710.30 were admitted. By his consent to this process, defendant waived his present preclusion argument (*see* *People v Moore*, 232 AD3d 1299, 1300 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]; *see generally* *People v Ahmed*, 66 NY2d 307, 311 [1985]). Any foundation argument as to these messages is unpreserved (*see* CPL 470.05 [2]; *People v Sutton*, 174 AD3d 1052, 1054 [3d Dept 2019], *lv denied* 34 NY3d 954 [2019]; *People v Saylor*, 173 AD3d 1489, 1491 n 2 [3d Dept 2019]).

Turning to the collateral proceeding, we first find that County Court acted well within its discretion in limiting the scope of the CPL article 440 hearing to genuine, material disputes of nonrecord fact and in summarily denying those aspects of defendant's motion that were contradicted by the record, unsupported by any evidence or sworn allegations, or that could not otherwise form the basis for postconviction relief (*see* CPL 440.30 [4]; *People v Jones*, 24 NY3d 623, 635 [2014]; *People v Dorvil*, 234 AD3d 1106, 1118 [3d Dept 2025], *lv denied* 44 NY3d 982 [2025]). As the court explained, several of the allegations underlying defendant's ineffective-assistance claim were wholly speculative, including the assertion that trial counsel was ineffective for failing to investigate the identity of the snowmobilers or the relevance of defendant's purported mental illness,

where defendant failed to make any showing that such investigation was feasible or that it would have yielded relevant, admissible and favorable evidence (*compare People v Oliveras*, 21 NY3d 339, 348 [2013]; *People v Lanier*, 191 AD3d 1094, 1096 [3d Dept 2021]).² In the absence of any proof of an actual head injury, there was no basis upon which to put forth expert testimony regarding same, nor was there any proffer as to what that testimony would be (*see People v Dorvil*, 234 AD3d at 1118; *People v Hamms*, 55 AD3d 1142, 1145 [3d Dept 2008], *lv denied* 11 NY3d 925 [2009]). Other claims are directly contradicted by the record, which demonstrates that counsel engaged in appropriate motion practice and was adequately prepared. Counsel was under no obligation to proceed with a *Huntley* hearing (*see People v Sposito*, 193 AD3d 1236, 1238 [3d Dept 2021], *affd* 37 NY3d 1149 [2022]), and defendant has failed to identify any specific admitted statements that were subject to suppression or otherwise set forth a colorable claim of coercion (*see People v Reichel*, 211 AD3d 1090, 1091-1092 [3d Dept 2022], *lv denied* 39 NY3d 1113 [2023]; *People v Machia*, 206 AD3d 1272, 1278 [3d Dept 2022], *lv denied* 38 NY3d 1151 [2022]). Defendant has likewise proffered no factual predicate of unlawful police conduct that would have warranted *Mapp*, *Dunaway* or *Ingle* hearings (*see People v Watts*, 215 AD3d 1170, 1175 [3d Dept 2023]; *People v Phelan*, 82 AD3d 1279, 1282 [3d Dept 2011], *lv denied* 17 NY3d 799 [2011]). Defendant has also failed to show the absence of explanation for counsel's failure to object to certain alleged hearsay and bolstering testimony, as such objections would have had little to no chance of success and trial counsel may well have concluded that an objection would have only drawn unwanted attention to that evidence (*see People v Reinfurt*, 241 AD3d 1015, 1025 [3d Dept 2025], *lv denied* 44 NY3d 1067 [2026]; *People v Henley*, 232 AD3d 1117, 1122 [3d Dept 2024], *lv denied* 43 NY3d 930 [2025]). The same may be said for the prosecutor's challenged summation remarks, which were also fair comment on the evidence or responsive to defendant's closing (*see People v Rudge*, 185 AD3d 1214, 1217 [3d Dept 2020], *lv denied* 35 NY3d 1070 [2020]; *People v Horton*, 181 AD3d 986, 996 [3d Dept 2020], *lv denied* 35 NY3d 1045 [2020]).

As for the claims that were the subject of the CPL article 440 hearing (*see* CPL 440.30 [5], [6]), the hearing evidence established that trial counsel met with defendant on multiple

2. We note that defendant's allegations of failure to investigate are directed exclusively at trial counsel, who was substituted in over a year following the subject incident.

occasions, discussed potential defenses, advised defendant of the risks of testifying in a case involving substantial proof of both intoxication and operation and reasonably pursued a trial strategy designed to create doubt as to the cause of defendant's behavior rather than advancing a patently untenable denial of operation, as defendant desired. County Court correctly concluded that trial counsel's strategic choice fell well within the bounds of meaningful representation and was not subject to second-guessing under settled law (see *People v Satterfield*, 66 NY2d 796, 799-800 [1985]; *People v Rickett*, 244 AD3d 1284, 1289 [3d Dept 2025]). We also cannot find that defendant was deprived of his right to testify by that strategy, where the credited evidence showed that counsel advised defendant that the decision was ultimately his, defendant voiced no objection with respect to that decision at trial when provided the express opportunity to do so, and the proposed testimony—when measured against the People's proof and defendant's own hearing testimony—would have been highly damaging to defendant's credibility and unlikely to affect the verdict in his favor. Overall, the record before us reflects a coherent defense theory based on existent facts, appropriate motion practice and effective advocacy throughout trial, and denial of defendant's CPL article 440 motion was therefore warranted.

Clark, Pritzker, Powers and Corcoran, JJ., concur. Ordered that the judgment and the order are affirmed.

3 The People of the State of New York, Respondent, v Larry J. Harris, Appellant. [252 NYS3d 314]—

Crimes—Manslaughter—Child Victim Abused by Mother's Boyfriend—Sufficiency and Weight of Evidence

Crimes—Lesser Included Offense—Criminally Negligent Homicide

Crimes—Evidence—Manslaughter—Child Victim's Hearsay Statements to School Social Worker Not Admitted for Their Truth—Right of Confrontation Not Implicated

Crimes—Right to be Present at Trial—Sidebar Conference

Reynolds Fitzgerald, J. Appeal from a judgment of the County Court of Broome County (Joseph Cawley, J.), rendered January 21, 2022, upon a verdict convicting defendant of the crime of manslaughter in the first degree.

In 2019, the victim's mother lived in an apartment on Burbank Avenue in the Village of Johnson City, Broome County with her son (hereinafter the victim), age 11, and daughter. At the time, she was involved in a romantic relationship with defendant and he frequently stayed at the apartment. On February 2, 2019, defendant and the victim were alone in the apartment for several hours while the victim's mother and her

daughter went shopping. That afternoon, the victim's mother received a telephone call from defendant stating that the victim was "acting crazy." When she returned to the apartment, she found the victim laid out on the living room couch, naked, cool and unresponsive. She then left the apartment and went to Walgreen's in search of oxygen. While she was gone, defendant called another woman and asked her to come to the apartment to help revive the victim. Eventually, emergency responders arrived to find the victim experiencing ventricular fibrillation. He was taken to the hospital and was pronounced dead. An investigation ensued, resulting in defendant being indicted on charges of murder in the second degree and manslaughter in the first degree. Following a jury trial, defendant was acquitted of the murder charge but convicted of manslaughter in the first degree. County Court thereafter sentenced defendant, as a second violent felony offender, to a term of 25 years in prison, to be followed by five years of postrelease supervision. Defendant appeals.

Defendant contends that the evidence produced at trial is not legally sufficient to support the charge of manslaughter in the first degree and that the verdict is against the weight of the evidence. "When assessing the legal sufficiency of a jury verdict, we view the facts in the light most favorable to the People and examine whether there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt. At the same time, when conducting a weight of the evidence review, we must view the evidence in a neutral light and determine first whether a different verdict would have been unreasonable and, if not, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence" (*People v Bridges*, 220 AD3d 1107, 1108 [3d Dept 2023] [internal quotation marks and citations omitted], *lv denied* 40 NY3d 1091 [2024]; see *People v Morgan*, 230 AD3d 864, 865 [3d Dept 2024], *affd* 45 NY3d 940 [2025]). In a circumstantial evidence case such as this, this Court must satisfy itself that "the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence" (*People v Baque*, 43 NY3d 26, 30 [2024], quoting *People v Sanchez*, 61 NY2d 1022, 1024 [1984]). As relevant here, a person is guilty of manslaughter in the first degree when he or she, "[w]ith intent to cause serious physical injury to another person, . . . causes the death of such person" (Penal Law § 125.20 [1]).

At trial, a school social worker testified that on February 1, 2019, the victim had revealed to her that a bruise on his face was the result of defendant striking him and that she had then reported this to the Johnson City police and Broome County Child Protective Services (hereinafter CPS). Responding to this report, a Johnson City police officer went to the apartment and interviewed the victim. He stated that he observed multiple bruises on the victim, but that the victim denied that they were caused by defendant. A CPS caseworker, who also interviewed the victim on the same date, confirmed that the victim had visible bruising on his face and neck, but that, while he appeared nervous, he did not disclose any abuse.

The victim's mother testified that she was in a romantic relationship with defendant and that he frequently stayed at her apartment with her children. The mother confirmed that on January 31, 2019, the victim told her that he was "in trouble" with defendant. She confirmed that both the Johnson City police and CPS had come to her apartment the following day and spoken to the victim and that she was afraid she would lose custody of her children. On February 1, 2019, defendant came to her apartment and defendant discussed various options they could pursue to prevent her from losing custody. The next morning, defendant came to her apartment and suggested that she take her daughter and leave the apartment to "run errands" as he wanted to talk to the victim. To this end, he gave her money and directed her to take his car. The mother and her daughter left, leaving defendant and the victim alone in the apartment for hours.* The mother testified that at approximately 1:39 p.m. she received a telephone call from defendant stating that she had "to get here, [the victim] is acting crazy." When the mother arrived at the apartment, she found the victim lying naked on the couch and he felt cool. She stated that, other than defendant, no one else was in the apartment, and when she tried to wake the victim, she could not. As she thought the victim was suffering from hypothermia, she told defendant to put him in the shower and turn hot water on him. As defendant was carrying the victim into the bathroom, she left the apartment to go to Walgreen's to purchase oxygen. Unsuccessful, she returned to the apartment and, contrary to defendant's instruction, called 911, even though defendant told her not to call anyone. At that point, both she and defendant began attempting to resuscitate the victim.

Defendant's other girlfriend testified that she received a call

* The mother's testimony regarding the various errands she undertook, and the businesses she went to, were corroborated by videos and receipts.

from defendant at approximately 2:00 p.m. on February 2, 2019, imploring her to come quickly to an apartment located on Burbank Avenue. When she arrived, she saw the victim lying on the floor in front of the bathroom. She asked defendant what had happened and he responded, “now’s not the time.” She stated that she began performing CPR on the victim, but he was unresponsive. She further testified that defendant would not allow her to call 911. After several minutes of performing CPR, she stopped and left the apartment surreptitiously as the victim’s mother was returning.

A Johnson City Police Department patrol officer, a Johnson City firefighter/EMT and an advance life support technician all testified that when they arrived at the apartment at approximately 2:29 p.m. they found the victim naked on the floor, cold, unresponsive and they began taking turns trying to resuscitate the victim. The patrol officer also stated that defendant was not present when she arrived. A State Police officer testified that he responded to the apartment after the victim was taken to the hospital to assist with the documentation and collection of physical evidence, and described the scene, including finding saturated boy’s clothing in the tub.

A forensic pathologist testified as to the results of the victim’s autopsy which he had performed. He noted that the victim had numerous injuries. The victim had a bruise to his left eye region and cheek, a scrape on his right temple, an abrasion between his right ear and eye, an abrasion to the under surface of his jaw and a scrape in his right ear canal. He relayed that these injuries were recent but had some healing characteristics to them and, in his opinion, these were the injuries previously documented by the CPS worker. Additionally, he testified that he observed lacerations on the victim’s lips and several scrapes, bruises and abrasions throughout the victim’s upper body, as well as on his scalp and several fingers. The pathologist testified that these bruises were recent, were not in the healing process and most likely occurred within 24 hours of the victim’s death. He opined that the victim died as a result of a homicide and that the cause of his death was the result of asphyxia—or lack of oxygen to his brain and heart—from either suffocation, smothering or drowning. The pathologist opined that the tears to the victim’s lip appeared to be from him biting his lip and, when coupled with the number of areas of pressure or impact on the victim’s head, it appears he was held up against something or into something or held underwater, which would explain the suffocation and the water in his lungs known as pulmonary edema. Based on the lack of swelling in the victim’s

brain—which would occur if the brain suffered an injury from lack of oxygen over a period of time—the pathologist determined that it was a matter of minutes between the insult/injury and when the victim ultimately passed away. The pathologist further ruled out suicide or other natural causes of his death.

The foregoing evidence, when viewed in the light most favorable to the People, is legally sufficient to support the conviction of manslaughter in the first degree. The proof showed that the victim had previously been physically abused by defendant, that defendant was alone with the victim, that the victim died quickly after asphyxia and that defendant was the only one with the victim when he called the mother and his other girlfriend seeking assistance in resuscitating the victim (see *People v Morgan*, 230 AD3d at 867; *People v Bridges*, 220 AD3d at 1111; *People v Nelligan*, 135 AD3d 1075, 1077 [3d Dept 2016], *lv denied* 27 NY3d 1072 [2016]). Viewing the evidence in a neutral light and according deference to the jury’s assessment of credibility of the various witnesses, we are similarly satisfied that the verdict is not against the weight of the evidence as intent may be inferred from defendant’s actions and the surrounding circumstances (see *People v Morgan*, 230 AD3d at 867; *People v Babcock*, 152 AD3d 962, 967 [3d Dept 2017], *lv denied* 30 NY3d 947 [2017]; *People v Rogers*, 94 AD3d 1246, 1249-1250 [3d Dept 2012], *lv denied* 19 NY3d 977 [2012]).

Defendant next asserts that County Court erred in refusing to submit to the jury the charge of criminally negligent homicide as a lesser included offense of manslaughter in the first degree. “A defendant is entitled to a lesser included offense charge upon request when (1) it is impossible to commit the greater crime without concomitantly committing the lesser offense by the same conduct and (2) there is a reasonable view of the evidence to support a finding that the defendant committed the lesser offense but not the greater” (*People v Oates*, 222 AD3d 1271, 1274 [3d Dept 2023] [internal quotation marks and citations omitted]; accord *People v Akins*, 240 AD3d 1003, 1006 [3d Dept 2025]). Inasmuch as the People do not dispute the first prong, the issue comes down to whether any reasonable view of the evidence would permit a jury to acquit on the greater charge but still convict on the lesser one. To that end, “[a] person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person” (Penal Law § 125.10). “A person acts with criminal negligence . . . when he [or she] fails to perceive a substantial and unjustifiable risk that such result will occur”

(Penal Law § 15.05 [4]). At trial, the pathologist testified that the victim died from asphyxiation caused by suffocation, smothering or drowning. Based on the victim's physical injuries, the pathologist opined that the victim was actively held against something or that his face was held under water. Thus, even giving defendant the most favorable view of the record, there is no reasonable view of the evidence to logically support a finding that defendant acted with criminal negligence and did not intend to cause the victim serious physical injury (see *People v Cuatlal*, 152 AD3d 539, 539 [2d Dept 2017], *lv denied* 30 NY3d 948 [2017]).

Defendant next contends that County Court erred in allowing the school social worker to testify as to the victim's hearsay statements, including that defendant struck him and caused the bruise on his face. We disagree. "Hearsay is an out-of-court statement admitted for the truth of the matter asserted, and the hearsay rule generally prohibits the introduction of such statements at trial" (*People v Agan*, 207 AD3d 861, 868 [3d Dept 2022] [internal quotation marks and citations omitted], *lvs denied* 38 NY3d 1186 [2022], 39 NY3d 939 [2022]). "The Confrontation Clause of the Sixth Amendment prohibits the use of a testimonial hearsay statement against a defendant unless the defendant is provided with an opportunity to cross-examine the witness" (*People v Hulbert*, 93 AD3d 953, 953 [3d Dept 2012] [citation omitted]; see *People v Wolz*, 112 AD3d 1150, 1153 [3d Dept 2013], *lv denied* 23 NY3d 1026 [2014]). These statements were not offered for the truth of the matter asserted, but rather to provide background information regarding the report that triggered the police and CPS investigation into the alleged abuse of the victim by defendant the day before his death and how the allegations were disclosed (see *People v Rose*, 185 AD3d 1228, 1231 [3d Dept 2020], *lv denied* 35 NY3d 1115 [2020]; *People v DeCarr*, 130 AD3d 1365, 1366 [3d Dept 2015], *lv denied* 26 NY3d 1008 [2015]). Moreover, County Court gave proper limiting instructions to the jury regarding such proof (see *People v Shackelton*, 177 AD3d 1163, 1165 [3d Dept 2019], *lv denied* 34 NY3d 1162 [2020]; *People v DeCarr*, 130 AD3d at 1366). Additionally, the Confrontation Clause was not implicated here because the statements were not admitted for their truth (see *People v Davis*, 23 AD3d 833, 835 [3d Dept 2005], *lv denied* 6 NY3d 811 [2006]; *People v Wisdom*, 23 AD3d 759, 761 [3d Dept 2005], *lv denied* 6 NY3d 840 [2006]).

Defendant, in his pro se supplemental brief, argues that he received ineffective assistance of counsel for a myriad of reasons. "To establish a claim of ineffective assistance of

counsel, a defendant is required to come forward with proof that the attorney failed to provide meaningful representation and that there was no strategic or other legitimate explanations for counsel's allegedly deficient conduct" (*People v Williams*, 232 AD3d 1124, 1125 [3d Dept 2024] [internal quotation marks and citations omitted], *lv denied* 43 NY3d 1059 [2025]; see *People v Sposito*, 193 AD3d 1236, 1237 [3d Dept 2021], *aff'd* 37 NY3d 1149 [2022]). Following our review of the record, we conclude that defendant has failed to make that showing. With respect to defendant's contention that the counts in the indictment were duplicitous and multiplicitous, this contention is unpreserved (see *People v Marcantonio*, 238 AD3d 1262, 1265 [3d Dept 2025]). As to defendant's contention that the indictment was amended, it was not the indictment, but rather the bill of particulars that was amended, and the People are free to do so (see CPL 200.95 [8]; *People v Horton*, 181 AD3d 986, 992 [3d Dept 2020], *lv denied* 35 NY3d 1045 [2020]). Turning to defendant's argument concerning peremptory challenges, the use of such challenges is a quintessentially tactical decision and defendant failed to show a lack of strategic explanation (see *People v Hooper*, 238 AD3d 1207, 1211 [3d Dept 2025]). To the extent that defendant argues defense counsel waived his *Antommarchi* rights, this is belied by the record. Before beginning jury selection, County Court explained to defendant his right to be present for sidebar conversations and that if defendant did not come forward to participate in the conference, the court was going to assume he elected not to participate. Thus, defendant's conduct served as an implicit waiver of his *Antommarchi* rights (see *People v Henahan*, 238 AD3d 1336, 1340 [3d Dept 2025], *lv denied* 43 NY3d 1055 [2025]). As to defendant's assertion that he was denied his right to be present at a pretrial hearing on June 23, 2020, this was not a pretrial hearing; instead, it was an appearance for oral argument on defendant's application for a judicial subpoena, and defendant's presence is not required where counsel is simply arguing a legal position to which the defendant has nothing of value to contribute (see *People v Williams*, 85 NY2d 945, 947 [1995]). Lastly, as to defendant's argument that trial counsel was ineffective for making a limited number of objections, defendant failed to establish that counsel's lack of raising objections was not a strategic attempt to avoid bringing added attention to or unintentionally emphasizing certain testimony (see *People v Deas*, 236 AD3d 1105, 1109 [3d Dept 2025], *lv denied* 43 NY3d 1007 [2025]). In viewing trial counsel's representation of defendant in total, we find that defendant was provided meaningful representation as trial counsel, among other things,

delivered cogent opening and closing arguments, conducted meaningful cross-examination and zealously represented defendant (see *People v Hooper*, 238 AD3d at 1211; *People v Deas*, 236 AD3d at 1109). We have considered defendant's remaining contentions and find them to lack merit.

Garry, P.J., McShan, Powers and Mackey, JJ., concur. Ordered that the judgment is affirmed.

4 The People of the State of New York, Respondent, v Larry J. Harris, Appellant. [253 NYS3d 342]—

Crimes—Predatory Sexual Assault against Child—Sufficiency and Weight of Evidence

Crimes—Disclosure—Diligence—Reasonable Efforts to Ascertain Victim's Medical Records, Defendant's Video Calls and Jail Letters—Certificate of Compliance Not Illusory

Crimes—Sentence—Persistent Violent Felony Offender

Grand Jury—Right to Appear before Grand Jury—Defense Counsel's Failure to Facilitate Grand Jury Testimony—Lack of Prejudice

Crimes—Right to Counsel—Effective Representation

Reynolds Fitzgerald, J. Appeals (1) from a judgment of the County Court of Broome County (Joseph Cawley, J.), rendered January 21, 2022, convicting defendant following a nonjury trial of the crimes of predatory sexual assault against a child (two counts) and rape in the third degree, and (2) by permission, from an order of said court, entered September 13, 2024, which denied defendant's motion pursuant to CPL 440.20 to set aside the sentence, without a hearing.

Defendant was charged by a four-count indictment with crimes stemming from allegations that, on multiple occasions between 2013 and 2018, he engaged in predatory sexual assault against a child (two counts) and committed rape in the third degree (two counts).¹ The People declared their readiness for trial and filed a certificate of compliance on August 4, 2020, and later supplemented their certificate and declaration of readiness on May 14, 2021. A nonjury trial ensued, after which defendant was found guilty as charged. Following a persistent violent felony offender hearing, defendant was found to be a persistent violent felony offender as to counts 1 and 2 and a second violent felony offender as to count 3. Defendant was subsequently sentenced to consecutive prison terms of 25 years to life on counts 1 and 2 and a concurrent prison term of four years, to be followed by two years of postrelease supervision, on count 3.

Defendant then moved pursuant to CPL 440.20 to set aside

1. At trial, the People moved to dismiss count 4, which County Court granted.

the sentence on the basis that County Court erred in finding him to be a persistent violent felony offender on counts 1 and 2. County Court denied defendant's motion without a hearing. Defendant appeals from the judgment of conviction and, by permission, the denial of his CPL 440.20 motion.

Defendant contends that the verdict related to the convictions for predatory sexual assault against a child is not supported by legally sufficient evidence and is against the weight of the evidence. He bases this contention on what he argues are the inconsistent accounts of the time frame underlying the charged criminal conduct and that there is no corroboration as to the victim's account of defendant's criminal conduct. "When assessing the legal sufficiency of a [factfinder] verdict, we view the facts in the light most favorable to the People and examine whether there is a valid line of reasoning and permissible inferences from which a rational [factfinder] could have found the elements of the crime proved beyond a reasonable doubt. In contrast, when undertaking a weight of the evidence review, this Court must first determine whether, based on all the credible evidence, a different finding would not have been unreasonable and, if not, then weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence" (*People v Sharlow*, 217 AD3d 1120, 1121 [3d Dept 2023] [internal quotation marks, brackets and citations omitted], *lv denied* 40 NY3d 1013 [2023]). As charged in count 1, "[a] person is guilty of predatory sexual assault against a child when, being [18] years old or more, he or she commits the crime of rape in the first degree . . . and the victim is less than [13] years old" (Penal Law § 130.96). A person is guilty of rape in the first degree "when he or she engages in sexual intercourse with another person . . . who is less than [13] years old and the actor is [18] years old or more" (Penal Law § 130.35 [former (4)]). As charged in count 2 for the underlying conduct establishing predatory sexual assault against a child, "a person is guilty of course of sexual conduct against a child in the first degree when, over a period of time not less than three months in duration . . . he or she, being [18] years old or more, engages in two or more acts of sexual conduct, which include at least one act of sexual intercourse . . . with a child less than [13] years old" (Penal Law § 130.75 [former (1) (b)]). "A person is guilty of rape in the third degree when . . . being [21] years old or more, he or she engages in sexual intercourse with another person less than [17] years old" (Penal Law § 130.25 [former (2)]).

The victim testified that she was born in 2002 and met defendant, who was her mother's boyfriend, in 2013. She stated that beginning in the fall 2013, defendant began to spend more time at their apartment, that she was alone with defendant often and the two became close. The victim testified that defendant had sexual intercourse with her for the first time when she was 11 years old, on Halloween night, while she was sleeping in her bedroom at their apartment on Doubleday Street in the City of Binghamton, Broome County (count 1). The victim further testified that between the summer of 2014 until January 2015, defendant had sexual intercourse with her on a regular basis, usually a few times a week, in her bedroom. She stated that it became routine for defendant to come into her bedroom while she was sleeping, touch her, take her clothes off and engage in sexual intercourse. The victim stated that defendant had sexual intercourse with her more than 10 times during this time period (count 2). The victim also testified that on several occasions defendant would bring her to an apartment in the Village of Johnson City, Broome County to have sexual intercourse. Specifically, she recalled that on November 4, 2018, defendant brought her to this apartment, had sexual intercourse with her and then took her to the mall to buy her clothes (count 3). She explained that defendant would buy her expensive items such as cellular telephones and clothing, tell her that he loved her, that they would have a future together, and that this—the relationship between the victim and defendant—was his dream.

The victim's mother testified that defendant's date of birth is in January 1975. She explained that she had a romantic relationship with defendant and that he spent time alone with the victim because she worked long hours. She confirmed that defendant bought expensive gifts for the victim and that she did not learn of defendant's sexual assault of the victim until June 2019. Thereafter, she confronted defendant regarding his sexual assaults and rapes of the victim and that in response to her allegations, he stated, "[you] will never understand that relationship." The victim's aunt testified that on June 9, 2019, the victim broke down, was very upset and crying hysterically as she disclosed to her that defendant sexually assaulted and raped her.

Defendant testified that he met the victim's mother in 2013, began to spend more time with them beginning in January 2014, but did not stay over in their apartment until May 2014.

He further testified that he, however, did not have a relationship with the victim during this time. Defendant denied having any sexual intercourse with the victim, except on one occasion in 2019, when the victim was mad, upset and crying and, “one thing led to another and we had sex.” In response to this testimony on direct, the People, on cross-examination and for impeachment purposes only, confronted defendant with text messages he had authored to the victim in 2016 that repeatedly referenced sexual acts and conduct then taking place between defendant and the victim.

We are satisfied that defendant’s convictions are supported by legally sufficient evidence relative to the time frame of his criminal conduct. The victim provided specific details and accounts of the sexual conduct that defendant engaged in and sufficiently identified the time frame of the sexual intercourse by recalling a holiday and by connecting the sexual acts to specific apartments and activities taking place at the time the sexual assaults and rapes occurred. Viewing the evidence in a light most favorable to the People, we find that the factfinder could properly credit the victim’s testimony and further find that such evidence was legally sufficient to support a conviction on all counts, specifically that such criminal conduct occurred, respectively, when the victim was 11 years old, over a period of time not less than three months in duration when she was less than 13 years old and when she was 16 years old (*see People v Cuadrado*, 227 AD3d 1174, 1176-1177 [3d Dept 2024], *lv denied* 42 NY3d 969 [2024]; *People v Sharlow*, 217 AD3d at 1122). As to the weight of the evidence, a different verdict in this case would not have been unreasonable had the factfinder credited defendant’s testimony or discredited the victim’s account of sexual assaults and rapes. However, contrary to defendant’s contention, the verdict is not against the weight of the evidence as there was corroborating evidence from the testimony of the other witnesses, pictures, a video and a text message conversation between the victim and defendant.² Furthermore, any inconsistencies in the victim’s testimony were thoroughly explored on cross-examination and “do not render the victim’s testimony inherently unbelievable or incredible as a matter of law” (*People v Mayette*, 233 AD3d 1097, 1101 [3d Dept 2024] [internal quotation marks, brackets and citation omitted], *lv denied* 43 NY3d 945 [2025]; *see People v*

2. The text message referred to here is separate and apart from those texts introduced for impeachment purposes.

Starnes, 206 AD3d 1133, 1140 [3d Dept 2022], *lv denied* 38 NY3d 1153 [2022]).³

Defendant next argues that the People did not exercise due diligence or make reasonable efforts in ascertaining the existence of the victim’s medical records, defendant’s video calls and jail letters, thus County Court should have found the certificate of compliance (hereinafter COC) illusory and dismissed the indictment. “[T]he key question in determining if a proper COC has been filed is whether the prosecution has exercised due diligence and made reasonable inquiries to ascertain the existence of material and information subject to discovery. . . . An analysis of whether the People made reasonable efforts sufficient to satisfy CPL article 245 is fundamentally case-specific, as with any question of reasonableness, and will turn on the circumstances presented. There is no rule of ‘strict liability’; that is, the statute does not require or anticipate a ‘perfect prosecutor.’ . . . [C]ourts should generally consider, among other things, the efforts made by the prosecution and the prosecutor’s office to comply with the statutory requirements, the volume of discovery provided and outstanding, the complexity of the case, how obvious any missing material would likely have been to a prosecutor exercising due diligence, the explanation for any discovery lapse, and the People’s response when apprised of any missing discovery” (*People v Bay*, 41 NY3d 200, 211-212 [2023] [internal quotation marks, brackets and citations omitted]). As the Court of Appeals determined, “CPL 245.80 (2) was modified to direct that a court should only dismiss a charge as a sanction for a disclosure violation if it has considered all other remedies and concluded that dismissal ‘is appropriate and proportionate to the prejudice suffered by the party’ ” (*id.* at 210).

County Court determined that the medical records were in private hands and had to be subpoenaed. Once subpoenaed, the People had to timely disclose them. The court noted that the medical records were obtained on August 17, 2021, and disclosed September 13, 2021, approximately 14 days prior to trial. As to the video calls, County Court further noted that the People disclosed them the same day they were received, resulting in no delay. The court ultimately determined that the COC was not illusory, the supplemental COC was filed in good faith, and defendant was not prejudiced as he had plenty of time to incorporate the information into his defense and use the infor-

3. Defendant, in his pro se supplemental brief, asserts that the People failed to establish the element of forcible compulsion. This assertion lacks merit as all counts are based on the victim’s lack of consent due to age.

mation at trial, thus no sanctions were required. We agree. In considering the due diligence factors, we find that the People had previously disclosed significant documentation. With respect to the jail letters, the People disclosed this as part of their discovery in August 2020. The People afforded defendant access to its electronic case file and the opportunity to inspect materials at the prosecutor's office. As to the video calls, the People did not know of their existence at the time of the filing of the initial or supplemental COC. Upon receipt of the video calls, the People disclosed them the same day. Pertaining to the medical records, said records were not in the People's possession until August 17, 2021. Upon learning that the medical records had not been disclosed, the People released them. We cannot say that the People failed to exercise due diligence to satisfy their continuing discovery obligations under CPL article 245. As such, County Court correctly determined that the COC was not illusory. Once this determination was made, the court properly determined if sanctions would be appropriate by determining the prejudice suffered by defendant. The court was correct in its assessment that any relevant information found in the medical records could easily be the subject of cross-examination of the victim, and the record evinces that the victim was thoroughly cross-examined regarding information she gave to the doctor which seemingly contradicted her direct testimony. Accordingly, County Court properly determined that no sanction was warranted. As to the jail letters, the court correctly found that these were not admissible and, even if they had been turned over belatedly, defendant was not prejudiced and no sanction would be imposed (*see People v Graham*, 233 AD3d 1361, 1366 [3d Dept 2024], *lv denied* 43 NY3d 944 [2025]; *People v Williams*, 224 AD3d 998, 1006 [3d Dept 2024], *lv denied* 41 NY3d 1021 [2024]).

Defendant contends that County Court erred in sentencing him as a persistent violent felony offender because the court improperly relieved the prosecution of their burden of proof by presuming that he did not receive youthful offender status on his 1990 conviction for rape in the first degree. We disagree. At the persistent violent felony offender hearing, the People called an inmate record coordinator at Elmira Correctional Facility, the inmate records clerk with the Broome County Sheriff's Department and submitted certificates of conviction and certificates of disposition setting forth that defendant was convicted in 1990 of rape, in 1994 of robbery in the first degree and, also in 1994, of attempted robbery in the first degree. The documentation lacks any reference to defendant being treated as a youthful offender pertaining to the 1990 rape conviction, which

stands in stark contrast to defendant's 1989 robbery conviction which states he was adjudicated a youthful offender. Most telling, this evidence revealed that subsequent to his 1990 rape conviction, defendant was sentenced as a second felony offender on his next felony conviction (the 1994 robbery conviction) without any intervening felony conviction. Defendant testified at the hearing, confirming the three convictions, yet stated that he was adjudicated youthful offender status on the rape conviction. "Other than defendant's bare assertions, there is nothing in the record to indicate that defendant received youthful offender treatment for the [1990 rape] conviction" (*People v Ketchmore*, 132 AD2d 889, 892 [3d Dept 1987], *lv denied* 70 NY2d 752 [1987]; see *People v Treadwell*, 80 AD2d 697, 698 [3d Dept 1981]) and, more importantly, the record evidence contradicts this assertion. Thus, County Court properly determined that defendant is a persistent violent felony offender (see *People v Ketchmore*, 132 AD2d at 891; *People v Treadwell*, 80 AD2d at 698).

Defendant, in his supplemental brief, contends that he did not receive effective assistance of counsel. "A criminal defendant is guaranteed the effective assistance of counsel by both the US and NY Constitutions and, pursuant to the more stringent standard under the NY Constitution, receives it when the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation. It is a defendant's burden to show that meaningful representation was not provided and, further, that there were no strategic or other legitimate explanations—i.e., those that would be consistent with the decisions of a reasonably competent attorney—for the alleged deficiencies of counsel" (*People v Burtner*, 236 AD3d 1145, 1146 [3d Dept 2025] [internal quotation marks and citations omitted]; see *People v Meadows*, 183 AD3d 1016, 1022 [3d Dept 2020], *lv denied* 35 NY3d 1047 [2020]). Defendant argues that defense counsel did not facilitate his testimony before the grand jury. We disagree. Initially, "as this matter involved a 'direct presentment' to the grand jury, defendant was not entitled to notice that a grand jury proceeding was pending" (*People v Williams*, 171 AD3d 1354, 1355 [3d Dept 2019]; see CPL 190.50 [5] [a]). Moreover, "the Court of Appeals has repeatedly and consistently held that—even when it is due to attorney error—a defense counsel's failure to timely facilitate a defendant's intention to testify before the grand jury does not, per se, amount to a denial of effective assistance of counsel. That is, even where no strategy is involved, a defendant must show prejudice" (*People v Graham*,

185 AD3d 1221, 1223 [3d Dept 2020] [internal quotation marks, brackets and citations omitted], *lv denied* 36 NY3d 929 [2020]). Here, defendant did not show any prejudice, as he testified during trial and was nevertheless found guilty (*see People v Hogan*, 26 NY3d 779, 787 [2016]). With respect to defendant's contention that the counts in the indictment were duplicitous and multiplicitous, this contention is unpreserved (*see People v Marcantonio*, 238 AD3d 1262, 1265 [3d Dept 2025]). Regarding defendant's assertion that defense counsel was ineffective for failing to make an opening statement, defense counsel was not required to make an opening statement (*see* CPL 260.30 [4]; 320.20 [3]) and any such error "in failing to make an opening statement is attributable to or substantially ameliorated by the fact that defendant elected to waive a jury trial" (*People v Webster*, 56 AD3d 1242, 1243 [4th Dept 2008] [internal quotation marks and citation omitted], *lv denied* 11 NY3d 931 [2009]). Defendant's contention that defense counsel failed to call several witnesses is belied by the record. Defense counsel put on the record his efforts to call two such witnesses, but that he could not locate them and that their family members refused to assist him. Moreover, "[g]enerally, a trial counsel's determination to not call a particular witness, including an expert witness, will not necessarily constitute ineffective assistance of counsel" (*People v Mosley*, 155 AD3d 1124, 1128 [3d Dept 2017], *lv denied* 31 NY3d 985 [2018]). Our review of the record evinces that trial counsel presented a solid defense focusing on gaps and ambiguities in the timeline as to the allegations of the sexual assaults. Defense counsel carried out this strategy through vigorous cross-examination of each witness, raising objections and delivering a closing argument that brought this theory to the factfinder for his consideration. Moreover, defendant failed to show the absence of a strategic or other logical reason for defense counsel's actions. "[O]ur assessment of the evidence, the law, and the circumstances in this case, viewed in totality and as of the time of the representation, leaves us satisfied that defendant received meaningful representation" (*People v Hooper*, 238 AD3d 1207, 1211 [3d Dept 2025] [internal quotation marks, brackets and citation omitted]; *see People v Colter*, 206 AD3d 1371, 1376 [3d Dept 2022], *lv denied* 38 NY3d 1149 [2022]). We have examined defendant's remaining contentions of ineffective assistance of counsel and find them to lack merit.

Finally, when considering defendant's conduct, the lasting impact on the victim in this case and defendant's lack of responsibility and remorse, we find that the imposed sentence is neither unduly harsh or severe, and we decline defendant's

invitation to modify it in the interest of justice (*see People v Cuadrado*, 227 AD3d at 1184; *People v Covington*, 222 AD3d 1166, 1171 [3d Dept 2023], *lv denied* 41 NY3d 964 [2024]).

Garry, P.J., McShan, Powers and Mackey, JJ., concur. Ordered that the judgment and the order are affirmed.

5 The People of the State of New York, Respondent, v Kevin Cox, Appellant. [252 NYS3d 311]—

Crimes—Murder—Depraved Indifference Murder—Multiple Organ Failure Due to Hypothermia

Crimes—Evidence—Photographic Evidence—Depraved Indifference Murder—Intubated Victim—Accurate Photos Not Introduced Solely to Inflamm Jury’s Emotions and Multiple Cautionary Instructions Given

Ceresia, J. Appeal from a judgment of the County Court of Rensselaer County (Debra Young, J.), rendered May 18, 2022, upon a verdict convicting defendant of the crimes of murder in the second degree (two counts) and assault in the first degree.

On the night of February 9, 2020, defendant was caring for his girlfriend’s son, the six-year-old victim. After deciding that the victim had misbehaved, defendant punished him, as he had in the past, by locking him outside. While the victim sat on the snow-covered back deck wearing only his pajamas, defendant smoked marihuana and went to bed. Upon awakening the following morning, defendant discovered the victim’s unconscious body frozen to the deck. After prying the victim from the deck with a shovel, defendant brought him indoors, attempted to revive him in the bathtub and called the victim’s mother. The victim was later transported to a hospital, where lifesaving measures were undertaken before he ultimately succumbed to multiple organ failure due to hypothermia. Defendant was charged with two counts of depraved indifference murder and one count of depraved indifference assault, and was convicted as charged following a jury trial. County Court sentenced defendant to three concurrent terms of 25 years to life in prison,* and defendant appeals.

The sole argument raised on appeal is that County Court erred when it allowed the People to introduce five photographs of the victim while hospitalized: one depicting the victim intubated in a hospital bed, and the other four showing an area of abrasion on the victim’s upper arm. “Accurate photographs of the victim are admissible, despite their potentially inflammatory effect, if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evi-

* With respect to the assault charge, defendant was sentenced as a mandatory persistent violent felony offender (*see* Penal Law § 70.08 [3] [a-1]).

dence, or to corroborate or disprove some other evidence offered or to be offered” (*People v Mayette*, 233 AD3d 1097, 1103 [3d Dept 2024] [internal quotation marks, brackets and citations omitted], *lv denied* 43 NY3d 945 [2025]; see *People v Pica-Torres*, 230 AD3d 855, 860 [3d Dept 2024], *lv denied* 42 NY3d 1054 [2024]). “Once a relevant purpose for a photograph is demonstrated, the question of whether the probative value of the photograph outweighs any prejudice to the defendant rests within the trial court’s sound discretion” (*People v Brinkley*, 174 AD3d 1159, 1165 [3d Dept 2019] [citation omitted], *lv denied* 34 NY3d 979 [2019]).

The single photograph of the intubated victim was relevant to illustrate and corroborate medical testimony about the extensive medical treatment he received, underscoring the seriousness of the internal injuries that led to his death (see *People v Brinkley*, 174 AD3d at 1165; *People v Molineaux*, 156 AD3d 1250, 1252 [3d Dept 2017], *lv denied* 31 NY3d 1085 [2018]). Given that the photograph was not introduced solely to inflame the jury’s emotions, and noting that multiple cautionary instructions were given, we find no abuse of discretion in the admission of this photograph (see *People v Heimroth*, 181 AD3d 967, 970-971 [3d Dept 2020], *lv denied* 35 NY3d 1027 [2020]; *People v Greenfield*, 167 AD3d 1060, 1063 [3d Dept 2018], *lv denied* 32 NY3d 1204 [2019]).

As for the four photographs of the abrasion on the victim’s arm, to the extent that defendant argues that these were unduly prejudicial, he did not raise this claim at trial and it is thus unpreserved for our review (see *People v Delbrey*, 179 AD3d 1292, 1296 [3d Dept 2020], *lv denied* 35 NY3d 969 [2020]; *People v Marra*, 96 AD3d 1623, 1625 [4th Dept 2012], *affirmed* 21 NY3d 979 [2013]). However, defendant did preserve by way of timely objection his contention that these photographs were inadmissible in that they depicted an injury that was not shown to be connected to the charged crimes. We find this position to be meritorious. No medical testimony ever touched upon the arm injury, let alone linked it to the incident in question. Indeed, the only witness who testified about this abrasion—the detective who took the photographs—stated that he did not know how it happened. Therefore, as the People failed to establish the relevance of these photographs, it was error to admit them (compare *People v Marra*, 96 AD3d at 1626). Nevertheless, the error was harmless. The photographs, which were not graphic in nature, depicted what appeared to be a minor injury and, moreover, the proof against defendant was overwhelming, with no significant probability that he would

have been acquitted but for their admission (*see People v Saunders*, 176 AD3d 1384, 1391 [3d Dept 2019], *lv denied* 35 NY3d 973 [2020]).

Reynolds Fitzgerald, J.P., Fisher, McShan and Mackey, JJ., concur. Ordered that the judgment is affirmed.

6 The People of the State of New York, Respondent, v Thomas Bessette, Appellant. [251 NYS3d 440]—

Crimes—Course of Sexual Conduct against Child—Weight of Evidence

Crimes—Witnesses—Limitation of Scope of Cross-Examination at Trial of Both Investigating Officer and Victim’s Mother

Crimes—Right to Counsel—Effective Representation—Appropriate Opening and Closing Remarks, Thorough Direct and Cross-Examination during Trial and Cogent Defense Theory

McShan, J. Appeal from a judgment of the County Court of Albany County (Andra Ackerman, J.), rendered December 6, 2022, upon a verdict convicting defendant of the crime of course of sexual conduct against a child in the second degree.

In June 2021, defendant was charged by indictment with one count of predatory sexual assault against a child stemming from allegations that between January 2020 and March 2021, defendant engaged in two or more acts of sexual conduct, which included at least one instance of sexual intercourse, with the victim at a home in Albany County where they both resided. Upon a review of the grand jury minutes, County Court found that the proof presented failed to establish that sexual intercourse between defendant and the victim occurred and, thus, the court reduced the charge to the lesser included offense of course of sexual conduct against a child in the second degree. Following a jury trial, defendant was convicted as charged and was later sentenced to a prison term of seven years, to be followed by 10 years of postrelease supervision. Defendant appeals.

We affirm. Defendant first contends that the verdict is against the weight of the evidence. “[W]hen conducting a weight of the evidence review, this Court must view the evidence in a neutral light and determine first whether a different verdict would have been unreasonable and, if not, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony to determine if the verdict is supported by the weight of the evidence” (*People v Gerhard*, 244 AD3d 1313, 1314 [3d Dept 2025] [internal quotation marks, brackets and citations omitted]; *see People v Morey*, 231 AD3d 1363, 1364 [3d Dept 2024], *lv denied* 43 NY3d 931 [2025]). A weight of the evidence review necessitates consideration of the evidence in a

neutral light while according deference to the jury's credibility assessments (see *People v Alvarez*, 238 AD3d 1266, 1269 [3d Dept 2025], *lv denied* 44 NY3d 981 [2025]; *People v Saunders*, 232 AD3d 1039, 1040 [3d Dept 2024], *lv denied* 43 NY3d 1058 [2025]). "A person is guilty of course of sexual conduct against a child in the second degree when, over a period of time not less than three months in duration . . . he or she, being [18] years old or more, engages in two or more acts of sexual conduct with a child less than [13] years old" (Penal Law § 130.80 [1] [b]; see *People v Baez*, 232 AD3d 1044, 1045 [3d Dept 2024]).

Defendant's argument does not directly assert a lack of evidence supporting any of the necessary elements of course of sexual conduct against a child in the second degree;¹ rather, defendant contends that he could not possibly have engaged in sexual conduct with the victim without being observed by one of the numerous inhabitants in the residence and, in turn, that the victim's testimony providing an account of the numerous acts of sexual conduct that occurred in defendant's room was essentially incredible. On that, defendant emphasizes his testimony that he was never alone in the house with the victim and that there were always six minors present, as the events he was accused of took place during the COVID-19 pandemic. Defendant asserted that he did not have a functioning lock on his door but acknowledged that he was able to shut his door. Defendant denied the allegations against him and insisted that he was never alone with the victim in his bedroom at any point.

The victim's mother testified at trial that defendant resided with her and the victim, along with numerous minors and adults, in a three-bedroom home, where defendant had his own room on the second floor. The victim's mother acknowledged that there were 12 people residing in the home in March 2021. Both the victim and the victim's mother testified that defendant would frequently take care of the various minors residing in the home while the adults were working during the day, and both indicated that, as part of that task, defendant would assign the minors chores around the house. According to the victim, it was during the times that defendant assigned the other minors to do chores, while the adults were out of the house, that he would call her back up to his bedroom to engage

1. The trial testimony readily establishes that the victim was under the age of 13 and that defendant was more than 18 years of age during the 15-month period in question and, according to the victim, defendant engaged in multiple acts that would satisfy the definition of "sexual conduct" at least twice weekly during that period (see Penal Law § 130.00 [former (10)]; see also § 130.00 [3]).

in sexual conduct. The victim testified that, although defendant did not have a lock on the door, he did not express any nervousness about anyone coming into the bedroom while the sexual conduct was occurring. The victim noted that defendant did not remove his or the victim's shirts during the episodes and, on occasion, he would pull the covers of his bed over them.

Contrary to defendant's contention, the aforementioned facts do not definitively establish that it was impossible to engage in the acts he was accused of without being discovered. Rather, the victim's account, which noted that the conduct occurred in defendant's room behind a closed door while the other minors in the house were engaged in various chores, provided a sufficient basis for the jury to determine whether the circumstances and time frames of the sexual conduct were established beyond a reasonable doubt. Accordingly, although a different verdict would not have been unreasonable had the jury credited defendant's account and rejected the victim's, they did not, and our neutral review of the evidence while according deference to the jury's credibility determinations satisfies us that the verdict is not against the weight of the evidence (*see People v Robbins*, 236 AD3d 1097, 1100 [3d Dept 2025]; *People v Cuadrado*, 227 AD3d 1174, 1177-1178 [3d Dept 2024], *lv denied* 42 NY3d 969 [2024]; *People v Wells*, 224 AD3d 1155, 1158 [3d Dept 2024], *lv denied* 42 NY3d 941 [2024]; *People v Gertz*, 204 AD3d 1166, 1169 [3d Dept 2022], *lv denied* 38 NY3d 1070 [2022]; *People v Horton*, 173 AD3d 1338, 1340 [3d Dept 2019], *lv denied* 34 NY3d 933 [2019]).

Defendant next contends that County Court erred in limiting his cross-examination at trial of both the investigating officer and the victim's mother. We disagree. Although "[s]pecific acts of misconduct may be explored on cross-examination of a witness for impeachment purposes when such cross-examination is conducted in good faith upon a reasonable basis in fact" (*People v Daley*, 9 AD3d 601, 602 [3d Dept 2004]; *see People v Smith*, 27 NY3d 652, 661 [2016]), "the trial court has broad discretion to limit the scope of cross-examination when the questions are irrelevant or only marginally relevant, concern collateral issues, or pose a danger of misleading the jury" (*People v Doane*, 212 AD3d 875, 882-883 [3d Dept 2023] [internal quotation marks, brackets and citation omitted], *lv denied* 39 NY3d 1154 [2023]; *see People v Green*, 208 AD3d 1539, 1544 [3d Dept 2022]). As to the investigating officer, defendant sought to cross-examine him with respect to an unsubstantiated complaint for an incident that occurred while he was on duty as well as an off-duty incident, both of which

were premised on allegations that the officer had struck a child. Neither incident resulted in discipline or criminal charges and neither directly implicated the officer's veracity (*see People v Rouse*, 34 NY3d 269, 276 [2019]; *People v Smith*, 27 NY3d at 661; *People v Walker*, 83 NY2d 455, 461 [1994]). As to the victim's mother, defendant sought to impeach her on the basis that she suffered from a mental health condition that impacted her truthfulness. However, defendant offered no competent evidence supporting the premise that her purported condition had any bearing on her ability to tell the truth (*see People v Gertz*, 204 AD3d at 1170; *People v McCray*, 102 AD3d 1000, 1007-1008 [3d Dept 2013], *aff'd* 23 NY3d 193 [2014]) and, noting the substance of the mother's testimony, using her purported condition essentially amounted to a collateral attack on the victim's credibility on grounds that could be explored directly through cross-examination of the victim (*see People v Doane*, 212 AD3d at 883; *People v Love*, 307 AD2d 528, 532 [3d Dept 2003], *lv denied* 100 NY2d 643 [2003]; *see also People v Francisco*, 44 AD3d 870, 870 [2d Dept 2007], *lv denied* 9 NY3d 1033 [2008]; *People v McGlothlin*, 6 AD3d 462, 463 [2d Dept 2004], *lv denied* 3 NY3d 644 [2004]). All told, we find that County Court properly weighed the relevant factors in making its determination to limit the grounds for cross-examination of both witnesses and we discern no abuse of discretion in its rulings (*see People v Erfurt*, 234 AD3d 1120, 1124 [3d Dept 2025], *lv denied* 43 NY3d 1008 [2025]; *People v Graham*, 215 AD3d 998, 1007 [3d Dept 2023], *lv denied* 40 NY3d 928 [2023]; *People v Green*, 208 AD3d at 1544; *People v Gannon*, 174 AD3d 1054, 1061 [3d Dept 2019], *lv denied* 34 NY3d 980 [2019]).

Defendant further argues that County Court committed reversible error when it failed to respond to the jury's request to hear the court's instruction on reasonable doubt and the victim's testimony with respect "to the abuse by both prosecution and defense." Contrary to his contention, we find that this argument is unpreserved.² Defendant maintains that he preserved this issue by requesting, during the charge conference, an instruction to suspend deliberations during the pendency of a request by the jury for more information or instruction. We reject the premise that the request for such a charge is sufficient to preserve the specific objection raised on appeal (*see People v Fleming*, 70 NY2d 947, 948 [1988]). In order to properly preserve an argument, a defendant must make

2. Although defendant initially contended that County Court committed a mode of proceedings error thereby obviating the need for preservation, he concedes in his reply brief that preservation was required.

a specific objection that would permit the court to cure the alleged error in real time (*see* CPL 470.05 [2]; *see also* *People v Keschner*, 25 NY3d 704, 721-722 [2015]; *People v Douglass*, 115 AD3d 1055, 1057 [3d Dept 2014]). On that, there is a clear distinction between the argument that a charge should have been provided to the jury that deliberations should always pause when a jury note is pending (*see* *People v Bonaparte*, 196 AD3d 866, 869 [3d Dept 2021], *lv denied* 37 NY3d 1025 [2021]; *People v Woodridge*, 30 AD3d 898, 900 [3d Dept 2006], *lv denied* 7 NY3d 852 [2006]; *People v Udzenski*, 146 AD2d 245, 251 [2d Dept 1989], *lv denied* 74 NY2d 853 [1989]) and the argument now advanced on appeal suggesting that the note at issue implicated a fundamental issue to the case and, in turn, that the court should have suspended deliberations until an answer to the note was provided (*see* *People v Mack*, 27 NY3d 534, 543 [2016]; *see also* *People v Morse*, 182 AD2d 781, 781 [2d Dept 1992]). The latter argument was not raised in response to the jury note, rendering that specific argument unpreserved (*see* *People v Alvarez*, 239 AD2d 263, 263 [1st Dept 1997], *lv denied* 90 NY2d 1009 [1997]; *People v Frye*, 192 AD2d 412, 412 [1st Dept 1993], *lv denied* 82 NY2d 894 [1993]). Moreover, to the extent that defendant asks us to exercise our interest of justice jurisdiction in response to this argument, we decline to do so based upon the circumstances presented here (*see* *People v Agosto*, 73 NY2d 963, 967 [1989]; *People v Robtoy*, 144 AD3d 1190, 1193 [3d Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Douglass*, 115 AD3d at 1057; *People v Sorrell*, 108 AD3d 787, 793 [3d Dept 2013], *lv denied* 23 NY3d 1025 [2014]; *People v Albanese*, 45 AD3d 691, 692 [2d Dept 2007], *lv denied* 10 NY3d 761 [2008]; *compare* *People v Morse*, 182 AD2d at 781).

Finally, defendant concedes that his argument suggesting that the investigating officer improperly bolstered the victim's testimony is unpreserved and, to the extent that defendant relies on these issues in support of his argument that counsel was ineffective, we find that argument lacking in merit. Defendant focuses on that part of the officer's testimony that generally reflected his considerations in deciding to pursue the investigation into the victim's allegations, including his assessment that the information he possessed at that time did not establish that she was motivated to fabricate the allegations (*see generally* *People v Gross*, 26 NY3d 689, 695 [2016]; *People v Ludwig*, 24 NY3d 221, 231 [2014]; *compare* *People v Pabon*, 28 NY3d 147, 157 [2016]). Even if we did deem the officer's statements objectionable, the latter point clearly informed defense counsel's cross-examination, which sought to emphasize the of-

ficer's failure to consider alternative theories and suggest to the jury that the investigation was flawed, which dispels the notion that defense counsel's failure to object "lacked a legitimate strategic purpose" (*People v Saunders*, 220 AD3d 812, 813 [2d Dept 2023], *lv denied* 40 NY3d 1041 [2023]; *see People v Lall*, 223 AD3d 1098, 1110 [3d Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Njoku*, 218 AD3d 1047, 1052 [3d Dept 2023], *lv denied* 40 NY3d 1093 [2024]). Similarly, defendant mischaracterizes the officer's testimony with respect to children's susceptibility to influence. The officer did not definitively state that the victim in this case was not susceptible to influence; rather, he acknowledged on cross-examination that minors were indeed more susceptible. This type of general testimony did not constitute impermissible vouching for the victim's credibility.³ Accordingly, we find no merit to defendant's argument that counsel's failure to object in either instance constituted the type of singular error that requires reversal (*see People v Cook*, 206 AD3d 1236, 1241 [3d Dept 2022]; *People v Mehmood*, 112 AD3d 850, 852 [2d Dept 2013]; *see also People v Englert*, 130 AD3d 1532, 1533-1534 [4th Dept 2015], *lvs denied* 26 NY3d 967 [2015], 26 NY3d 1144 [2016]). Beyond defendant's claimed errors, our review of the record readily reflects that defense counsel made a pretrial motion that successfully obtained a reduction in the sole charge of the indictment, made appropriate opening and closing remarks, engaged in thorough direct and cross-examination during trial and otherwise pursued a cogent defense theory (*see People v Williams*, 234 AD3d 1180, 1184 [3d Dept 2025], *lv denied* 43 NY3d 966 [2025]; *People v Lopez*, 226 AD3d 1165, 1166-1167 [3d Dept 2024], *lv denied* 42 NY3d 905 [2024]; *People v Wilkins*, 216 AD3d 1359, 1364-1365 [3d Dept 2023], *lv denied* 40 NY3d 1000 [2023]; *see also People v Barber*, 13 AD3d 898, 902 [3d Dept 2004], *lv denied* 4 NY3d 796 [2005]). Accordingly, we are satisfied that defense counsel provided competent representation.

Garry, P.J., Ceresia, Fisher and Mackey, JJ., concur. Ordered that the judgment is affirmed.

7 In the Matter of Andrei Nicolau, Petitioner, v Richard M. Platkin, as Justice of the Supreme Court, Respondent. [252 NYS3d 331]—

Licenses—Firearms—Revocation of Pistol Permit—Rational Basis and Not Arbitrary or Capricious

3. On redirect, the officer clarified that the younger a child victim was, the more susceptible he or she would be to influence, and that particular line of inquiry by the People was objected to by defense counsel.

Powers, J. Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to CPLR 506 [b] [1]) to review a determination of respondent which revoked petitioner's pistol permit.

Petitioner, who was previously granted certain firearms permits in the City of New York, was granted an Albany County pistol permit in 2019. In October 2023, petitioner went to the Schoharie County Sheriff's office to complete necessary fingerprinting for an out-of-state pistol permit. While there, petitioner made the Sheriff's deputy aware that he had purposely concealed on his person a Sig Sauer P365 air pistol—which is powered by carbon dioxide to shoot BBs and, by design, replicates a Sig Sauer P365 pistol. Based on this event, respondent suspended petitioner's Albany County pistol permit and directed him to surrender the permit and all handguns held pursuant to any New York permit.* After a hearing, his Albany County pistol permit was revoked. Petitioner commenced the instant proceeding pursuant to CPLR article 78 seeking to annul that determination.

Following the revocation of a firearm license, we “review whether a rational basis exists for the licensing authority's determination, or whether the determination is arbitrary and capricious” (*Matter of Nagi v Barrett*, 232 AD3d 1261, 1262 [4th Dept 2024] [internal quotation marks and citation omitted]; see *Matter of Husejnovic v DeProspo*, 225 AD3d 597, 598 [2d Dept 2024], *appeal dismissed* 41 NY3d 1008 [2024]; *Matter of Schmitt v Connolly*, 139 AD3d 1199, 1199 [3d Dept 2016]). With one exception not relevant here, a pistol “license may be revoked and cancelled at any time . . . elsewhere than in the city of New York by any judge or justice of a court of record” based on “conduct that would have resulted in the denial of a license” (Penal Law § 400.00 [11] [a]). Denial of a license is authorized when an applicant lacks “good moral character,” meaning that the applicant lacks “the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others” (Penal Law § 400.00 [1] [b]). “In determining whether to revoke a pistol license pursuant to Penal Law § 400.00 (11), a licensing officer is vested with broad discretion to resolve

* Respondent initially directed, among other things, that petitioner “surrender his pistol license and all firearms held by him pursuant to said license.” However, in light of petitioner holding permits granted by the City of New York, this was subsequently modified to require that petitioner “surrender said license and all handguns held by him pursuant to said license, or held pursuant to any other license to carry or possess concealed weapons issued by the State of New York or any political subdivision thereof.”

factual and credibility issues, and her or his determination is accorded great weight” (*Matter of Rosenberg v Neary*, 238 AD3d 1047, 1048 [2d Dept 2025] [citations omitted]; see *Matter of Nagi v Barrett*, 232 AD3d at 1262; *Matter of Hahn v Williams*, 107 AD3d 1346, 1346 [3d Dept 2013], *appeal dismissed* 22 NY3d 891 [2013]).

Revocation of petitioner’s pistol permit had a rational basis and is not arbitrary or capricious. The basic facts of the incident are uncontested. Namely, petitioner purposefully brought a Sig Sauer P365 air pistol—which, without thorough inspection, appeared to be a real handgun—into a sheriff’s office, where weapons are prohibited, and displayed it to test the reaction of the Sheriff’s deputy. Despite not being arrested as a result of the incident and assuming petitioner did not violate Penal Law § 265.01-e (see generally Penal Law § 265.00 [3]; *People v Colon*, 116 AD3d 1234, 1237 [3d Dept 2014], *lv denied* 24 NY3d 959 [2014]), this conduct demonstrated exceedingly poor judgment. This incident, in conjunction with petitioner’s admission that he has engaged in similar conduct in the past and would be inclined to do so in the future by bringing a replica firearm into a courthouse, evidences that he lacks “the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others” (Penal Law § 400.00 [1] [b]; see *Matter of Kantarakias v Hyun Chin Kim*, 226 AD3d 1020, 1021 [2d Dept 2024], *appeal dismissed* 42 NY3d 1040 [2024]; *Matter of DeAngelo v Burns*, 124 AD3d 1156, 1157 [3d Dept 2015]; *Matter of Dorsey v Teresi*, 26 AD3d 635, 636 [3d Dept 2006]). Respondent’s brief, colloquial statement that concealed carry is a privilege is not fatal to the revocation of petitioner’s permit in light of the accurate standard underlying the determination.

Petitioner’s additional claim that he was denied due process as a result of respondent’s failure to provide him the opportunity to review the body camera footage taken during the underlying incident is unpreserved as he made no such request during the hearing (see *Matter of Lamo [Commissioner of Labor]*, 205 AD3d 1297, 1298-1299 [3d Dept 2022]; see generally *Matter of Woojin Cho v New York State Dept. of Health, Bd. of Professional Med. Conduct*, 243 AD3d 1049, 1050-1051 [3d Dept 2025]). Nevertheless, this argument is without merit (see *Matter of Dickerson v Hart*, 226 AD3d 893, 894 [2d Dept 2024]; *Matter of Gerson v Ryder*, 226 AD3d 894, 896 [2d Dept 2024]; *Matter of DeAngelo v Burns*, 124 AD3d at 1157).

Aarons, J.P., Pritzker, Ceresia and Mackey, JJ., concur.

Adjudged that the determination is confirmed, without costs, and petition dismissed.

8 In the Matter of Andrew P. DeWolf, Appellant, v James V. McDonald, as Commissioner of Health, et al., Respondents. [251 NYS3d 447]—

Appeal—Academic and Moot Questions—Final Determination of Commissioner of Health That EMT Violated Basic and Advanced Life Support Treatment Protocols—Denial of Motion for Reargument or Renewal

Powers, J. Appeals (1) from a judgment of the Supreme Court (Andra Ackerman, J.), entered April 1, 2024, in Albany County, which granted respondents' motion to dismiss the petition, (2) from an order of said court, entered May 22, 2024, in Albany County, which, among other things, granted that part of petitioner's motion seeking renewal and, upon renewal, adhered to its prior decision and (3) from an order of said court, entered December 3, 2024, in Albany County, which, among other things, denied petitioner's motion for renewal.

In June 2021, respondent Department of Health (hereinafter DOH) served petitioner with a notice of hearing and statement of charges, alleging that, between 2018 and 2019, petitioner endangered the lives of 26 patients in his care as an emergency medical technician (hereinafter EMT).^{*} Petitioner contested the charges and, after an evidentiary hearing, an Administrative Law Judge (hereinafter ALJ) issued a report and recommendation that the charges be sustained, petitioner's EMT certification be revoked and he be fined \$26,000. Petitioner filed exceptions to the report and recommendation administratively and, significant to this appeal, separately commenced the instant proceeding pursuant to CPLR article 78. Respondents moved to dismiss the proceeding for failure to exhaust administrative remedies, which Supreme Court granted in an April 2024 judgment. Petitioner then moved for reargument and/or renewal and, in a May 2024 order, the court granted renewal and, upon reviewing papers which it had not in the first instance, adhered to its prior decision. Subsequently, in July 2024, respondent Commissioner of Health issued a final determination which adopted the ALJ's report and recommendation. Petitioner again moved for renewal of the April 2024 judgment dismissing the petition and attached to that motion, among other things, the Commissioner's final determi-

^{*} DOH charged petitioner with 134 violations of basic and advanced life support treatment protocols; namely, that he failed to regularly monitor patients' vital signs, failed to follow instructions from supervising physicians and overdosed patients on various controlled substances.

nation. In a December 2024 order, the court denied the second motion seeking renewal on the basis that petitioner failed to demonstrate new facts or allege a change in the law. Petitioner appeals from the April 2024 judgment, as well as the May 2024 and December 2024 orders.

Petitioner does not dispute that, nearly one year after he commenced this proceeding, the Commissioner issued a final determination which adopted and made effective the ALJ's report and recommendation. As the final determination effectively supersedes the nonfinal report and recommendation, petitioner's rights would not be impacted by a determination on the soundness of the report and recommendation and, consequently, the arguments raised herein have been rendered moot (*see Matter of Lamb v New York State Dept. of Motor Vehs.*, 187 AD3d 1269, 1270 [3d Dept 2020]; *Matter of Direct Energy Servs., LLC v New York State Pub. Serv. Commn.*, 174 AD3d 1194, 1196 [3d Dept 2019]). Despite petitioner's urging to the contrary, the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). A challenge such as this is not likely to recur or evade review, as challenges to nonfinal administrative determinations are generally precluded under CPLR 7801 (1) and arguments as to the underlying merits can be made upon entry of a final determination (*see Matter of Viznitz Insts., Inc. v New York State Educ. Dept.*, 244 AD3d 1338, 1340 [3d Dept 2025]; *Matter of Marxuach v New York State Dept. of Corr. & Community Supervision*, 211 AD3d 1442, 1444 [3d Dept 2022]; *Matter of Duve v Richards*, 81 AD3d 1226, 1227-1228 [3d Dept 2011]). Indeed, petitioner has commenced a new CPLR article 78 proceeding contesting the final determination, which remains pending before this Court.

Accordingly, petitioner's appeal from the April 2024 judgment dismissing the petition and his appeals from those aspects of the May 2024 and December 2024 orders seeking renewal must be dismissed as moot. Relatedly, petitioner's appeal from the portion of the orders denying reargument must also be dismissed, as no appeal lies from the denial of a motion to reargue (*see Santiago v General Motors LLC*, 232 AD3d 1173, 1175 [3d Dept 2024]; *Matter of Center for Jud. Accountability, Inc. v New York State Joint Commn. on Pub. Ethics*, 228 AD3d 1148, 1148 n 2 [3d Dept 2024], *appeal dismissed* 43 NY3d 934 [2025]).

Garry, P.J., Clark, Pritzker and Corcoran, JJ., concur. Ordered that the appeals are dismissed, as moot, without costs.

9 Places in Saratoga, LLC, Appellant, v Frank J. Izzo et al., Respondents. [253 NYS3d 363]—

**Covenants—Covenant of Good Faith and Fair Dealing—Stipulation of Settlement—Proposed Rainwater Catchment System to Receive Runoff from Roof of Building Located on Adjoining Land
Adjoining Landowners—Entry on Adjoining Land to Make Repairs—Proposed Rainwater Catchment System to Receive Runoff from Roof of Building**

Clark, J.P. Appeal from an order of the Supreme Court (Richard Kupferman, J.), entered August 22, 2024, in Saratoga County, which (1) denied plaintiff's motion for partial summary judgment, and (2) searched the record and granted partial summary judgment to defendants.

Plaintiff and defendants own adjoining parcels of property in the City of Saratoga Springs, Saratoga County. Defendants' parcel is improved by a two-story building. For over 100 years, plaintiff's parcel featured a two-story wooden barn located approximately 10 feet beyond the north wall of defendants' building. Attached to the barn's south wall was a single-story structure that connected to the north wall of defendants' building.

In 2018, plaintiff demolished the preexisting structures on its parcel in connection with a plan to build a three-story building. Before beginning work in furtherance of the project, plaintiff commenced a special proceeding under RPAPL 881 seeking a license to access several adjoining lots to perform excavation work, to relocate a drainage line and to relocate a sewer line servicing defendants' parcel. Defendants answered the petition and, as relevant here, raised a concern that plaintiff's design for its new building would render the north wall of their building inaccessible for repairs, representing that they may agree to allow plaintiff to relocate the sewer line benefitting their parcel, but only if plaintiff agreed to undertake remedial measures to protect the north wall of their building. Annexed to defendants' answer was a letter from an architect that they had retained to review the scope of the project, who also raised a concern about plaintiff's proposal to address storm water runoff from the roof of defendants' building, which slopes downward toward the shared boundary line with plaintiff's parcel.

In November 2018, the parties entered a stipulation of settlement resolving the RPAPL 881 proceeding as against defendants (hereinafter the stipulation). Under paragraph 6, before defendants would agree to abandon the sewer line easement benefitting their parcel, plaintiff was required to have a structural engineer inspect the north wall of defendants' building "to determine and opine [on] the measures . . . to be undertaken to appropriately protect th[e] wall" during the construction process. Paragraph 7 provided that, upon receipt

of the structural engineer's report and prior to the commencement of construction, the parties "shall enter into discussions as to the nature [and] scope [of,] and [their] respective responsibilities for," such protective measures, which would "necessarily include the design . . . and construction[,] at [plaintiff's] sole cost and expense[,] of a rainwater catchment system to receive runoff" from the roof of defendants' building and plaintiff's proposed new building. Paragraph 8 stated that "[p]romptly after agreement upon and completion of the parties of their respective responsibilities [for] the protective measures, [defendants] shall execute an instrument . . . confirming termination [and] abandonment of any and all sewer and related utility easements" in favor of their property.

In accordance with the stipulation, plaintiff's structural engineer issued a report that recommended, among other things, structural repairs to the north wall of defendants' building prior to the commencement of construction. The report also raised a concern about potential water infiltration between defendants' building and plaintiff's proposed new building, explaining that the construction plans called for removing a preexisting roof gutter on the north wall of defendants' building even though roof drainage flowed toward plaintiff's new building from that direction and that "an alternate means of removing roof water" would be necessary. The report further warned that the projected height of plaintiff's new building would cause increased drifted snow buildup on the roof of defendants' building, which would require strengthening the existing roof or an alternative means of snow removal.

Upon receipt of the structural engineering report, the parties began discussions about a rainwater catchment system plaintiff was proposing to resolve the concerns about water runoff from defendants' roof. Defendants' architect, however, proposed a different solution. Despite negotiations in this regard, plaintiff's proposed system was never installed. Nevertheless, defendants executed a termination of easement agreement abandoning the sewer line easement benefitting their property, and plaintiff eventually began constructing its new building. At some point prior to or shortly after the commencement of construction, a gutter that ran along the north side of the roof of defendants' building was removed.¹

In December 2019, defendants moved by order to show cause for settlement of the stipulation executed during the RPAPL 881 proceeding and an order compelling plaintiff to pay for

1. The parties dispute who removed the gutter.

improvements to their roof to eliminate the possibility of its collapse from increased snow load accumulations. In support of such relief, defendants emphasized the concern about increased snow accumulations on their roof as set forth in the structural engineering report, explaining that the parties had attempted to negotiate a solution but were at an impasse. Defendants further emphasized that plaintiff had proceeded with the construction of its building without addressing the increased snow load concerns, averring that this was contrary to paragraph 7 of the stipulation. Supreme Court (Crowell, J.) denied the motion in January 2020.

Plaintiff subsequently commenced this action alleging that water runoff from the roof of defendants' building was infiltrating its new building, causing damage to its property. The complaint set forth causes of action for breach of the implied covenant of good faith and fair dealing, promissory estoppel, nuisance, trespass and negligence, and sought money damages as well as a permanent injunction "barring [defendants] from allowing any rainwater runoff" from the roof of their building onto plaintiff's property. Defendants joined issue and interposed various affirmative defenses, including that they had a prescriptive easement affording them "the right to discharge water . . . from [their] property on to plaintiff's property." Thereafter, plaintiff moved for partial summary judgment relative to its nuisance and trespass claims, which are premised upon defendants' alleged failure to address the water runoff from the roof of their building. Defendants opposed the motion, proffering, among other things, an expert affidavit in which a licensed engineer opined that "any water that may have penetrated [plaintiff's building] was from sources other than the roof of [defendants' building]" and stemmed from plaintiff's own actions. Finding that there were outstanding questions of fact as to the source of the water infiltration, Supreme Court denied plaintiff's motion.

A lengthy discovery period thereafter ensued, following which plaintiff filed another motion for partial summary judgment on its nuisance and trespass claims. Plaintiff's motion also sought summary judgment on liability relative to its causes of action for negligence and breach of the covenant of good faith and fair dealing, as well as dismissal of defendants' prescriptive easement affirmative defense. By decision and order entered August 22, 2024, Supreme Court (Kupferman, J.) denied plaintiff's motion for partial summary judgment and, after searching the record pursuant to CPLR 3212 (b), granted summary judgment in favor of defendants dismissing the causes of action alleging

a breach of the covenant of good faith and fair dealing and promissory estoppel. As an initial procedural matter, the court declined to consider the merits of plaintiff's successive motion for summary judgment relative to its nuisance and trespass claims, finding that plaintiff "failed to demonstrate that any new facts" existed to warrant revisiting the prior order denying plaintiff's motion for summary judgment on the same causes of action. The court otherwise found that there were questions of fact as to whether defendants' actions or omissions were a proximate cause of the water infiltration at plaintiff's building, precluding judgment as a matter of law in plaintiff's favor on its claim for negligence, and that questions of fact also existed on defendants' prescriptive easement affirmative defense. As for its decision to search the record and grant partial summary judgment to defendants on two of plaintiff's claims, the court found that no "rational factfinder" could find that defendants breached the covenant of good faith and fair dealing as it pertained to their conduct under the stipulation of settlement executed during the RPAPL 881 proceeding and that there were no genuine issues of material fact regarding plaintiff's promissory estoppel claim, compelling summary dismissal of both causes of action. Plaintiff appeals.²

Initially, plaintiff argues that Supreme Court abused its discretion in declining to consider the merits of its successive motion for summary judgment relative to its nuisance and trespass claims. We disagree. "Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause" (*Consolidated Mtge., LLC v Westport Golf Invs., LLC*, 141 AD3d 923, 925 [3d Dept 2016] [citations omitted], *lv dismissed* 28 NY3d 1102 [2016], quoting *MLCFC 2007-9 ACR Master SPE, LLC v Camp Waubeeka, LLC*, 123 AD3d 1269, 1271 [3d Dept 2014]; see *Wells Fargo Bank, N.A. v Leonardo*, 167 AD3d 814, 815 [2d Dept 2018], *lv denied* 34 NY3d 908 [2020]). Although additional discovery was conducted after plaintiff made its initial motion and plaintiff submitted additional evidence in support of its second motion, "evidence is not newly discovered simply because it was not submitted on the previous motion" (*Vinar v Litman*, 110 AD3d 867, 868 [2d Dept 2013] [internal quotation marks and citation omitted]).

2. Plaintiff does not challenge Supreme Court's decision to search the record and grant summary judgment in defendants' favor dismissing the claim for promissory estoppel, thereby abandoning any argument in this regard (see *Matter of Maidenbaum & Sternberg, LLP v New York State Dept. of Taxation & Fin.*, 243 AD3d 1054, 1056 [3d Dept 2025]).

“Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means” (*id.* at 868-869 [citations omitted]; see *Pavlovich v Zimmet*, 50 AD3d 1364, 1365 [3d Dept 2008]). The additional evidence submitted by plaintiff in support of its second motion did not establish facts that were unavailable to it at the time of its initial motion, and plaintiff did not point to any newly discovered evidence warranting a reconsideration of the prior order denying its initial motion for judgment as a matter of law on its trespass and nuisance claims. Accordingly, Supreme Court providently exercised its discretion in declining to do so (see *Consolidated Mtge., LLC v Westport Golf Invs., LLC*, 141 AD3d at 925; *MLCFC 2007-9 ACR Master SPE, LLC v Camp Waubeeka, LLC*, 123 AD3d at 1271-1272; *Vinar v Litman*, 110 AD3d at 869; *Pavlovich v Zimmet*, 50 AD3d at 1365).

Supreme Court also properly denied plaintiff’s motion for summary judgment on its negligence claim, which is premised upon an allegation that defendants breached a duty of care to maintain their property in a safe condition “by failing to install or maintain adequate drainage or take any sufficient preventative measures to control” the water runoff from their roof. Even assuming, without deciding, that plaintiff will be able to establish that defendants breached a duty of care owed to it in this regard, the expert affidavit defendants submitted in opposition to plaintiff’s motion raises several outstanding questions of fact on the issue of causation, including, but not limited to, whether any negligent acts or omissions on defendants’ part proximately caused the water infiltration problem at plaintiff’s building, whether the issue is solely attributable to plaintiff’s own negligent conduct and whether water runoff from defendants’ roof is a source of the problem (see *e.g. WFE Ventures, Inc. v GBD Lake Placid, LLC*, 197 AD3d 824, 827 [3d Dept 2021]; *Congregation B’nai Jehuda v Hiye Realty Corp.*, 35 AD3d 311, 312 [1st Dept 2006]). Moreover, contrary to plaintiff’s contention, Supreme Court also properly denied its motion for summary judgment dismissing defendants’ prescriptive easement affirmative defense, as plaintiff did not adequately brief this issue in its motion papers and there are several outstanding questions of fact precluding judgment as a matter of law in plaintiff’s favor (see *Vacation Vil. Homeowners Assn., Inc. v Town of Fallsburg*, 233 AD3d 1196, 1201 [3d Dept 2024]; *Barlow v Spaziani*, 63 AD3d 1225, 1227 [3d Dept 2009]).

We do, however, agree with plaintiff that Supreme Court

erred in searching the record and granting summary judgment to defendants dismissing the cause of action alleging a breach of the covenant of good faith and fair dealing relative to the 2018 stipulation. CPLR 3212 (b) “permits a court to search the record and grant summary judgment to a nonmoving party” on “a cause of action or issue that is the subject of the motions before the court” (*Schillaci v Sarris*, 122 AD3d 1085, 1088 [3d Dept 2014] [internal quotation marks and citation omitted]). However, “[s]ummary judgment is a drastic remedy” and should not be granted if there are genuine issues of material fact that remain outstanding (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). “It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)” (*Amici v Mazza*, 234 AD3d 1170, 1172 [3d Dept 2025] [internal quotation marks and citations omitted], *lv denied* 44 NY3d 902 [2025]).

The covenant of good faith and fair dealing is implied in every contract and “is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement” (*Fourth Branch Assoc. Mechanicville v Niagara Mohawk Power Corp.*, 235 AD2d 962, 965-966 [3d Dept 1997] [internal quotation marks and citations omitted]; *see* 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 [2002]; *Van Amburgh v Boadle*, 231 AD3d 187, 190 [3d Dept 2024]; *Integrity Intl., Inc. v HP, Inc.*, 211 AD3d 1194, 1198 [3d Dept 2022]). When parties “enter into a binding contract under which the[ir] obligations . . . are conditioned on the negotiation of future agreements,” the covenant of good faith and fair dealing requires such parties “to negotiate in good faith” (*IDT Corp. v Tyco Group, S.A.R.L.*, 23 NY3d 497, 502-503 [2014]). However, “that obligation can come to an end without a breach by either party,” as “[t]here is such a thing as a good faith impasse” (*id.* at 503; *see McGowan v Clarion Partners, LLC*, 188 AD3d 497, 497-498 [1st Dept 2020], *lv denied* 37 NY3d 903 [2021]). Whether a party has negotiated in good faith “necessitates examination of a state of mind [and] is [generally] not an issue which is readily determinable on a motion for summary judgment” (*Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d 485, 487 [1st Dept 2011] [internal quotation marks and citation omitted]).

Plaintiff’s cause of action for breach of the implied covenant of good faith and fair dealing is based upon an allegation that

defendants have failed to negotiate in good faith under the terms of the stipulation executed during the RPAPL 881 proceeding because they are refusing to agree to plaintiff's proposed rainwater catchment system—which plaintiff has agreed to pay for at its sole cost and expense—unless plaintiff undertakes substantial repairs to defendants' roof to account for the increased snow load accumulations posed by the construction project. Under paragraph 7 of the stipulation, once the parties received the report of plaintiff's structural engineer, they were required to “enter into discussions” about the nature and scope of, as well as the parties' respective responsibilities for, the protective measures to be undertaken to protect defendants' north wall during the construction process. Such measures were to “necessarily include” the design and construction of a rainwater catchment system to receive runoff from the roof of defendants' building. The plain and unambiguous language of this paragraph therefore required the parties to engage in good faith negotiations about a rainwater catchment system, but it did not require a specific system to be utilized or for the parties to reach an agreement in that regard (see *IDT Corp. v Tyco Group, S.A.R.L.*, 13 NY3d 209, 214 [2009]).

Here, the record reflects that, instead of refusing to entertain any solution to address the water runoff concerns from their roof, defendants worked with an architect to propose an alternative design for a rainwater catchment system after the architect raised concerns about plaintiff's proposal. The record further demonstrates that defendants continued to engage in discussions with plaintiff's representatives in that regard. At the same time, there is also evidence in the record tending to support plaintiff's claim that defendants' objection to plaintiff's proposal was based, at least in part, on plaintiff's failure to agree to reconstruct defendants' roof to protect against increased snow load accumulations. Although defendants had a founded concern about excess snow accumulations on their roof resulting from the height of plaintiff's new building, and the representations they made in support of their 2019 motion to compel reveal their belief that paragraph 7 of the stipulation required plaintiff to address this issue, the stipulation is silent as to any obligation by plaintiff in this regard and it is unclear whether this was a topic of the settlement discussions. Mindful that summary judgment is a drastic remedy, and regardless of whether plaintiff may ultimately prevail on its claim, there is a question of fact as to whether defendants are conditioning their assent to plaintiff's proposed rainwater catchment system on extracontractual demands and whether they have engaged in

good faith negotiations in this regard (*see Integrity Intl., Inc. v HP, Inc.*, 211 AD3d at 1199; *Fonda v First Pioneer Farm Credit, ACA*, 86 AD3d 693, 695 [3d Dept 2011]; *Credit Suisse First Boston v Utrecht-America Fin. Co.*, 80 AD3d at 487). Thus, Supreme Court erred in searching the record and granting judgment as a matter of law in defendants' favor on the cause of action for breach of the implied covenant of good faith and fair dealing.

The parties' remaining contentions, to the extent not expressly addressed, have been considered and found lacking in merit.

Pritzker, McShan, Powers and Corcoran, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as searched the record and granted summary judgment to defendants dismissing the cause of action asserting a breach of the implied covenant of good faith and fair dealing; and, as so modified, affirmed.

10 Lisa S. Wissert, as Administrator of the Estate of William R. Wissert, Deceased, Appellant-Respondent, v Medline Industries Inc., Defendant and Third-Party Plaintiff-Respondent-Appellant; Pengate Handling Systems of New York, Inc., Third-Party Defendant-Respondent. [252 NYS3d 322]—

Labor—Safe Place to Work—Hydraulic System Work Constituted Repair and Not Routine Maintenance—Triable Issue as to Whether Safety Stand was Provided for Technician to Service Order Picker Machine

Mackey, J. Cross-appeals from an order of the Supreme Court (Martin Auffredou, J.), entered September 23, 2024, in Warren County, which (1) denied plaintiff's motion for partial summary judgment, (2) partially granted defendant's cross-motion for, among other things, summary judgment dismissing plaintiff's complaint, and (3) granted summary judgment dismissing the third-party complaint.

William R. Wissert (hereinafter decedent) was a technician working for third-party defendant Pengate Handling Systems of New York, Inc. (hereinafter Pengate) when he suffered fatal injuries. On the date in question, he went to a facility owned by defendant to service an order picker (hereinafter the picker)—this particular machine, which is similar to a forklift, was fitted with a platform upon which a person can stand that can be hydraulically raised and lowered. Decedent proceeded to examine and disassemble the picker, at which time the picker's raised platform fell upon decedent, causing his death.

Plaintiff, in her capacity as the administrator of decedent's estate, commenced this action against defendant for claims

arising under Labor Law §§ 200, 240 (1), 241 (6), common-law negligence and wrongful death. Defendant in turn filed a third-party action against Pengate for indemnification and contribution. Plaintiff thereafter moved for partial summary judgment on the Labor Law § 240 (1) claim, arguing that the lack of a safety device—namely, a “safety stand”—constituted a violation of the Labor Law and thus entitled her to summary judgment on that claim.¹ Defendant opposed plaintiff’s motion, cross-moved for summary judgment dismissing all of plaintiff’s claims and further argued that it was entitled to common-law indemnification from Pengate. Pengate supported defendant’s cross-motion for summary judgment against plaintiff, but opposed defendant’s motion as to Pengate. Supreme Court ultimately found that defendant had demonstrated that decedent was not engaged in work at the time of the accident and that plaintiff failed to raise an issue of fact in this regard. Accordingly, the court denied plaintiff’s motion and granted defendant’s cross-motion, dismissing plaintiff’s complaint. In light of this, the court found defendant’s motion as to Pengate to be “academic” and dismissed the third-party complaint. These cross-appeals by plaintiff and defendant ensued.

Plaintiff primarily contends that Supreme Court erred in denying her motion for summary judgment as to her Labor Law § 240 (1) cause of action, and defendant in turn argues that it was properly awarded summary judgment on that issue. We reverse the award of summary judgment, as we find several questions of fact preclude such an award on plaintiff’s Labor Law § 240 (1) claim in favor of either party (*see Nusbaum v 1455 Wash. Ave., LLC*, 240 AD3d 1113, 1114 [3d Dept 2025]). “Labor Law § 240 (1)’s list of required safety devices (e.g., ‘scaffolding,’ ‘hoists,’ ‘braces,’ ‘irons’ and ‘stays’) . . . evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise . . . [from] such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993] [internal quotation marks and citations omitted]), and it is well settled that this protective provision “is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed” (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991])

1. The maintenance manual for the picker provides that “[w]hen it is necessary to perform a procedure with the operator’s platform elevated,” a safety stand (i.e., a long metal pole) should be placed “between the carriage and baseleg” to prevent the platform from dropping.

[internal quotation marks and citations omitted]). Relevant here, the provision “requires that contractors, owners and their agents provide elevation-related safety devices that are so constructed, placed and operated as to give proper protection to any laborer engaged in the . . . repairing . . . of a building or structure, and a failure to do so results in liability for any injuries proximately caused thereby” (*Breslin v Access Auto Sales & Serv., LLC*, 239 AD3d 1119, 1120 [3d Dept 2025] [internal quotation marks and citation omitted]).²

“Repairing is distinguished from the uncovered activity of routine maintenance, which involves replacing components that require replacement in the course of normal wear and tear” (*Alexander v Hart*, 64 AD3d 940, 943 [3d Dept 2009] [internal quotation marks and citation omitted]; see *Markou v Sano-Rubin Constr. Co., Inc.*, 182 AD3d 674, 675-676 [3d Dept 2020]), whereas work that is occasioned by an “isolated and unexpected event” constitutes repair work under the protection of Labor Law § 240 (1) (*Eherts v Shoprite Supermarkets, Inc.*, 199 AD3d 1270, 1272 [3d Dept 2021]; see *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 987 [3d Dept 2009]). Liability is nevertheless precluded where a worker “(1) had adequate safety devices available, (2) knew both that the safety devices were available and that they were expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice” (*Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d 1166, 1167-1168 [2020] [internal quotation marks, brackets and citation omitted]; accord *Burgos v Darden Rests., Inc.*, 234 AD3d 1037, 1039 [3d Dept 2025]).

Even assuming that defendant and plaintiff met their respective prima facie burdens on summary judgment, we conclude that each successfully raised issues of fact precluding summary judgment in favor of either party as to the Labor Law § 240 (1) claim. In support of her motion, plaintiff submitted the deposition testimony of Michael Hill, a technician employed by Pengate and decedent’s coworker at the time of the accident. Hill testified that, after being informed that the picker in question needed work, he examined it prior to the day of the accident and identified the problem to be a leaking

2. On appeal, defendant and Pengate do not argue that the fall of the picker’s platform upon decedent is, in and of itself, an accident outside the protection of Labor Law § 240 (1). We find that the fall of the platform at issue here is precisely the type of gravity-related accident covered under the statute (see *Jiron v China Buddhist Assn.*, 266 AD2d 347, 349 [2d Dept 1999]).

lift cylinder. That problem required repacking of the hydraulics, which involved raising and securing the picker's platform, removing the cylinder and then installing new seals. According to Hill, this is a two-to-five-hour job and, unlike replacing a filter on a hydraulic system, which would be considered scheduled maintenance, was outside the scope of scheduled maintenance and required a separate work order.³ Hill testified that, on the day of the accident, he and decedent moved the picker to the loading dock and raised the platform "to begin the repair process," albeit without securing the platform's elevated position. Shortly thereafter, however, Hill testified that decedent determined that the parts kit provided to them was incorrect, such that they could not proceed. Hill explained that decedent nevertheless said to him, "Let me just take a look at it, and let me just get this snap ring off," before decedent walked over to the picker. Hill stated that removal of the snap ring is part of the repacking procedure and that he then observed decedent trying to remove the snap ring with a pair of snap ring pliers. Thereafter, while Hill briefly returned to his work van to retrieve a manual, the picker's platform fell upon decedent. Hill testified that he had previously worked with decedent on repacking hydraulics and that, at that time, they had chained the platform of the picker to a mast with a chain that decedent had brought with him.

Plaintiff also relied upon the affidavit of Edward Zemeck, a professional engineer. Therein Zemeck opined that the hydraulic system work to be performed by decedent constituted a repair and not routine maintenance, as it stemmed from an isolated event. Zemeck further averred that the appropriate safety device to be employed was a safety stand, which did not appear to have been provided or made known to decedent despite such device being required pursuant to the picker's maintenance manual. To the extent that decedent had apparently previously used a chain to secure the platform, Zemeck explained that such was not an appropriate safety device as it could not have served its intended purpose because there was no place to properly rig the chain to prevent the platform from falling. The picker's maintenance manual supports Zemeck's opinion, warning that "[w]hen it is necessary to perform a pro-

3. The "Scheduled Maintenance Agreement" between defendant and Pengate appears to confirm Hill's testimony, as repacking hydraulics is not listed as a service provided routinely, on a scheduled basis. Rather, repacking the hydraulics would ostensibly come under that part of the agreement addressing "additional repairs."

cedure with the operator's platform elevated, place a safety stand between the carriage and baseleg."⁴

Defendant in turn submitted its scheduled maintenance agreement with Pengate, emphasizing that hydraulic leaks are expressly listed. We note, however, that although the agreement is identified as one for "maintenance" and notes that work should be "carried out once every service interval," it also provides that "[r]epairs will be carried out at current rates for labor, parts and expenses." In support of defendant's motion, Pengate also submitted the expert affidavit of Joseph Danatzko, a professional engineer. Danatzko opined that Labor Law § 240 (1) was not violated here because decedent was not performing a repair at the time of the incident and, further, that a chain was an appropriate safety device that could have prevented the accident and was readily available.

Upon this record, we find that ample evidence was presented to raise triable issues of fact as to whether decedent's work activities fell within the protections afforded by Labor Law § 240 (1). Indeed, "delineating between routine maintenance and repairs is frequently a close, fact-driven issue" (*Pakenham v Westmere Realty, LLC*, 58 AD3d at 987). We similarly find that issues of fact were raised as to whether appropriate safety devices were provided to decedent and whether he had engaged in any conduct precluding liability (*see generally Biaca-Neto v Boston Rd. II Hous. Dev. Fund Corp.*, 34 NY3d at 1167-1168). Nor is Supreme Court's finding that decedent was not engaged in "work" at the time of the accident supported by the record. Rather, Hill's testimony that decedent was seen attempting to remove a snap ring, which is part of the repacking procedure, mere seconds before the accident, raises a question of fact in that regard. Accordingly, summary judgment as to plaintiff's Labor Law § 240 (1) cause of action should have been denied (*see Breslin v Access Auto Sales & Serv., LLC*, 239 AD3d at 1122; *Burgos v Darden Rests., Inc.*, 234 AD3d at 1039-1040; *Hawver v Steele*, 204 AD3d 1125, 1129 [3d Dept 2022]; *Pakenham v Westmere Realty, LLC*, 58 AD3d at 988; *see also Alexander v Hart*, 64 AD3d at 943).

We agree with plaintiff that, as the dismissal of her wrongful death claim was predicated solely upon Supreme Court's finding of no liability under her Labor Law § 240 (1) cause of action, it should be reinstated. In light of this, that part of Supreme Court's order dismissing the third-party complaint as academic must also be reversed.

4. The maintenance manual provides that a chain may instead be used to "stabilize the mast," a situation not at issue in this case.

Reynolds Fitzgerald, J.P., Ceresia, Fisher and McShan, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as dismissed plaintiff's Labor Law § 240 (1) and wrongful death claims and defendant's third-party complaint, and, as so modified, affirmed.

11 Darwish Auto Group, LLC, et al., Respondents, v TD Bank, N.A., Defendant, and Walid Darwish, Appellant. (And a Third-Party Action.) [253 NYS3d 352]—

Limited Liability Companies—Members and Managers—Breach of Fiduciary Duty of Member and Sole Shareholder of Auto Group Formed for Purpose of Acquiring and Operating Car Dealerships—Unilateral Modification of Access to Various Bank Accounts Maintained by Dealerships without Authorization—Conversion of Corporate Funds for Personal Use

Injunctions—Preliminary Injunction—Sale, Disposition or Transfer of Auto Dealerships Barred as Well as Associated Real Estate during Pendency of Declaratory Judgment Action

Clark, J. Appeals (1) from that part of an order of the Supreme Court (Richard Platkin, J.), entered September 12, 2024, in Albany County, which required defendant Walid Darwish to file an accounting and monthly statements, (2) from that part of an order of said court, entered September 12, 2024, in Albany County, which required defendant Walid Darwish to post an undertaking, and (3) from an order of said court, entered December 31, 2024, in Albany County, which, among other things, partially granted plaintiffs' motion for partial summary judgment and to dissolve a preliminary injunction.

This matter comes to us for a second time (*see* 224 AD3d 1115 [3d Dept 2024]). Defendant Walid Darwish (hereinafter defendant) is the member and sole shareholder, respectively, of plaintiffs Darwish Auto Group, LLC (hereinafter DAG) and Darwish General Corp. (hereinafter DGC)—entities formed in June 2021 for the purpose of acquiring and operating car dealerships. In connection with an endeavor to acquire 10 car dealerships in upstate New York, defendant also formed separate limited liability companies (hereinafter the dealership companies) pertaining to each dealership.

Defendant thereafter secured \$62 million in funding from an affiliate of the Potamkin Automotive Group, 2427 Investments, Inc. (hereinafter the lender), to purchase the 10 dealerships at issue. However, the funding was conditioned upon defendant's assent to reorganize plaintiffs so that they would be controlled by a management committee and a board of directors (hereinafter the governing bodies) consisting of defendant and two individuals affiliated with the lender—i.e., third-party defendants Barry Frieder and Mark Manzo—with no member having

the authority to unilaterally act on plaintiffs' behalf. Under the financing deal, plaintiffs would each hold a 50% ownership interest in the dealerships and defendant would be retained by plaintiffs to manage the dealerships pursuant to a separate employment agreement.¹

A few months after the financing deal was implemented, plaintiffs commenced this action alleging that defendant had unilaterally modified access to various TD Bank accounts maintained by the dealerships without authorization. Consequently, plaintiffs' original complaint sought a declaratory judgment directing defendant TD Bank, N.A. to implement plaintiffs' requested changes to the account access and precluding defendant from making further unilateral changes thereto.² In a subsequently filed amended complaint, plaintiffs also sought a declaration that they are managed by a majority of the members of their governing bodies, instead of defendant alone, and that such governing bodies also have the authority to "manage, direct, and control the business, property, and affairs" of plaintiffs and the dealerships, including the right to direct access to the TD Bank accounts and to authorize dealership sales "without interference from" defendant. Plaintiffs' amended complaint also interposed claims for breach of contract and breach of fiduciary duties based upon, among other things, defendant's alleged interference with the directives of plaintiffs' governing bodies and his refusal to cooperate with potential dealership sales. Defendant joined issue, asserted various counterclaims and affirmative defenses, and commenced a third-party action against four named individuals affiliated with the lender—including Frieder and Manzo—as well as 10 Jane and John Does.

Following extensive procedural history not directly relevant here, plaintiffs discovered that defendant had initiated an unauthorized advance of several million dollars from Ford Motor Credit Company LLC (hereinafter referred to as the Ford Advance) against certain future profits from the Ford dealerships operated by plaintiffs. Consequently, plaintiffs moved for a preliminary injunction requiring defendant to return the allegedly misappropriated funds and to cease further dissipation

1. Pursuant to the terms of a contribution agreement defendant signed in connection with the funding deal, plaintiffs would subsequently assign their membership interests in the dealerships to a new entity—i.e., DP Dealership Holdings, LLC—once each manufacturer affiliated with the dealerships consented to the change in ownership.

2. Plaintiffs also sought a preliminary injunction requesting such relief during the pendency of the action, which Supreme Court granted and which this Court affirmed upon defendant's appeal (*see* 224 AD3d at 1119).

of company assets during the pendency of the action. In February 2024, Supreme Court partially granted the motion to the extent of enjoining defendant from dissipating “any of the [Ford Advance] funds in his possession,” but otherwise denied the remainder of the relief requested in the motion.

Upon learning that defendant had dissipated a large portion of the Ford Advance funds, plaintiffs moved to, among other things, compel defendant’s compliance with the February 2024 order. Around the same time, defendant filed a motion alleging that plaintiffs and the third-party defendants were in ongoing negotiations for the sale of certain dealerships and sought, among other things, a preliminary injunction barring the sale, disposition or transfer of the dealerships, as well as their associated real estate, during the pendency of the action.

By decision and order entered September 12, 2024 (hereinafter the first preliminary injunction order), Supreme Court denied so much of plaintiffs’ motion as sought to compel defendant’s return of the Ford Advance funds, but directed defendant to provide an accounting of such funds within 30 days and to furnish monthly account statements to plaintiffs thereafter. In a second order entered the same date (hereinafter the second preliminary injunction order), Supreme Court, as relevant here, enjoined plaintiffs and the third-party defendants from transferring or disposing of the dealerships during the pendency of the action and directed that defendant post an undertaking of \$3 million within 30 days (*see* CPLR 6312 [b]).

Prior to entry of the two preliminary injunction orders, plaintiffs moved for partial summary judgment on liability relative to all of their claims. Defendant opposed the motion and cross-moved for partial summary judgment on certain of his counterclaims and third-party claims, arguing, among other things, that he owned and controlled the dealerships, that he “never agreed to [a] change in the status of the management of” plaintiffs, and that plaintiffs and the third-party defendants misappropriated dealership funds, used his confidential bank token to conceal the misappropriation, and engaged in a scheme to oppress him and destroy the dealerships’ business. Defendant also moved to reargue and/or renew so much of the second preliminary injunction order as required him to post an undertaking, and plaintiffs moved to dissolve the second preliminary injunction order precluding the sale of the dealerships during the pendency of the action.

By decision and order entered December 31, 2024, Supreme Court granted plaintiffs’ motion for partial summary judgment, denied defendant’s cross-motion for partial summary judgment,

denied defendant's motion to reargue and/or renew, and granted plaintiffs' motion to dissolve the second preliminary injunction order. Supreme Court found, as relevant here, that plaintiffs were entitled to summary judgment on their claim seeking a declaration that plaintiffs and the dealerships are managed and controlled by the governing bodies and not by defendant alone, rejecting defendant's arguments in opposition and concluding that there were no triable issues of fact precluding judgment as a matter of law in that regard. Supreme Court also concluded that plaintiffs established their entitlement to summary judgment on their breach of contract claim alleging that defendant breached his employment agreement with plaintiffs by interfering with the directives of their governing bodies, and that he also breached his fiduciary duties to plaintiffs by converting the Ford Advance, as well as another advance from Nissan Extended Services North America (hereinafter the Nissan Advance), to his own benefit.

As for defendant's cross-motion, Supreme Court found that there were outstanding questions of fact precluding judgment as a matter of law in his favor on certain of his counterclaims and third-party claims, and that he otherwise did not meet his prima facie burden on his claims for an accounting and declaratory relief. In conjunction with its determination that plaintiffs' governing bodies are authorized to manage the dealerships without interference from defendant, Supreme Court held that the second preliminary injunction order barring plaintiffs' sale of the dealerships was "erroneously granted and should be dissolved," rendering academic defendant's challenge to the amount of the undertaking ordered in connection therewith. Defendant appeals from so much of the first preliminary injunction order as directed an accounting of the Ford Advance funds, so much of the second preliminary injunction order as directed him to post an undertaking, and the entirety of the December 2024 order.³

Turning first to the appeal from the first preliminary injunction order, we disagree with defendant's contention that Supreme Court exceeded its powers by sua sponte directing an accounting of the Ford Advance funds. Although plaintiffs' no-

3. This Court denied defendant's motion to stay the December 2024 order pending appeal (*see* 2025 NY Slip Op 61896[U] [3d Dept 2025]). Defendant has since noticed an appeal from a subsequent Supreme Court order granting a motion by plaintiffs to strike his demand for a jury trial and denying a motion by plaintiffs for sanctions; such appeal has yet to be perfected. A review of NYSCEF reveals that, as of December 1, 2025, a nonjury trial in this matter was ongoing. During oral argument before this Court, counsel for plaintiffs confirmed that the dealerships have been sold.

tice of motion to compel did not specifically seek an accounting of such funds (*see* CPLR 2214 [a]), it contained a general prayer for “further relief as the Court deems just,” thereby authorizing the court, in its discretion, “to grant relief that [was] not too dramatically unlike that which [was] actually sought” (*Meadow at Clarke Hollow Bay, LLC v White*, 155 AD3d 1325, 1325-1326 [3d Dept 2017] [internal quotation marks and citation omitted]; *see Willette v Willette*, 53 AD3d 753, 755 [3d Dept 2008]). An accounting of the Ford Advance funds was aimed at preventing the further dissipation of such funds in defendant’s possession and, thus, served a similar purpose as plaintiffs’ request to compel compliance with the February 2024 order precluding the dissipation of such funds. Supreme Court’s order directing an accounting of such funds was also grounded in a sufficient evidentiary basis (*compare Bank of Am., N.A. v Amigon*, 241 AD3d 479, 481 [2d Dept 2025]) and we discern no “substantial prejudice” to defendant in the court having done so (*Czajka v Pendell*, 174 AD3d 970, 971 [3d Dept 2019] [internal quotation marks and citation omitted]).

Next, defendant’s appeal from the second preliminary injunction order challenging the amount of the undertaking issued in connection therewith must be dismissed. The December 2024 order on the parties’ respective summary judgment motions dissolved the second preliminary injunction order, thereby also effectively terminating defendant’s obligation to post an undertaking (*see* CPLR 6312 [b]). As no undertaking was posted by defendant and the obligation to post an undertaking is no longer effective, defendant’s argument challenging the amount thereof is moot and we discern no basis to apply the mootness exception (*see General Elec. Co. v Metals Resources Group*, 293 AD2d 417, 419 [1st Dept 2002]; *Honeywell, Inc. v Technical Bldg. Servs.*, 103 AD2d 433, 435 [3d Dept 1984]).

We also discern no basis upon which to disturb Supreme Court’s grant of summary judgment to plaintiffs on their claim for declaratory relief. In that regard, plaintiffs sought, among other things, a declaration that a majority of the members of their governing bodies “have the power to manage, direct, and control the business, property, and affairs of [plaintiffs] and the [d]ealerships,” including the right to authorize dealership sales, without interference from defendant. Entitlement to such a declaration turns on an interpretation of the relevant corporate documents at issue and is subject to ordinary principles of contract interpretation (*see Harris v Reagan*, 177 AD3d 1056, 1057 [3d Dept 2019]; *Maldonado v DiBre*, 140 AD3d 1501, 1506 [3d Dept 2016], *lv denied* 28 NY3d 908

[2016]). Contracts must be “construed in accord with the parties’ intent” (*Ficel Transp., Inc. v State of New York*, 209 AD3d 1153, 1155 [3d Dept 2022] [internal quotation marks and citations omitted]), which is best adduced through the contractual language itself (see *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Thus, “a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Donohue v Cuomo*, 38 NY3d 1, 13 [2022] [internal quotation marks, brackets, and citations omitted]; see *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 38 NY3d 169, 178 [2022]; *Greenfield v Philles Records*, 98 NY2d at 569). Whether a contract is ambiguous is a question of law that requires resort to “the four corners of the document,” affording each term its “plain and ordinary meaning” and without consideration of “outside sources” (*Daire v Sterling Ins. Co.*, 204 AD3d 1189, 1190-1191 [3d Dept 2022] [internal quotation marks and citations omitted]; see *Integrity Intl., Inc. v HP, Inc.*, 211 AD3d 1194, 1196 [3d Dept 2022]).

In support of their motion for summary judgment, plaintiffs submitted, among other things, the Borrowing Agreement defendant signed to secure the \$62 million in funding to purchase the dealerships, which, as relevant here, stated that DAG would be governed by the terms of an amended Operating Agreement, dated April 18, 2022, and DGC would be governed by the terms of a Shareholder’s Agreement executed the same date (hereinafter collectively referred to as plaintiffs’ amended governing documents). The Borrowing Agreement further provided that plaintiffs would be managed by three-member governing bodies, which, in turn, would have “the right, power and authority to make all decisions on behalf of each of the [d]ealership [c]ompanies,” including “all decisions regarding the acquisition, management . . . , operations, financing, accounting and sale of any or substantially all of . . . their assets.”

Consistent with the Borrowing Agreement, plaintiffs’ amended governing documents, which bear defendant’s signature, expressly delegated management of plaintiffs to their governing bodies and provided that a “decision by [a] majority” of the members thereof “shall be required to authorize any actions taken” on plaintiffs’ behalf. The amended governing documents also granted plaintiffs’ governing bodies the right to manage “the business, property and affairs of the [d]ealership [c]ompanies, so long as the [d]ealership [c]ompanies are member managed and owned directly by [plaintiffs].” Defendant signed documents in which he delegated himself, as

well as Frieder and Manzo, as the members of plaintiffs' governing bodies, and signed his employment agreement with DGC, which listed defendant as the president of the dealerships, provided that he would "report to [plaintiffs' governing bodies]" in that capacity.

Based upon the plain and unambiguous language of the aforementioned documents, we agree with Supreme Court that plaintiffs established, *prima facie*, that defendant delegated plaintiffs' management to three-member governing bodies, which, in turn, also had the right to manage the affairs of the dealerships, including the right to authorize their sale (*see generally* *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 38 NY3d at 178; *Donohue v Cuomo*, 38 NY3d at 13). The burden therefore shifted to defendant to demonstrate a triable issue of fact in opposition to plaintiffs' cause of action seeking a declaration to that end.

We agree with Supreme Court that defendant did not satisfy such burden. In that regard, defendant submitted several corporate documents that he claimed raised a question of fact as to plaintiffs' management structure, including copies of plaintiffs' original governing documents that were in existence prior to the funding deal. Although plaintiffs' original governing documents set forth that defendant had exclusive management authority over plaintiffs at the time they were in existence, this does not create a question of fact as to plaintiffs' *current* management structure, as the amended governing documents contained a clear and unambiguous merger clause providing that they superseded "all prior and contemporaneous" agreements on the same subject matter (*see Xi Mei Jia v Intelli-Tec Sec. Servs., Inc.*, 114 AD3d 607, 608 [1st Dept 2014]; *Kindler v Newsweek, Inc.*, 277 AD2d 159, 160 [1st Dept 2000]). Nor did defendant establish a triable issue of fact by highlighting portions of his deposition testimony during which he indicated he had not reviewed the amended governing documents prior to signing them. The record confirms that defendant, a sophisticated party, was represented by counsel in connection with the transaction and his purported failure to review such documents does not render them unenforceable (*see Wu v Uber Tech., Inc.*, 43 NY3d 288, 299-300 [2024]; *Chimart Assoc. v Paul*, 66 NY2d 570, 574 [1986]; *Da Silva v Musso*, 53 NY2d 543, 550 [1981]). Notwithstanding his representations to the contrary in several court filings, defendant also maintains that the operating agreements for the dealership companies establish his status as sole member/owner of the dealerships with

the exclusive right to manage their affairs.⁴ However, the dealership operating agreements state that the dealership companies would be “managed by all LLC members,” list defendant as merely the “initial” member, and define plaintiffs as the “limited liability company member[s]” who made “capital contribution[s] . . . in exchange for their LLC ownership.” Such language unambiguously establishes plaintiffs’ ownership interest in the dealership companies.⁵ The Borrowing Agreement defendant signed to obtain the funding to purchase the dealerships, as well as a corresponding Contribution Agreement, also establish plaintiffs’ ownership of the dealerships. In our view, rather than supporting defendant’s claim that he is the sole member/owner of the dealership companies with the exclusive authority to make decisions on their behalf, the dealership operating agreements, when read in conjunction with the Contribution Agreement and the Borrowing Agreement, conclusively establish otherwise.

Defendant’s attempt to establish a triable issue of fact based on the manufacturer agreements he entered into with the dealerships’ franchisors fares no better. Although those agreements listed defendant as “Dealer Principal,” “Principal Owner” or “Executive Manager” of the dealerships with varying degrees of management authority and generally prohibited anyone else from serving in such role without the consent of the manufacturers, the manufacturer agreements have no bearing on plaintiffs’ management structure and do not supplant the plain and unambiguous language of plaintiffs’ amended governing documents (*see Zinter Handling, Inc. v General Elec. Co.*, 101 AD3d 1333, 1337 [3d Dept 2012]). As noted by Supreme Court, defendant’s management role as set forth in the manufacturer agreements is consistent with the terms of defendant’s employment agreement with DGC, which was executed in connection with the funding deal and contemplated defendant’s active and substantial management role over the

4. As previously noted, under the amended governing documents, plaintiffs’ direct ownership of the dealership companies was a condition precedent to their governing bodies having the authority to manage the affairs of the dealerships.

5. Although the operating agreement for one dealership company—i.e., WD Amsterdam, LLC—lists defendant as 100% owner of that company and counsel for the third-party defendants revealed during a deposition that such operating agreement had not been superseded “at the dealership level,” a subsequently executed Contribution Agreement signed by defendant in April 2022 in connection with the funding deal represented that plaintiffs “each own[] [50%] of the membership interests” in the dealership companies, including WD Amsterdam. The corresponding Borrower Agreement made a similar representation.

dealerships. As such, the manufacturer agreements do not raise a triable issue of fact in opposition to plaintiffs' claim for declaratory relief.

To the extent defendant continues to argue, as he did below, that plaintiffs' amended governing documents never became effective since they were not approved by the manufacturers, such claim is also unavailing. Indeed, manufacturer approval was not a condition precedent to the amended governing documents becoming effective (*see Rooney v Slomowitz*, 11 AD3d 864, 866 [3d Dept 2004]; *compare MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 646 [2009]). Nor does the parties' postclosing conduct raise a triable issue of fact in opposition to plaintiffs' claim for declaratory relief, as parol evidence may not be used to establish a question of fact where, as here, the language of the underlying agreements is clear and unambiguous (*see Gaudette v Gaudette*, 222 AD3d 1313, 1316 [3d Dept 2023]; *United States Fid. & Guar. Co. v Delmar Dev. Partners, LLC*, 14 AD3d 836, 838 [3d Dept 2005]; *Estate of Hatch v NYCO Mins.*, 245 AD2d 746, 749 [3d Dept 1997]).

Contrary to defendant's contention, Supreme Court also properly rejected his waiver, modification and abandonment defenses relative to the amended governing documents. The evidence adduced in support of the parties' respective motions demonstrates that the other two members of plaintiffs' governing bodies have consistently exercised their management prerogatives under the amended governing documents in a manner evincing an unequivocal intent not to abandon such agreements (*compare Steven Strong Dev. Corp. v Washington Med. Assoc.*, 303 AD2d 878, 881 [3d Dept 2003]). Moreover, the amended governing documents required a signed writing to waive or modify their terms, which did not occur here (*see generally Del Gallo Country Pools, Inc. v Kulbako*, 173 AD3d 1399, 1401 [3d Dept 2019]; *Turk v Anello*, 280 AD2d 819, 821 [3d Dept 2001]). We have considered defendant's remaining arguments in opposition to plaintiffs' claim for declaratory relief and in support of his cross-motion, including his arguments pertaining to equitable estoppel, fraudulent inducement and corporate oppression, and find that Supreme Court properly rejected them as a matter of law (*see Suber v Churchill Owners Corp.*, 228 AD3d 414, 415 [1st Dept 2024]; *DuBow v Century Realty, Inc.*, 172 AD3d 622, 622 [1st Dept 2019]; *compare Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 106-107 [2006]).

Next, we are unpersuaded by defendant's contention that Supreme Court erroneously granted plaintiffs summary judg-

ment on their claim for breach of fiduciary duties in connection with defendant's alleged conversion of the Ford and Nissan Advances.⁶ "A cause of action for breach of fiduciary duty requires the existence of a fiduciary relationship, misconduct by the defendant[] and damages directly caused by the misconduct" (*Amici v Mazza*, 234 AD3d 1170, 1173 [3d Dept 2025] [internal quotation marks and citations omitted], *lv denied* 44 NY3d 902 [2025]; *see Delibasic v Manojlovic*, 174 AD3d 1096, 1096 [3d Dept 2019]). Here, there is no dispute that defendant, as a manager and director of plaintiffs, owed fiduciary duties to plaintiffs, which encompassed a duty to act in good faith and refrain from converting corporate funds to his own benefit (*see Chan v Havemeyer Holdings LLC*, 223 AD3d 403, 403 [1st Dept 2024]; *M&M Country Store, Inc. v Kelly*, 159 AD3d 1102, 1103 [3d Dept 2018]; *see also* Business Corporation Law § 717 [a]; Limited Liability Company Law § 409 [a]). Despite the fact that the agreements authorizing the Ford and Nissan Advances stated that the advance funds were being "pa[id] to the [d]ealership[s]," defendant conceded during a deposition that the advances were placed directly into his personal bank account, were not recorded in the dealerships' financial records, and that he spent all but \$200,000 of the funds to pay personal debts, to purchase a home for his parents, and to invest in a relative's business. Given such proof, coupled with the evidence that plaintiffs have incurred damages as a result of defendant's conduct, plaintiffs satisfied their prima facie burden on their claim for breach of fiduciary duties (*see Taylor v Wynkoop*, 132 AD3d 843, 845-846 [2d Dept 2015]; *Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 102 AD3d 1033, 1038 [3d Dept 2013]; *Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 246 [1st Dept 1989]). In opposition, defendant maintains that there is a question of fact as to whether the advances constituted part of his compensation for managing the dealerships. However, defendant offered no support for this proposition beyond his own conclusory assertions (*see Ithaca Montessori Sch. v Pfeffer*, 239 AD3d 1128, 1131 [3d Dept 2025]; *JPMorgan Chase Bank, N.A. v Verderose*, 154 AD3d 1198, 1200 [3d Dept 2017]), and his employment agreement with plaintiffs clearly delineated the terms of his yearly salary and bonus. On

6. Although defendant correctly notes that plaintiffs' amended complaint did not discuss the advances in connection with their claim for breach of fiduciary duties, "summary judgment may be granted on an unpleaded cause of action" where, as here, "the proof supports such a cause of action and the opposing party has not been misled to its prejudice" (*Village of Sharon Springs v Barr*, 165 AD3d 1445, 1447 [3d Dept 2018] [internal quotation marks and citation omitted]).

this record, we discern no basis upon which to disturb the grant of summary judgment to plaintiffs on their claim for breach of fiduciary duties.

We also conclude that the award of summary judgment to plaintiffs on their breach of contract claim relative to defendant's failure to comply with his employment agreement was warranted. By its express terms, defendant's employment agreement with plaintiffs required him to "follow all policies and procedures" of plaintiffs' governing bodies and provided that his "duties and responsibilities may be extended or curtailed" at their discretion. The record contains overwhelming evidence establishing that defendant, in breach of such agreement, failed to recognize the authority of plaintiffs' governing bodies and to abide by the decisions of the majority of their members, including by refusing to cooperate with efforts to sell the dealerships and cutting off administrative access to the TD Bank accounts. In an attempt to raise a triable issue of fact in this regard, defendant primarily relies on the same defenses and arguments he made in opposition to plaintiffs' motion for summary judgment on their claim for declaratory relief, which, as previously noted, were properly rejected by Supreme Court. Even construing the proof in the light most favorable to defendant as the nonmoving party (*see Golobe v Mielnicki*, 44 NY3d 86, 92 [2025]), defendant has not established the existence of any triable issues of fact precluding judgment as a matter of law in plaintiffs' favor on their breach of contract claim (*see Liberty Mut. Ins. Co. v PMI Newco, LLC*, 225 AD3d 941, 942 [3d Dept 2024]).

Contrary to defendant's contention, Supreme Court also properly denied his cross-motion for summary judgment on certain of his counterclaims and third-party claims. There is a direct factual dispute with respect to defendant's claims premised upon the alleged misuse of his confidential bank token by plaintiffs' chief financial officer, rendering a trial on that issue necessary (*see Marcellus Energy Servs. LLC v Tompkins Ins. Agencies, Inc.*, 238 AD3d 1366, 1371 [3d Dept 2025]). There are also outstanding questions of fact on defendant's breach of fiduciary duty claim, and defendant otherwise failed to satisfy his prima facie burden on the remaining counterclaims/third-party claims that were the subject of his cross-motion. Moreover, defendant's argument that Supreme Court erred in denying his cross-motion for summary judgment pertaining to his counterclaim/third-party claim for an equitable accounting is raised for the first time in his reply brief and, thus, we deem such argument to be abandoned (*see Stone*

Cast, Inc. v Couch, Dale Marshall P.C., 242 AD3d 1415, 1416 n 1 [3d Dept 2025]). Defendant's remaining contentions, to the extent not expressly addressed herein, have been considered and found unavailing.

Garry, P.J., Pritzker, Powers and Corcoran, JJ., concur. Ordered that the order entered September 12, 2024, which required defendant Walid Darwish to file an accounting and monthly statements, is affirmed, without costs. Ordered that the appeal from the order entered September 12, 2024, which required defendant Walid Darwish to post an undertaking, is dismissed, as moot, without costs. Ordered that the order entered December 31, 2024, is affirmed, without costs.

12 Michael C. Lueck, Appellant, v State of New York, Respondent. [253 NYS3d 377]—

Pleading—Sufficiency of Pleading—Libel and Slander—Newspaper Report Based on Erroneous State Police Blotter Regarding Arrest and Felony Charge
Pleading—Sufficiency of Pleading—Libel and Slander—Particularity of Words Alleged to be Defamatory

Ceresia, J. Appeal from an order of the Court of Claims (Zainab Chaudhry, J.), entered October 30, 2024, which granted defendant's motion to dismiss the claim.

In May 2021, a newspaper reported that claimant had been arrested and charged with a felony. This was untrue, and after being contacted by the State Police, the newspaper issued a retraction, stating that their original report had been based upon an erroneous State Police blotter item. Subsequently, claimant filed the instant claim, contending that he had been defamed by the State Police. Defendant moved to dismiss the claim on the grounds that claimant had failed to adequately plead his claim pursuant to Court of Claims Act § 11 (b) and CPLR 3016 (a). The Court of Claims granted defendant's motion, and claimant appeals.

We reverse. The claim alleged, in relevant part, as follows: "[o]n May 8, 2021, . . . a newspaper of general circulation . . . published the following: 'Michael C. Lueck, 47, of Red Hook, was arrested by [S]tate [P]olice at Claverack in the Village of Red Hook at 10:30 a.m. Friday, May 7, and charged with unlawful surveillance, a felony' . . . The information contained in this news item was incorrect in that . . . claimant was neither arrested nor charged with a felony. . . . On May 10, 2021, the [newspaper] printed a retraction which stated as follows, 'Michael C. Lueck was not arrested and charged with a felony. Because of incorrect information provided by [S]tate [P]olice, a blotter item incorrectly reported that he was.'"

Turning to defendant's first argument for dismissal, Court of Claims Act § 11 (b) necessitates that a claim "state the time when and place where such claim arose [and] the nature of same" (see *Berg v State of New York*, 228 AD3d 1077, 1077 [3d Dept 2024]). "Absolute exactness is not required, but a claim must provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability" (*id.* at 1077 [internal quotation marks, brackets and citations omitted]; see *Katan v State of New York*, 174 AD3d 1212, 1213 [3d Dept 2019]). We find that claimant satisfied these requirements. The pleading alleged that the claim arose on the State Police blotter at a time between claimant's purported arrest on May 7, 2021, and the newspaper report of it on May 8, 2021, and that the nature of the claim was one for defamation based upon the publishing of the erroneous blotter item. This furnished appropriate specificity to allow defendant to investigate and promptly ascertain the extent of its liability (see *Berg v State of New York*, 228 AD3d at 1077). Indeed, it is noteworthy that, by the time the claim was filed, the State Police had long since conducted a prompt investigation into the matter, leading to the newspaper's retraction.

As for defendant's second argument for dismissal, CPLR 3016 (a), which pertains to defamation actions, mandates that "the particular words complained of shall be set forth in the complaint" (CPLR 3016 [a]; see *Carr v Wegmans Food Mkts., Inc.*, 182 AD3d 667, 669-670 [3d Dept 2020]). The claim must also set forth "the time, manner and persons to whom the alleged defamatory statements were made" (*Wilcox v Newark Val. Cent. School Dist.*, 74 AD3d 1558, 1560 [3d Dept 2010] [internal quotation marks and citation omitted]). Again, we conclude that these requirements were met (see *Carr v Wegmans Food Mkts., Inc.*, 182 AD3d at 669-670; *Wilcox v Newark Val. Cent. School Dist.*, 74 AD3d at 1560; compare *Rosen v Price Chopper*, 239 AD3d 1132, 1133 [3d Dept 2025]). In referencing the newspaper's published retraction, the claim stated that claimant had not been arrested and charged with a felony notwithstanding the fact that the State Police blotter wrongly reported that he was. Viewed in the light most favorable to claimant, this was sufficient to convey the particular words comprising the basis of the alleged defamation (see *Moreira-Brown v City of New York*, 71 AD3d 530, 530 [1st Dept 2010]). Additionally, as noted above, the time and manner of the claim were adequately articulated. Finally, with regard to whom the statement in the blotter was made, the claim satisfactorily indicated that it was disseminated to news organizations, including the newspaper in question.

In view of all of the foregoing, the motion to dismiss the claim should have been denied.

Aarons, J.P., Pritzker, Powers and Mackey, JJ., concur. Ordered that the order is reversed, on the law, without costs, and motion to dismiss denied.

13 In the Matter of Abigail X., Appellant. [252 NYS3d 329]—

Names—Change of Name—Transgender Status—Sealing of Court Records

McShan, J. Appeal from that part of an order of the Supreme Court (James Walsh, J.), entered December 6, 2024, in Saratoga County, which, in a proceeding pursuant to Civil Rights Law § 60, denied petitioner’s request to seal court records.

Petitioner is a transgender individual who commenced this Civil Rights Law article 6 proceeding to change his name and to seal the court record of this proceeding. Supreme Court granted the name change but denied his sealing request, finding that a list of “public interest concerns” outweighed petitioner’s safety concerns.* Asserting that the court abused its discretion in denying his sealing request, petitioner appeals.

We are once again confronted with the denial of a sealing request in a Civil Rights Law article 6 proceeding—by the same Supreme Court justice—predicated on amorphous “public interest concerns.” As was the case in those appeals, we once again modify the order to grant petitioner’s sealing request. As we recently indicated, “nothing in the statute conditions sealing the record of the name change proceeding upon an applicant’s financial circumstances or the status of unrelated civil litigation” (*Matter of Timothy C.*, 242 AD3d 1483, 1484 [3d Dept 2025]). Rather, “whether to grant or deny a sealing request under Civil Rights Law § 64-a depends solely upon the potential for harm to the applicant arising from public access to a court record of the applicant’s name change proceeding” and “a court abuses its discretion by relying upon real or theo-

* That list “includ[ed], but [was] not limited to, the due process of any judgment creditors, the effects upon powers of attorney, any unknown implications with Article 81 proceedings, the due process in foreclosure actions, deed recordation and title insurance, mortgages recorded with the County Clerk’s office, probate matters, interference with single scope background investigations for security clearance purposes or firearm authorizations, and lastly, any adverse impact upon future genealogical research.” Supreme Court further cited the potential for prejudice to a litigant in a future proceeding that was merely theoretical at the time of this proceeding.

retical ‘public interest concerns’ to deny a Civil Rights Law § 64-a sealing request” (*id.*; see Civil Rights Law § 64-a [1]; *Matter of Cody VV. [Brandi VV.]*, 226 AD3d 24, 27-29 [3d Dept 2024]). Said directly, “[t]o decline to seal the record despite the applicant’s showing of jeopardy is to place the applicant at risk of the very harms the statute is meant to guard against” (*Matter of Kieran B.*, 242 AD3d 1486, 1487 [3d Dept 2025]).

Petitioner in this case affirmed his transgender status and indicated that he was seeking to change his name to one that reflects his male gender identity in conformance with the name he uses in his personal and professional life. Petitioner also expressed fear that exposure to the records from this proceeding would effectively expose his transgender status and expose him to increased risk for hate crimes, harassment and other discrimination. Those circumstances warrant entitlement to have the record of his name change proceeding sealed pursuant to Civil Rights Law § 64-a (see *Matter of Kieran B.*, 242 AD3d at 1488; *Matter of Christopher C.*, 242 AD3d 1485, 1485-1486 [3d Dept 2025]; *Matter of Timothy C.*, 242 AD3d at 1485) and “Supreme Court abused its discretion here when it again invoked an inapplicable standard to arrive at the opposite conclusion” (*Matter of Kieran B.*, 242 AD3d at 1488).

Garry, P.J., Ceresia, Fisher and Mackey, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as denied petitioner’s request to seal court records; application granted to that extent; and, as so modified, affirmed.

14 The People of the State of New York et al., Respondents, and Green Education and Legal Fund et al., Appellants, v Norlite, LLC, Defendant. [253 NYS3d 385]—

Environmental Conservation—Air Pollution Control—Application of Green Amendment to Private Owner/Operator of Industrial Facility That Mines Shale—Inadequate Implementation of Fugitive Dust Control Measures
Environmental Conservation—Air Pollution Control—Application of Green Amendment to State Agency—Action to Compel Agency to Take Enforcement Action against Private Entity in Nature of Mandamus—Court Could Not Compel Act Where Agency Could Exercise Judgment or Discretion

Fisher, J. Appeal from an order of the Supreme Court (Kimberly O’Connor, J.), entered December 30, 2024, in Albany County, which, among other things, upon renewal, granted a motion by certain plaintiffs to partially dismiss certain cross-claims.

Defendant owns and operates an industrial facility located in Albany County, partly located in the Town of Colonie and partly in the City of Cohoes. At this facility, defendant mines shale

from an on-site quarry and processes it into sellable aggregate through various processes. Each production step can result in different types of air pollution that could cause deleterious health effects when inhaled. Defendant operates such facility under an air emissions permit issued by plaintiff Department of Environmental Conservation (hereinafter DEC) pursuant to the comprehensive substantive standards and procedural requirements of ECL article 19 and title V of the Clean Air Act (*see* 42 USC § 7661 *et seq.*), as well as a hazardous waste permit issued pursuant to the similarly comprehensive requirements of ECL article 27. As part of the many conditions of those permits, defendant is required to implement a fugitive dust plan designed to minimize the release of air pollutants from its facility.

Despite defendant's plan, nearby residents have reported exposures to clouds of dust originating from defendant's facility for several years. In response, DEC has issued multiple notices of violation, charging defendant with failures to comply with various conditions of its air emissions permit and the ECL—including by failing to adequately implement dust control measures. In resolving these charges since June 1990, defendant has cumulatively paid over half a million dollars in penalties and contributions to environmental benefit projects, as well as committing to undertake a variety of additional actions to reduce the exposure of nearby residents to dust from its facility.

In October 2022, following continued releases of fugitive dust from defendant's facility, plaintiffs State of New York and DEC (hereinafter collectively the state plaintiffs) commenced an action against defendant alleging a public nuisance and violations of various statutory, regulatory and permit conditions, seeking civil penalties and a permanent injunction to abate such nuisance and enjoin the violations. The remaining plaintiffs—a group of individuals and organizations whose members are adversely impacted by the fugitive dust emissions (hereinafter the intervenors)—intervened in the enforcement action against defendant and filed a third-party complaint asserting causes of action against both defendant and the state plaintiffs. As relevant here, the intervenors interposed a cross-claim seeking a declaratory judgment against DEC declaring that permitting the continued operation of defendant's facility in a manner that results in fugitive dust emissions violates their rights to a clean and healthful environment under the Green Amendment to the NY Constitution. The intervenors also sought an injunction directing DEC to revoke or rescind

defendant's permits and prohibit defendant from resuming operation. The state plaintiffs then moved to dismiss the cross-claim for failure to state a cause of action, contending that the Green Amendment did not create a cause of action to compel enforcement action by DEC, and therefore the agency could not be compelled to perform a discretionary function through a writ of mandamus. Supreme Court ultimately granted such motion and dismissed this cause of action against the state plaintiffs, predominantly relying on a recent decision handed down by the Fourth Department (*see Fresh Air for the Eastside, Inc. v State of New York*, 229 AD3d 1217, 1220 [4th Dept 2024], *appeal dismissed* 42 NY3d 1084 [2025], *lv denied* 44 NY3d 907 [2025]). The intervenors appeal, and this Court granted leave for Delaware Riverkeeper Network and Green Amendments for Generations to appear as amici curiae (hereinafter the amici).

We affirm. The Green Amendment to the NY Constitution declares that “[e]ach person shall have a right to clean air and water, and a healthful environment” (NY Const, art I, § 19). Effective January 1, 2022, the Green Amendment was adopted by a significant majority of New York voters in November 2021. Prior to its ratification, as required for amending the constitution through a ballot initiative (*see* NY Const, art XIX, § 1), the Green Amendment passed in the Assembly and Senate in successive legislative sessions (*see* 2021-2022 NY Senate-Assembly Bill S528, A1368; 2019-2020 NY Senate-Assembly Bill, S2072, A2064), where it was proposed as following the models set forth by several other states (*see* Senate Sponsor’s Mem in Support of 2019-2020 Senate Bill S2072). But unlike the amendments enacted in those states, the version of the Green Amendment proposed and ratified in New York did not include language requiring the State to enforce the amendment (*see* Mont Const, art II, § 3; art IX, § 1; Pa Const, art I, § 27), or expressly authorizing members of the public to enforce the amendment (*see* Haw Const, art XI, § 9; Mont Const, art IX, § 1). Assembly hearings related to the proposal confirmed this point, where assemblymembers sponsoring the Green Amendment acknowledged that it would not change any other laws and did not afford citizens any additional rights of action against individuals or businesses beyond existing claims for public nuisance, land use laws and negligence (*see Friends of Fort Greene Park v New York City Parks & Recreation Dept.*, 87 Misc 3d 1064, 1093-1094 [Sup Ct, NY County 2025, Chesler, J.]; *see also Matter of Streeter v New York City Dept. of Env’tl. Protection*, 83 Misc 3d 417, 422 [Sup Ct, Kings County 2024, Frías-Colón, J.]).

With this backdrop, we disagree with the contentions of the

intervenors and amici that the Green Amendment “creat[es] a self-executing substantive right that imposes environmental standards above and beyond the state’s preexisting—and robust—environmental regulatory regime” (*Chan v United States Dept. of Transp.*, 2024 WL 5199945, *38, 2024 US Dist LEXIS 231658, *133-134 [SD NY, Dec. 23, 2024, 23-cv-10365 (LJL)]; see *Galbraith v City of Buffalo*, 811 F Supp 3d 422, 439 [WD NY, Oct. 20, 2025, No. 23-cv-814 (JLS)]). Indeed, “New York courts have held that a private right of action for violations of the state constitution is unavailable if an alternative remedy is available elsewhere, such as under state tort law or through a” CPLR article 78 proceeding (*Alwan v City of New York*, 311 F Supp 3d 570, 586 [ED NY 2018]; see *Martinez v City of Schenectady*, 97 NY2d 78, 83 [2001]; *Shelton v New York State Liq. Auth.*, 61 AD3d 1145, 1150 [3d Dept 2009]; see also *Galbraith v City of Buffalo*, 811 F Supp 3d at 439 [“The existence of these alternative remedies precludes a private right of action under the Green Amendment” (citation omitted)]).

In turning to those alternative remedies, we decline the intervenors’ and amici’s invitation to depart from the reasoning of the Fourth Department. Although the intervenors pleaded a cause of action in “the complaint [which] ostensibly seeks declaratory relief, it is essentially a CPLR article 78 proceeding in the nature of mandamus, seeking to compel the State to take enforcement action against a private entity” (*Fresh Air for the Eastside, Inc. v State of New York*, 229 AD3d at 1219 [internal quotation marks and citation omitted]). A writ of mandamus “lies where an administrative body has failed to perform a duty enjoined upon it by law, the performance of that duty is mandatory and ministerial rather than discretionary, and there is a legal right to the relief sought” (*Matter of Hoffmann v New York State Ind. Redistricting Commn.*, 41 NY3d 341, 364 [2023]; see *Matter of Melendez v New York State Dept. of Corr. & Community Supervision*, 240 AD3d 1111, 1112 [3d Dept 2025], *lv denied* 44 NY3d 1073 [2026]). A ministerial act is “best described as one that is mandated by some rule, law or other standard and typically involves a compulsory result” (*Matter of Hussain v Lynch*, 215 AD3d 121, 126 [3d Dept 2023] [internal quotation marks and citations omitted]). However, the extraordinary remedy of “mandamus is not available to compel an officer or body to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment that could theoretically produce a variety of acceptable outcomes” (*Matter of Clements v New York Secretary*

of *State*, 227 AD3d 84, 87 [3d Dept 2024] [internal quotation marks, brackets and citations omitted], *appeal dismissed* 43 NY3d 955 [2025]; see *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]). This specifically includes instances where “a party seeks to compel an administrative agency of the State to take enforcement action against a private entity” (*Fresh Air for the Eastside, Inc. v State of New York*, 229 AD3d at 1219).

Here, the intervenors contend that their constitutional rights to clean air and a healthful environment have been violated by DEC’s regulatory failure to take enforcement action against defendant based on its inadequate implementation of fugitive dust control measures. These allegations are grounded in the issuance of the air emissions and hazardous waste permits to defendant, which allow an enforcement action when the permit conditions are not being met (see 6 NYCRR 201-1.12) or the permit is “held by unqualified or unsuitable persons” (ECL 27-0913 [3]). Contrary to the intervenors’ contentions, the facts here do not suggest a ministerial duty, as the Legislature imbued DEC with discretionary enforcement authority by providing that DEC “may modify, suspend or revoke a permit” (ECL 70-0115 [1]) and lists “[s]ome of the factors which [DEC] may consider in arriving at [its] determination” (ECL 27-0913 [3]; see 6 NYCRR 201-1.12 [a]). Such variation in acceptable outcomes is observable by virtue of the extensive list of resolutions that defendant agreed to when resolving prior charges, ranging from monetary fines and environmental benefit donations to other capital expenditures to the facility (see *Tango v Tulevech*, 61 NY2d 34, 41 [1983]; *Clements v New York Secretary of State*, 227 AD3d at 89-90; *Matter of Willows Condominium Assn. v Town of Greenburgh*, 153 AD3d 535, 537 [2d Dept 2017]). While perhaps these outcomes are unsatisfactory to the intervenors, as private parties they cannot use mandamus “to compel a particular outcome” from an administrative agency (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* 587 US 1027 [2019]; see *Fresh Air for the Eastside, Inc. v State of New York*, 229 AD3d at 1219-1220).

Accordingly, Supreme Court properly granted the state plaintiffs’ motion to dismiss the intervenors’ third cause of action. Since we have found that cause of action to essentially be one for mandamus under CPLR article 78, we find it duplicative and unnecessary to address it further within the context of CPLR 3001 (see *Matter of Central Hudson Gas & Elec. Corp. v State of N.Y. Pub. Serv. Commn.*, 242 AD3d 33, 36-37 [3d Dept

2025]). We have examined the remaining contentions of the parties and amici, and have found them to be academic or without merit.

Clark, J.P., Aarons, Pritzker and Reynolds Fitzgerald, JJ., concur. Ordered that the order is affirmed, without costs.

15 Claire E. Zwickel et al., as Trustees, Respondents, v Underhill Land LLC et al., Appellants, et al., Defendants. [253 NYS3d 379]—

Injunctions—Preliminary Injunction—Undertaking

Fisher, J. Appeal from an order of the Supreme Court (Sharon Graff, J.), entered September 23, 2024, in Greene County, which partially denied a motion by defendants Underhill Land LLC and Underhill RE Holding LLC to vacate the preliminary injunction.

The underlying facts of this case are familiar to this Court, being the third time we have had occasion to consider an appeal arising from this dispute (*see* 243 AD3d 973 [3d Dept 2025]; 237 AD3d 1455 [3d Dept 2025]). Briefly, plaintiffs are trustees of a family trust that owns a parcel of real property in the Town of Catskill, Greene County (hereinafter the Zwickel property). Defendants are developers who acquired a parcel of real property containing a four-lot subdivision in 2022, the majority of which lies north of the Zwickel property.* Although the western boundaries of both properties run along Underhill Road, defendants' property has limited access to this public road due the topography of the adjacent terrain. A narrow, triangular strip of defendants' property extends between Underhill Road and a portion of the Zwickel property. This strip of land contains an old wagon road (hereinafter the subject road), which originates at Underhill Road and proceeds northeast along the parties' property line, avoiding the challenging topography and providing access to the remaining lots on defendants' property. As part of their residential development plan, defendants began work to improve the subject road to make it suitable for vehicular travel.

In March 2023, plaintiffs commenced this action alleging that the work associated with the subject road constituted a trespass on their property and caused them damages. Plaintiffs simultaneously moved by order to show cause to enjoin defendants from, among other things, encroaching on the Zwickel property and performing work on or along the subject road. Supreme Court, in the relevant part, granted a preliminary

* Lot 1 was subsequently sold to a codefendant.

injunction enjoining defendants from entering upon or making roadway improvements that encroached on the Zwickel property. Supreme Court then set an undertaking in the amount of \$2,500, reasoning that defendants were still able to access their land and continue construction on their lots despite the injunction. In doing so, Supreme Court granted defendants leave to seek modification of the undertaking if they were unable to obtain certificates of occupancy due to inadequate access arising from the preliminary injunction. This Court affirmed the orders granting the preliminary injunction and the undertaking (243 AD3d at 976).

Thereafter, the Town of Catskill denied defendants the certificates of occupancy associated with their subdivided lots due to the inadequacy of the subject road. Defendants moved to vacate or modify the preliminary injunction, seeking to increase the undertaking to \$1 million. Plaintiffs submitted opposition, and Supreme Court held a conference on the motion, permitting supplemental submissions addressing defendants' likelihood of success on their easement counterclaims. Ultimately, Supreme Court declined to vacate the preliminary injunction but, based on an estimated cost to construct an alternate roadway by one of defendants' principals, substantially increased the undertaking to \$165,000. Defendants appeal.

We affirm. CPLR 6314 permits a defendant enjoined by a preliminary injunction to move at any time to vacate or modify it or the associated undertaking (*see generally Hofstra Univ. v Nassau County, N.Y.*, 166 AD3d 863, 866 [2d Dept 2018]). The determination whether to vacate or modify a preliminary injunction or the undertaking "is addressed to the sound discretion of the court and may be granted either upon compelling or changed circumstances that render continuation of the injunction inequitable or upon failure to proceed expeditiously" (*Matter of New York State Off. of Victim Servs. v Blue*, 240 AD3d 1064, 1065 [3d Dept 2025] [internal quotation marks and citations omitted], *appeal dismissed* 44 NY3d 1035 [2025]).

Defendants failed to demonstrate that Supreme Court improvidently exercised its discretion in declining to vacate the order granting the preliminary injunction based on their easement counterclaim. An express easement appurtenant "is created through a written conveyance, subscribed by the grantors, that burdens the servient estate for the benefit of the dominant estate" (*Gugino v Scripa*, 228 AD3d 1112, 1113 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Northwood Sch., Inc. v Fletcher*, 190 AD3d 1136, 1138 [3d Dept 2021]). Whereas an implied easement requires "(1) unity and

subsequent separation of title, (2) the claimed easement must have, prior to separation, been so long continued and obvious or manifest as to show that it was meant to be permanent, and (3) the use must be necessary for the beneficial enjoyment of the land” (*Biles v Whisher*, 160 AD3d 1159, 1160 [3d Dept 2018] [internal quotation marks and citations omitted]; see *LaBarge v MJB Lake LLC*, 220 AD3d 1100, 1102 [3d Dept 2023]). “A party claiming a prescriptive easement must show, by clear and convincing evidence, that the use of the easement was open, notorious, hostile and continuous for a period of 10 years” (*Sardino v Scholet Family Irrevocable Trust*, 238 AD3d 1289, 1292 [3d Dept 2025] [internal quotation marks and citations omitted], *lv denied* 44 NY3d 909 [2026]). Concerning public highways, “once a road becomes a public highway, it is presumed to continue until it is shown to exist no longer” (*Curtis v Town of Galway*, 50 AD3d 1370, 1371 [3d Dept 2008] [internal quotation marks and citation omitted]).

In support of their motion to vacate the preliminary injunction, defendants relied on a 1911 deed granting a right-of-way across lands west of the Zwickel property as evidence of an express easement. However, that deed was between two sets of former owners of certain portions of defendants’ property, and not the owner of the Zwickel property—who was not a party to that transaction—and therefore defendants’ predecessor in title could not have gained a right-of-way over the Zwickel property (see *Simone v Heidelberg*, 9 NY3d 177, 182 [2007]; see also *McColgan v Brewer*, 84 AD3d 1573, 1574 [3d Dept 2011]). Defendants next contend that a 1906 severance of a larger property—the resulting southern half being the Zwickel property and the northern half forming the portion of defendants’ property to the north—created an implied easement. It is undisputed that there was both unity and a subsequent severance in title, however, defendants presented no evidence of obvious use that was meant to become permanent before the severance or the necessity of an easement at the time (see *Beretz v Diehl*, 302 AD2d 808, 810 [3d Dept 2003]; *U.S. Cablevision Corp. v Theodoreu*, 192 AD2d 835, 838 [3d Dept 1993]; compare *Thomas Gang, Inc. v State of New York*, 19 AD3d 861, 862 [3d Dept 2005]). As to the existence of a prescriptive easement, although there is mention in the 1911 deed of the open use of the subject road by defendant’s predecessor in interest, there is no evidence of specific dates and times of said use and whether that use was continuous and uninterrupted for the requisite period (see *Weir v Gibbs*, 46 AD3d 1192, 1193-1194 [3d Dept 2007]; *Alexy v Salvador*, 217 AD2d 877, 879 [3d Dept 1995]; compare *Auswin Realty Corp. v*

Klondike Ventures, Inc., 163 AD3d 1107, 1109-1110 [3d Dept 2018]). Moreover, as it relates to each of defendants' easement claims, the record is at best inconclusive as to the road's character as a public highway. Critically, the 1911 deed references Underhill Road as a "public highway" but, in the same sentence, refers to the subject road as "an old highway," omitting the word "public." Based on the foregoing, we cannot say that defendants established that the subject road was a public highway so as to warrant vacatur of the preliminary injunction (see *Beretz v Diehl*, 302 AD2d at 810; compare *Petti v Town of Lexington*, 92 AD3d 1111, 1113 [3d Dept 2012]; *Curtis v Town of Galway*, 50 AD3d at 1371-1372).

Next, defendants contend that Supreme Court abused its discretion when it declined to increase the undertaking to \$1 million. We disagree. The amount of an undertaking "must not be based upon speculation and must be rationally related to the damages the defendants might suffer if the court later determines that the relief to which the undertaking relates should not have been granted" (572 *Walt Whitman Rd. Holdings, LLC v Whitman Capital, LLC*, 237 AD3d 878, 883 [2d Dept 2025] [internal quotation marks and citation omitted]). "The fixing of the amount of an undertaking is a matter within the sound discretion of the Supreme Court, and its determination will not be disturbed absent an improvident exercise of that discretion" (*Tahmin v Interlaken Owners, Inc.*, 228 AD3d 983, 985 [2d Dept 2024] [internal quotation marks and citation omitted]; see *Darwish Auto Group, LLC v TD Bank, N.A.*, 224 AD3d 1115, 1119 [3d Dept 2024]). To support their claim that the undertaking should have been set at a minimum of \$1 million, defendants submitted an affidavit of its principal asserting a constellation of damages associated with the preliminary injunction. Such affidavit was couched in terms of conclusory and speculative events, including allegations based on losses defendants could "potentially" incur, that they "probably will have to litigate" with nonparty neighbors or the unavailability of financing due to market forces impacting real estate loans. Given this lack of support—particularly for such a significant increase—defendants "failed to establish the existence of compelling or changed circumstances that render continuation of the injunction inequitable" without a \$1 million undertaking (*Matter of National Fuel Gas Distrib. Corp. v City of Jamestown*, 108 AD3d 1045, 1047 [4th Dept 2013] [internal quotation marks and citation omitted]). Accordingly, we perceive no abuse of discretion by Supreme Court in the amount it ultimately fixed (see *Matter of New York State Off. of Victim Servs. v Blue*, 240 AD3d at 1066; 255 *Butler Assoc., LLC v 255 Butler, LLC*,

208 AD3d 829, 831 [2d Dept 2022]; *456 Johnson, LLC v Maki Realty Corp.*, 177 AD3d 829, 830 [2d Dept 2019]).

Garry, P.J., Ceresia, McShan and Mackey, JJ., concur. Ordered that the order is affirmed, with costs.

16 Michelle D. Llera, Respondent-Appellant, v Carlos R. Llera, Appellant-Respondent. [253 NYS3d 390]—

Husband and Wife and Other Domestic Relationships—Support—Maintenance—Termination of Husband’s Obligation upon Wife’s Cohabitation with Boyfriend—Ambiguous Conditions of Habitually Living with and Holding out as Spouse

Husband and Wife and Other Domestic Relationships—Counsel Fees—Ambiguous Cohabitation Provision of Settlement Agreement—Disparity in Parties’ Financial Circumstances

Aarons, J. Cross-appeals from an order of the Supreme Court (Dianne Freestone, J.), entered January 30, 2025, in Saratoga County, which, among other things, (1) denied defendant’s motion to terminate certain maintenance payments, and (2) denied plaintiff’s motion to hold defendant in contempt.

Plaintiff (hereinafter the wife) and defendant (hereinafter the husband) executed a marital separation and settlement agreement in December 2022. The settlement agreement obligated the husband to pay to the wife spousal maintenance each month plus a portion of his annual net bonus. The settlement agreement also provided that the husband’s maintenance obligation would terminate upon, among other conditions, the wife’s “cohabitation as defined in Domestic Relations Law [§] 248” (hereinafter the cohabitation provision). A few days after executing the settlement agreement, the wife moved into a residence owned by her boyfriend. The settlement agreement was thereafter incorporated but not merged into the parties’ February 2023 judgment of divorce.

In April 2023, the husband moved to terminate his spousal maintenance obligation, alleging that the wife’s relationship with the boyfriend met the requirements of Domestic Relations Law § 248. Under that statute, a court may terminate a spousal maintenance obligation upon proof that two conditions are met: “the payee is habitually living with another person *and* holding himself or herself out as the spouse of such other person, although not married to such other person” (Domestic Relations Law § 248 [emphasis added]).

The husband also served the wife with discovery demands, prompting the wife to move in October 2023 for, as relevant here, an order deeming the husband’s attorney a witness based upon his role in drafting the settlement agreement and disqualifying him. The wife conceded—indeed, she never

disputed—that she was “habitually living with” the boyfriend since December 2022 (Domestic Relations Law § 248), but the husband’s discovery demands signaled that he read the cohabitation provision to exclude Domestic Relations Law § 248’s holding-out condition. In opposition, the husband affirmed his understanding of the cohabitation provision as including both the habitually-living-with and holding-out conditions in Domestic Relations Law § 248, and that he intended to prove that the wife and the boyfriend were holding themselves out as spouses. In June 2024, Supreme Court denied the wife’s motion to disqualify the husband’s attorney, provided that the husband did not challenge the settlement agreement language.

Shortly thereafter, the husband retained new counsel and, in August 2024, after deposing the wife and the boyfriend, withdrew his April 2023 motion and re-moved to terminate his maintenance obligation based upon the cohabitation provision. As the wife predicted, the husband argued that the cohabitation provision was unambiguous and only required him to prove the first condition of Domestic Relations Law § 248, i.e., that the wife was habitually living with the boyfriend. The wife opposed and cross-moved for contempt for failing to pay maintenance and for counsel fees. Following oral argument, Supreme Court denied the husband’s August 2024 motion and denied the wife’s contempt motion but granted her request for counsel fees. These cross-appeals ensued. We affirm.

Turning first to the husband’s contentions regarding the cohabitation provision, “[a] stipulation of settlement that is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation” (*Daryl N. v Amy O.*, 222 AD3d 1054, 1057 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Siouffi v Siouffi*, 177 AD3d 1206, 1207 [3d Dept 2019]). By purporting to incorporate the definition of “cohabitation” in Domestic Relations Law § 248, the statute is a substantive term of the settlement agreement (see *Advanced Refractory Tech. v Power Auth. of State of N.Y.*, 81 NY2d 670, 678 [1993]; *Matter of Town of Saugerties [Town of Saugerties Policeman’s Benevolent Assn.]*, 91 AD3d 1264, 1265 [3d Dept 2012]). The text of the statute, however, does not contain the word “cohabitation,” nor does the statute expressly set out a definition of that word. It is not clear from the settlement agreement that the parties intended only to incorporate Domestic Relations Law § 248’s habitually-lives-with condition (see generally *Northrup v Northrup*, 43 NY2d 566, 571 [1978]; *Campello v Alexandre*, 155 AD3d 1381, 1383 [3d Dept 2017]), or if the parties intended to

define “cohabitation” as “habitually living with another person and holding himself or herself out as the spouse of such other person, although not married to such other person” (Domestic Relations Law § 248). As such, and contrary to the husband’s view, the cohabitation provision is ambiguous because it is “subject to more than one reasonable interpretation” (*Gaudette v Gaudette*, 222 AD3d 1313, 1314 [3d Dept 2023] [internal quotation marks and citations omitted]; see *Donohue v Cuomo*, 38 NY3d 1, 13 [2022]; *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

Furthermore, Supreme Court appropriately resolved the ambiguity through extrinsic evidence of the parties’ intent at the time they executed the settlement agreement (see *Momberger v Momberger*, 97 AD3d 945, 946 [3d Dept 2012]; *Desautels v Desautels*, 80 AD3d 926, 928 [3d Dept 2011]). In this regard, the wife conceded to moving into the boyfriend’s residence days after executing the settlement agreement, undermining any assertion that she understood that her living arrangement alone would trigger the cohabitation provision. The court also relied upon affidavits filed by the husband in connection with prior motions, the first of which was dated four months after execution of the settlement agreement. Those affidavits—in particular, the affidavit filed in opposition to the wife’s application to disqualify the husband’s attorney—indicated that the husband shared the wife’s understanding of the cohabitation provision as incorporating both conditions in Domestic Relations Law § 248. As such, the court’s denial of the husband’s August 2024 motion to terminate his maintenance obligation will not be disturbed.

We also decline to disturb Supreme Court’s denial of the wife’s contempt motion based upon the husband’s failure to pay the wife her share of his 2023 and 2024 net bonuses as required under the additional maintenance provisions of the settlement agreement. In light of the ambiguity of the cohabitation provision—which is now resolved—along with the wife’s concession to habitually living with the boyfriend, we cannot say that there was an unequivocal mandate to make maintenance payments until both of Domestic Relations Law § 248’s conditions were met (see *Matter of Brookover v Harris*, 217 AD3d 1411, 1412 [4th Dept 2023]; *Matter of John U. v Sara U.*, 195 AD3d 1280, 1283 [3d Dept 2021]).

We further reject the husband’s invitation to reverse Supreme Court’s award of counsel fees to the wife in connection with his back-to-back motions to terminate his maintenance obligation. Although the court did not explain its ratio-

nale, the husband's shifting interpretations of the cohabitation provision, the wife's vindication of her right to maintenance payments and the disparity in the parties' financial circumstances as described in the judgment of divorce all militate in favor of a discretionary award of counsel fees pursuant to Domestic Relations Law § 237 (b) (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *Victoria M. v Christopher L.*, 236 AD3d 1210, 1211 [3d Dept 2025]). The parties remaining contentions, to the extent not specifically addressed, have been reviewed and found to be without merit.

Clark, J.P., Pritzker, Reynolds Fitzgerald and Fisher, JJ., concur. Ordered that the order is affirmed, without costs.

17 In the Matter of District Attorney of Columbia County, on Behalf of Lucky Orphans Horse Rescue Inc., Respondent, v Andrea Nussinow, Appellant. [252 NYS3d 328]—

Animals—Cruelty to Animals—Failure to Provide Proper Sustenance

Appeal—Dismissal—Town Court Order for Forfeiture of Seized Horses and Requiring Respondent Property Owner to Post Security Bond for Costs Incurred for Housing and Care Not Appealable

Pritzker, J. Appeals (1) from an order of the Town Court of Germantown, Columbia County (Wendy Nack-Lawlor, J.), dated September 18, 2024, which, in a proceeding pursuant to Agriculture and Markets Law § 373, required respondent to post security and, (2) from an order of said court, entered October 18, 2024, which granted petitioner's application for forfeiture of seized animals.

Lucky Orphans Horse Rescue Inc. is a nonprofit horse sanctuary and an impounding organization as defined by the Agriculture and Markets Law (*see* Agriculture and Markets Law § 373 [6]). In July 2024, the State Police executed a search warrant on respondent's property, resulting in the seizure of 13 horses based upon allegations that respondent failed to provide proper sustenance in violation of Agriculture and Markets Law § 353. Respondent was arrested and charged with 13 counts of violating Agriculture and Markets Law § 353, and the seized horses were placed in Lucky Orphans' care and custody.

Petitioner, on behalf of Lucky Orphans, filed a petition requiring respondent to post security, pursuant to Agriculture and Markets Law § 373 (6), for the costs incurred for housing and caring for the horses for 30 days. Following a bond hearing, Town Court orally ordered respondent to post a cash security bond in the requested amount within five days. Respondent immediately requested a stay pending appeal, which the court denied. Thereafter, respondent, by letter motion in

County Court, requested a stay of Town Court's order pending appeal. County Court (Herman, J.), denied the request without addressing the merits and directed respondent to article 17 of the Uniform Justice Court Act and CPLR articles 55 and 78 for the proper procedure to appeal Town Court's order. Subsequently, after respondent failed to post the security bond within five days, Town Court issued a written order forfeiting respondent's "right, title, and interest" in the horses and vested ownership in the horses to Lucky Orphans (*see* Agriculture and Markets Law § 373 [6] [b] [2]). Respondent appeals from Town Court's oral and written orders.

Respondent's appeals must be dismissed because Town Court's orders are not appealable to this Court (*see* UJCA 1701). Rather, the proper procedure would be for respondent to appeal those orders to County Court (*compare Matter of Park Realty Corp. v Hydrania Inc.*, 17 AD3d 898, 899 [3d Dept 2005], and *Matter of Kern v Guller*, 40 AD3d 1231, 1232 [3d Dept 2007], with *Viscusi v Albany County Dental Assoc.*, 226 AD3d 1124, 1125 [3d Dept 2024]).

Garry, P.J., Clark, Powers and Corcoran, JJ., concur. Ordered that the appeals are dismissed, without costs.

18 Barbara Mermell, Respondent, v Ashokan Center, Inc., et al., Appellants. [253 NYS3d 372]—

Trial—Note of Issue and Statement of Readiness—Denial of Motion to Vacate Note of Issue—Court Invited Defendants' Future Application for Social Security Disability Records Closer to Trial—Identification of Possible Alternative Means to Acquire Relevant Records

Negligence—Maintenance of Premises—Constructive Notice of Dangerous Condition—Photographs Raised Triable Questions About Adequate Illumination of Pedestrian Path Where Fall Occurred

Corcoran, J. Appeals (1) from an order of the Supreme Court (David Gandin, J.), entered February 21, 2025, in Ulster County, which denied defendants' motion to vacate the note of issue, and (2) from an order of said court, entered July 17, 2025, in Ulster County, which denied defendants' motion for summary judgment dismissing the complaint.

In February 2020, plaintiff tripped over a rock and fell on a pedestrian path at defendants' retreat center, where she worked as an independent contractor. She alleged that defendants negligently permitted a dangerous condition to exist on the path and failed to adequately illuminate the area where she fell. According to her bill of particulars, when she fell and hit her head in 2020 she aggravated an asymptomatic traumatic brain injury sustained in a 1987 motor vehicle accident for which she was awarded Social Security disability benefits.

At her March 2024 deposition, she was questioned about her disability claim and how her abilities were diminished before her accident at defendants' premises. Defense counsel obtained some remote medical and forensic records and demanded an authorization to obtain her file from the Social Security Administration in anticipation of an independent medical examination.

At Supreme Court's direction, plaintiff filed a note of issue on July 8, 2024. Defendants moved to vacate the note of issue, arguing that the case was not ready for trial and that they could not prepare a defense because they had not received the disability records. In an order dated October 22, 2024, the court granted defendants' motion to vacate the note of issue. At a conference held on December 13, 2024, defendants advised the court that the disability records remained outstanding. The court directed plaintiff to again file a note of issue and scheduled a trial for October 20, 2025. Plaintiff filed a note of issue pursuant to the court's directive, prompting defendants' second motion to vacate the note of issue on the same grounds, namely, that the federal agency had not responded to the request for records. After determining that defendants had not pursued the records diligently, the court denied defendants' motion to vacate the note of issue on February 21, 2025. The court found defendants' claim of prejudice to be speculative, noted that the trial was scheduled for October 2025, and held that defendants could seek additional relief if they had not completed a physical examination in the interim. In April 2025, defendants moved for summary judgment dismissing the complaint. Supreme Court denied the motion, finding that defendants' own submissions raised material questions of fact. Defendants appeal from both orders.¹

We affirm. "While a note of issue will generally be stricken if the case is not ready for trial, the motion to strike can be denied where the parties had sufficient time to complete discovery" (*Rosen v Mosby*, 180 AD3d 1253, 1256 [3d Dept 2020] [internal quotation marks and citations omitted]; *accord Lisa I. v Manikas*, 188 AD3d 1369, 1371 [3d Dept 2020]). The trial court's disposition of a motion to vacate the note of issue will be disturbed only upon a showing of abuse of discretion (*see Lindgren v Anoaia*, 224 AD3d 1105, 1107 [3d Dept 2024]).

Although the parties confirmed at oral argument that defendants still have not received the Social Security disability records, Supreme Court did not abuse its discretion in denying

1. This Court granted defendants' motion to stay the trial scheduled for October 20, 2025, pending resolution of these appeals.

the motion to vacate the note of issue. Trial courts possess inherent authority to control their calendars and to supervise the progress of litigation (see *Murray-Gardner Mgt. v Iroquois Gas Transmission Sys.*, 251 AD2d 954, 956 [3d Dept 1998]). Here, the court had scheduled the trial for October 2025, nearly 10 months after the December 2024 conference, and stated that it would entertain an appropriate application closer to trial if defendants had not conducted the physical examination due to outstanding requests for records. Given the potential indefinite delay and absent a concrete showing of prejudice, the court acted within its discretion in declining to vacate the note of issue, particularly when it invited a future application closer to trial and plaintiff identified possible alternative means to acquire relevant records. Defendants' arguments concerning any alleged prejudice related to post-note of issue discovery are conclusory and unavailing.

We also find that Supreme Court appropriately denied defendants' summary judgment motion. "[T]he owner of property has a nondelegable duty to maintain his or her property in a reasonably safe condition, taking into account foreseeability of injuries to others" (*Gignak v Bruno*, 237 AD3d 1351, 1353 [3d Dept 2025]). "In moving for summary judgment, defendant[s] bore the initial burden of establishing that [they] maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition" (*Levitt v Tops Mkts., LLC*, 240 AD3d 973, 974 [3d Dept 2025] [internal quotation marks and citations omitted]). "Constructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit the defendant[s] to discover it and take corrective action" (*id.* [internal quotation marks and citations omitted]; see *Benjamin v Court Jester Athletic Club, Ltd.*, 217 AD3d 1206, 1206 [3d Dept 2023]). To satisfy this burden, defendants were required to offer evidence of when the accident site was last inspected prior to plaintiff's fall (see *Lloyd v 797 Broadway Group, LLC*, 216 AD3d 1290, 1292 [3d Dept 2023]). "[P]roof of regular inspections and maintenance of the area in question—including an inspection and any remedial action just prior to the incident—is ordinarily sufficient to satisfy a defendant's burden of showing no notice of a dangerous condition" (*Stewart v Canton-Potsdam Hosp. Found., Inc.*, 79 AD3d 1406, 1407 [3d Dept 2010] [internal quotation marks and citation omitted]; see *Faville v County of Albany*, 163 AD3d 1297, 1298 [3d Dept 2018]). However, "[m]ere reference to general inspection practices is insufficient to establish a lack of constructive notice" (*Lloyd v 797*

Broadway Group, LLC, 216 AD3d at 1292 [internal quotation marks, ellipsis and citations omitted]; see *Lisker v Vue Catering, Inc.*, 237 AD3d 921, 922 [2d Dept 2025]). “Whether a dangerous condition exists is generally a question for the jury” (*Greblewski v Strong Health MCO, LLC*, 161 AD3d 1336, 1336 [3d Dept 2018] [citation omitted]).

According to plaintiff, she exited the administration building between 5:30 p.m. and 6:00 p.m., walked several steps and tripped over “a large rock” on the gravel pathway. The pathway was bordered on each side by rocks like the one that caused plaintiff to trip. Defendants identified several sources of illumination near the location of the fall, including an exterior light fixture above the administration building entrance, two solar-powered pathway lights mounted on a wooden post, and light emanating from a lodge near the pathway.

Defendants did not satisfy their initial burden of establishing, as a matter of law, the absence of constructive notice of the rock in the pathway. Although defendants’ manager verified the absence of prior complaints and characterized the pathway as heavily traveled on “any given day,” defendants failed to establish that the relevant area was inspected at or near the time of plaintiff’s fall (see *Lloyd v 797 Broadway Group, LLC*, 216 AD3d at 1292; compare *Levitt v Tops Mkts., LLC*, 240 AD3d at 975; *Knickerbocker v Ulster Performing Arts Ctr.*, 74 AD3d 1526, 1527 [3d Dept 2010]). The manager’s assertion that he routinely traversed the grounds, and that he walked over the pathway that day, without detailing the time or circumstances, constituted a mere general inspection practice that did not suffice to eliminate questions about whether the defect should have been discovered and remedied (see *Lloyd v 797 Broadway Group, LLC*, 216 AD3d at 1292; *Minutolo v County of Broome*, 130 AD3d 1202, 1204 [3d Dept 2015]). Accordingly, Supreme Court properly concluded that defendants failed to establish prima facie that they lacked constructive notice of a dangerous condition.

Turning to the premises lighting, defendants failed to establish, as a matter of law, that the illumination of the pathway at the time of plaintiff’s accident was sufficient to render it reasonably safe. Plaintiff’s testimony constituted the only evidence concerning the condition of the path on the evening of her fall.² While the manager averred that the photographs showed typical nighttime lighting conditions on the pathway,

2. While defendants argue that plaintiff never specifically testified that inadequate lighting contributed to her fall, plaintiff alleged in her bill of particulars that insufficient illumination along the pathway was a contributing cause of the accident. Additionally, at her deposition, when plaintiff was

(n. cont’d)

he did not explain when or why the photos were taken and defendants failed to provide any competent proof of the *actual* lighting conditions when plaintiff fell (*see Harvey v Laz Parking Ltd, LLC*, 128 AD3d 1203, 1205 [3d Dept 2015]; *compare Revesz v Carey*, 86 AD3d 821, 822 [3d Dept 2011]). Although the manager surmised that the lodge lights were likely turned on because a school group stayed at the lodge that night, defendants offered no direct proof of that assertion. Defendants' photographs did not show that the lodge lights effectively illuminated the spot where plaintiff fell. As Supreme Court aptly observed, while the light fixture above the administrative building door emitted a downward beam, a slanted awning underneath it partially blocked projection of that light and cast a shadow over the initial stretch of the pathway. Defendants' other photographs depicted the pathway, including the area where plaintiff fell after dark, with no visible illumination from nearby solar fixtures reaching that location. Because defendants' photographs raised triable questions about the illumination of the path, the court properly concluded they did not establish *prima facie* the sufficiency of the lighting. Accordingly, the court properly denied defendants' motion for summary judgment on the ground that they failed to demonstrate the absence of constructive notice of a dangerous condition in the first instance.

Garry, P.J., Clark, Pritzker and Powers, JJ., concur. Ordered that the orders are affirmed, with costs.

19 In the Matter of Kimberly Page Will, an Attorney. (Attorney Registration No. 5987607.) [249 NYS3d 315]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Kimberly Page Will was admitted to practice by this Court in 2022 and lists a business address in Bridgeton, New Jersey with the Office of Court Administration. Will now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Will's application.

Upon reading Will's affidavit sworn to January 7, 2026, and filed January 12, 2026, and upon reading the February 17,

asked whether she could see where she was going, she responded that it "wasn't pitch black, but it was pretty dark." Nor could she describe the exact size of the rock because it was "dark" at the time of her accident.

2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Will is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Garry, P.J., Pritzker, Reynolds Fitzgerald, Fisher and Corcoran, JJ., concur. Ordered that Kimberly Page Will's application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that Kimberly Page Will's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Kimberly Page Will is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Will is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Kimberly Page Will shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

20 In the Matter of Thomas Oliver McGimpsey, an Attorney. (Attorney Registration No. 5260740.) [248 NYS3d 868]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Thomas Oliver McGimpsey was admitted to practice by this Court in 2014 and lists a business address in Lake Mary, Florida with the Office of Court Administration. McGimpsey now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose McGimpsey's application.

Upon reading McGimpsey's affidavit sworn to January 6, 2026, and filed January 12, 2026, and upon reading the February 17, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that McGimpsey is eligible to resign for nondisciplinary reasons, we grant his application and accept his resignation.

Aarons, J.P., Pritzker, Reynolds Fitzgerald, Fisher and Mac-

key, JJ., concur. Ordered that Thomas Oliver McGimpsey's application for permission to resign is granted and his nondisciplinary resignation is accepted; and it is further ordered that Thomas Oliver McGimpsey's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Thomas Oliver McGimpsey is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and McGimpsey is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold himself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Thomas Oliver McGimpsey shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to him.

21 In the Matter of Jodi S. Wilenzik, an Attorney. (Attorney Registration No. 4614335.) [249 NYS3d 316]—

Attorney and Client—Resignation—Nondisciplinary Reasons—Application Granted

Per Curiam. Jodi S. Wilenzik was admitted to practice by this Court in 2008 and lists a business address in North Wales, Pennsylvania with the Office of Court Administration. Wilenzik now seeks leave to resign from the New York bar for nondisciplinary reasons (*see* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [a]). The Attorney Grievance Committee for the Third Judicial Department (hereinafter AGC) advises that it does not oppose Wilenzik's application.

Upon reading Wilenzik's affidavit sworn to January 7, 2026, and filed January 15, 2026, and upon reading the February 17, 2026 correspondence in response by the Deputy Chief Attorney for AGC, and having determined that Wilenzik is eligible to resign for nondisciplinary reasons, we grant her application and accept her resignation.

Aarons, J.P., Pritzker, Reynolds Fitzgerald, Fisher and Mackey, JJ., concur. Ordered that Jodi S. Wilenzik's application for permission to resign is granted and her nondisciplinary resignation is accepted; and it is further ordered that Jodi S. Wilenzik's name is hereby stricken from the roll of attorneys and counselors-at-law of the State of New York, effective im-

mediately, and until further order of this Court (*see generally* Rules for Atty Disciplinary Matters [22 NYCRR] § 1240.22 [b]); and it is further ordered that Jodi S. Wilenzik is commanded to desist and refrain from the practice of law in any form in the State of New York, either as principal or as agent, clerk or employee of another; and Wilenzik is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto, or to hold herself out in any way as an attorney and counselor-at-law in this state; and it is further ordered that Jodi S. Wilenzik shall, within 30 days of the date of this decision, surrender to the Office of Court Administration any Attorney Secure Pass issued to her.

FOURTH DEPARTMENT, FEBRUARY, 2026

(February 11, 2026)

1 The People of the State of New York, Respondent, v Edgar Tolentino, Appellant. [248 NYS3d 407]—

Crimes—Appeal—Invalid Waiver

Appeal from a judgment of the Monroe County Court (Stacey Romeo, A.J.), rendered July 18, 2022. The judgment convicted defendant upon a guilty plea of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3]). Defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. We agree with defendant that his waiver of the right to appeal is invalid. Defendant orally waived his right to appeal and executed a written waiver thereof. The language in the written waiver, however, is “inaccurate and misleading insofar as it purports to impose ‘an absolute bar to the taking of a direct appeal’ and to deprive defendant of his ‘attendant rights to counsel and poor person relief, [as well as] all post-conviction relief separate from the direct appeal’ ” (*People v Nesmith*, 235 AD3d 1239, 1239 [4th Dept 2025], *lv denied* 43 NY3d 964 [2025], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* 589 US 1302 [2020]; *see People v Ocasio*, 222 AD3d 1364, 1364-1365 [4th Dept 2023]; *People v Fernandez*,

218 AD3d 1257, 1257-1258 [4th Dept 2023], *lv denied* 40 NY3d 1012 [2023]). Although County Court's oral colloquy remedied the written waiver's mischaracterization of the waiver as an absolute bar to the taking of an appeal, the court's verbal statements did nothing to counter the other inaccuracies set forth in the written appeal waiver, including the purported waiver of all state and federal postconviction challenges (*see People v Mason*, 236 AD3d 1354, 1355 [4th Dept 2025], *lv denied* 43 NY3d 1010 [2025]; *see also Nesmith*, 235 AD3d at 1240; *People v Hughes*, 199 AD3d 1332, 1333 [4th Dept 2021]). Contrary to defendant's contention, however, his sentence is not unduly harsh or severe. Present—Whalen, P.J., Curran, Montour, Smith and Greenwood, JJ.

2 The People of the State of New York, Respondent, v Ryan Laws, Appellant. [248 NYS3d 390]—

Crimes—Appeal—Valid Waiver

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered August 2, 2023. The judgment convicted defendant upon a plea of guilty of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]).

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Williams*, 228 AD3d 1316, 1316 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *denied reconsideration* 42 NY3d 1055 [2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]; *People v Lopez*, 6 NY3d 248, 256 [2006]). County Court's oral colloquy did not mischaracterize the waiver of the right to appeal as "an absolute bar to the taking of a first-tier direct appeal" (*Thomas*, 34 NY3d at 558; *see People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). To the extent that defendant contends that the written waiver form he executed was defective, the oral colloquy, which followed the appropriate model colloquy, "cured th[e] [alleged] defect[s]" (*People v Hoose*, 236 AD3d 1294, 1295 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025] [internal quotation marks omitted]; *see People v Tandle*, 238 AD3d 1503, 1504 [4th Dept 2025], *lv denied* 43 NY3d 1059 [2025]; *Williams*, 228 AD3d at 1317).

Defendant's valid waiver of the right to appeal precludes our

review of his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 255-256; *Tandle*, 238 AD3d at 1504). Present—Whalen, P.J., Curran, Montour, Smith and Greenwood, JJ.

3 The People of the State of New York, Respondent, v Rafael Martinez, Appellant. [248 NYS3d 388]—Appeal from a judgment of the Supreme Court, Erie County (Debra L. Givens, A.J.), rendered April 4, 2023. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and therefore does not preclude our review of his challenge to the severity of his sentence (*see People v Swiderski*, 217 AD3d 1416, 1417 [4th Dept 2023]), we conclude that the sentence is not unduly harsh or severe. Finally, we note that the certificate of conviction and the uniform sentence and commitment form incorrectly state that defendant was sentenced as a second felony offender in County Court, and they must be amended to reflect that he was actually sentenced as a second felony drug offender in Supreme Court (*see People v Jones*, 224 AD3d 1348, 1353 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]). Present—Whalen, P.J., Curran, Montour, Smith and Greenwood, JJ.

4 In the Matter of Nicholas J. Macrina, Respondent-Appellant, v Ellissa M. Merritt, Also Known as Salm, Appellant-Respondent. In the Matter of Ellissa M. Merritt, Also Known as Salm, Appellant-Respondent, v Nicholas J. Macrina, Respondent-Appellant. [247 NYS3d 865]—Appeal and cross-appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered November 18, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parties joint legal custody of the subject child with primary physical residence to petitioner-respondent Nicholas J. Macrina.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Whalen, P.J., Curran, Montour, Smith and Greenwood, JJ.

5 Joseph D. Burgdorf, Appellant, v Betsy Ross Nursing and Rehabilitation Center, Inc., Doing Business as Betsy Ross

Nursing and Rehabilitation Center, et al., Respondents, et al., Defendants. [247 NYS3d 869]—Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Scott J. DelConte, J.), entered July 20, 2023. The order and judgment, among other things, denied plaintiff's motion for leave to amend his complaint.

It is hereby ordered that the order and judgment so appealed from is unanimously affirmed without costs. Present—Whalen, P.J., Curran, Montour, Smith and Greenwood, JJ.

6 Peter C. Lomtevas, Appellant, v City of Schenectady et al., Respondents. [247 NYS3d 868]—Appeal from an order of the Supreme Court, Schenectady County (Paul E. Davenport, J.), entered October 17, 2024. The order granted the motion of defendants to dismiss the complaint and dismissed the complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Whalen, P.J., Curran, Montour, Smith and Greenwood, JJ.

7 Debra D. Smith, Appellant, v Thomas P. Azzarella, Respondent. [247 NYS3d 865]—Appeal from an order of the Supreme Court, Erie County (Daniel Furlong, J.), entered September 9, 2024. The order, among other things, denied the application of plaintiff for an award of attorney's fees.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Curran, J.P., Montour, Smith and Greenwood, JJ.

8 The People of the State of New York, Respondent, v Tylor J. Felix, Appellant. [248 NYS3d 391]—

Crimes—Appeal—Valid Waiver

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered May 23, 2024. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of grand larceny in the third degree (Penal Law § 155.35 [1]). We reject defendant's contention that the waiver of the right to appeal is invalid. We conclude that, "[a]lthough the written waiver included a misleading heading, the oral colloquy, together with the remainder of the written waiver, 'was sufficient to support a knowing and voluntary waiver under the totality of the circum-

stances’ ” (*People v Hopkins*, 221 AD3d 1436, 1436 [4th Dept 2023], *lv denied* 41 NY3d 943 [2024]; *see People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* 589 US 1302 [2020]). Defendant’s challenge to the severity of his sentence is encompassed by his valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]). Present—Lindley, J.P., Bannister, Ogden, Nowak and DelConte, JJ.

9 The People of the State of New York, Respondent, v Samiere Williams, Appellant. [251 NYS3d 457]—

Crimes—Appeal—Waiver—Demand of Trial Court as Condition to Plea Bargain

Crimes—Right to Counsel—Effective Representation—Plea of Guilty

Appeal from a judgment of the Monroe County Court (Stacey Romeo, A.J.), rendered July 19, 2022. The judgment convicted defendant upon a plea of guilty of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of one count of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]).

Contrary to defendant’s contention, we conclude that the oral colloquy, together with the written waiver of the right to appeal, “‘was sufficient to support a knowing and voluntary waiver under the totality of the circumstances’ ” (*People v Jones*, 239 AD3d 1475, 1476 [4th Dept 2025]; *see People v Hannah T.*, 240 AD3d 1260, 1261 [4th Dept 2025]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]). Defendant, relying on *People v Sutton* (184 AD3d 236, 244-245 [2d Dept 2020], *lv denied* 35 NY3d 1070 [2020]), also contends that the waiver is invalid because it was included as part of the plea agreement as offered by County Court and the court failed to sufficiently articulate the reasons for its demand. This Court, however, has not adopted the rule created by the Second Department (*see People v Gaines*, 239 AD3d 1350, 1350 [4th Dept 2025]; *People v Figueroa*, 230 AD3d 1581, 1583 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). In any event, the court here, unlike the trial court in *Sutton*, “included the appeal waiver as a condition of the plea offer prior to accepting defendant’s plea and articulated on the record that the appeal waiver was required in order for defendant to secure

the benefit of the sentencing limitation promised by the court” (*Figueroa*, 230 AD3d at 1583; *see Gaines*, 239 AD3d at 1350). Contrary to defendant’s further contention, a waiver of the right to appeal is not unconscionable per se (*see People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *see generally Thomas*, 34 NY3d at 557), nor was it unconscionable for the court to demand a waiver of the right to appeal as a condition of a favorable plea bargain (*see e.g. Gaines*, 239 AD3d at 1350; *Figueroa*, 230 AD3d at 1583).

Defendant’s valid waiver of the right to appeal precludes our review of his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Brinkman*, 240 AD3d 1431, 1432 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]), and we decline to reduce the sentence pursuant to our interest of justice jurisdiction (*cf. Hannah T.*, 240 AD3d at 1262).

Defendant’s contention that he was denied effective assistance of counsel survives his guilty plea and valid waiver of the right to appeal “only insofar as defendant contends that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of [his] attorney[’s] allegedly poor performance” (*People v Richards*, 239 AD3d 1330, 1331 [4th Dept 2025], *lv denied* 44 NY3d 1013 [2025] [internal quotation marks omitted]; *see People v Molski*, 179 AD3d 1540, 1540-1541 [4th Dept 2020], *lv denied* 35 NY3d 972 [2020]; *People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]). “Where, as here, a defendant contends that [they were] denied the right to effective assistance of counsel guaranteed by both the Federal and New York State Constitutions, we evaluate the claim using the state standard, which affords greater protection than its federal counterpart” (*People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see People v Stultz*, 2 NY3d 277, 282-284 [2004], *rearg denied* 3 NY3d 702 [2004]). Under the state standard, “[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met” (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Kates*, 162 AD3d 1627, 1631 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *denied reconsideration* 32 NY3d 1173 [2019]). “In the context of a guilty plea, a defendant has been afforded meaningful representation when [they] receive[] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel”

(*People v Ford*, 86 NY2d 397, 404 [1995]; see *Kates*, 162 AD3d at 1631; *People v Brown*, 305 AD2d 1068, 1069 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]). Here, defense counsel secured a favorable plea bargain for defendant, and nothing in the record casts doubt on the apparent effectiveness of defense counsel (see *Ford*, 86 NY2d at 404; *People v Smith*, 198 AD3d 1347, 1348 [4th Dept 2021]). Present—Lindley, J.P., Bannister, Ogden, Nowak and DelConte, JJ.

10 The People of the State of New York, Respondent, v Tylor J. Felix, Appellant. [250 NYS3d 754]—

Crimes—Right to Speedy Trial—Motion to Dismiss Indictment on Statutory Grounds—Initial Burden

Crimes—Endangering Welfare of Child—Weight of Evidence—Motor Vehicle Collision

Appeal from a judgment of the Wayne County Court (Arthur B. Williams, J.), rendered April 2, 2024. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the second degree and endangering the welfare of a child.

It is hereby ordered that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of endangering the welfare of a child under count 2 of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal mischief in the second degree (Penal Law § 145.10) and endangering the welfare of a child (§ 260.10 [1]). The conviction arises from an incident during which defendant ran his pickup truck into the back of a pickup truck operated by the complainant. The complainant's six-year-old son was riding as a passenger in the back seat of his truck.

Contrary to defendant's contention, County Court did not err in denying that part of his omnibus motion seeking to dismiss the indictment on statutory speedy trial grounds. "CPL 30.30 requires dismissal of a felony indictment where the People are not ready for trial within six months of the commencement of the criminal action" (*People v England*, 84 NY2d 1, 4 [1994], *rearg denied* 84 NY2d 846 [1994]; see CPL 30.30 [1] [a]). On a motion to dismiss an indictment on statutory speedy trial grounds (see CPL 30.30 [1]; 210.20 [1] [g]), "a defendant bears the initial burden of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]). The defendant meets that burden "by alleging only that the prosecution failed to declare

readiness within the statutorily prescribed time period’ ” (*People v Goode*, 87 NY2d 1045, 1047 [1996]; see *People v Santos*, 68 NY2d 859, 861 [1986]). Here, although defendant alleged in support of the motion that the People’s failure to disclose certain material discoverable under CPL 245.20 rendered their certificate of compliance illusory and, thus, the People should be deemed not ready for trial, defendant failed to allege “the commencement date of the criminal action, that the statutorily prescribed time period was six months, or that an unexcused delay of more than six months had elapsed since the commencement of the action” (*People v Cotto*, 240 AD3d 1311, 1312 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]; cf. *People v Agee*, 235 AD3d 1247, 1248 [4th Dept 2025]). Defendant thus “failed to satisfy his initial burden under CPL 30.30 of alleging that the prosecution [did not] declare readiness within the statutorily prescribed time period’ ” (*Cotto*, 240 AD3d at 1312-1313).

Defendant’s contention that the evidence is legally insufficient to support his conviction of endangering the welfare of a child is not preserved for our review inasmuch as defendant’s motion for a trial order of dismissal was not “specifically directed at the ground[]” now raised on appeal, i.e., that there is no evidence that defendant was aware that the child was in the complainant’s vehicle (*People v Moore*, 232 AD3d 1299, 1300 [4th Dept 2024], *lv denied* 43 NY3d 945 [2025]; see *People v Gray*, 86 NY2d 10, 19 [1995]). Nevertheless, “we necessarily review the evidence adduced as to each of the elements of th[at] crime[] in the context of our review of defendant’s challenge regarding the weight of the evidence” (*Moore*, 232 AD3d at 1300 [internal quotation marks omitted]).

A review of the weight of the evidence requires us to first determine whether an acquittal would not have been unreasonable (see *People v Danielson*, 9 NY3d 342, 348 [2007]). Where an acquittal would not have been unreasonable, we “must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions” (*id.*). Here, we conclude that an acquittal would not have been unreasonable with respect to the endangering the welfare of the child count. Furthermore, viewing the evidence in light of the elements of that crime as charged to the jury (see *id.* at 349), we conclude that the jury was not justified in finding defendant guilty beyond a reasonable doubt of endangering the welfare of a child, and we therefore modify the judgment accordingly. There was no evidence presented at the trial from which the jury could reason-

ably infer that defendant was aware that the child was in the complainant's vehicle (*cf. People v Turner*, 172 AD3d 1768, 1771 [3d Dept 2019], *lv denied* 34 NY3d 939 [2019]; *see generally People v Pelt*, 157 Misc 2d 90, 93 [Crim Ct, Kings County 1993]).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant further modification or reversal of the judgment. Present—Lindley, J.P., Bannister, Ogden, Nowak and DelConte, JJ.

11 Kimberly Alecki, Respondent, v Tech Park Owner, LLC, Appellant, et al., Defendants. [247 NYS3d 868]—Appeal from an order of the Supreme Court, Monroe County (Erin S. Skinner, J.), entered February 27, 2025, in a personal injury action. The order denied the motion of defendant Tech Park Owner, LLC, to vacate a default judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Lindley, J.P., Bannister, Ogden and Nowak, JJ.

12 In the Matter of Greenidge Generation, LLC, Appellant, v New York State Department of Environmental Conservation et al., Respondents. [247 NYS3d 877]—Appeal from a judgment (denominated judgment and order) of the Supreme Court, Yates County (Vincent M. Dinolfo, J.), entered November 14, 2024, in a proceeding pursuant to CPLR article 78. The judgment, *inter alia*, annulled the denial of petitioner's application to renew its Clean Air Act Title V permit.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 28, 2025,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Lindley, J.P., Bannister, Ogden and Nowak, JJ. [**Prior Case History: 86 Misc 3d 338.**]

13 In the Matter of Niagara Metals, LLC, Also Known as Diamond Hurwitz Scrap, LLC, et al., Appellants, v City of Buffalo Zoning Board of Appeals et al., Respondents, and Aim Erie Recycling, LLC, Respondent. [247 NYS3d 866]—Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Amy C. Martoche, J.), entered September 16, 2024, in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, granted in part the motion of respondent Aim Recycling Erie, LLC, to dismiss the petitions.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Lindley, J.P., Bannister, Ogden, Nowak and DelConte, JJ.

14 The People of the State of New York, Respondent, v Ray Jones, III, Appellant. [252 NYS3d 370]—

Crimes—Evidence—Photographs Depicting Social Media Messages Sent to Victim—Authentication

Crimes—Use of Child in Sexual Performance—Promoting Sexual Performance by Child—Sexually Motivated Felony—Sufficiency and Weight of Evidence

Crimes—Right to Counsel—Effective Representation—Challenge to Expert Testimony—Child Sexual Abuse Accommodation Syndrome—Cross-Examination of Police Investigators

Appeal from a judgment of the Monroe County Court (Sam L. Valleriani, J.), rendered January 24, 2019. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, criminal sexual act in the third degree, rape in the third degree, sexual abuse in the third degree, use of a child in a sexual performance, promoting a sexual performance by a child and endangering the welfare of a child.

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

Memorandum: In this prosecution arising from allegations that defendant sexually abused a female child (victim) over a period of years during the victim's childhood, defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law former § 130.96), criminal sexual act in the third degree (former § 130.40 [2]), rape in the third degree (former § 130.25 [2]), sexual abuse in the third degree (§ 130.55), use of a child in a sexual performance as a sexually motivated felony (§§ 130.91, 263.05), promoting a sexual performance by a child as a sexually motivated felony (§§ 130.91, 263.15), and endangering the welfare of a child (§ 260.10 [1]). We affirm.

Defendant contends that the indictment was “jurisdictionally defective” because the 6½-year time period set forth in the count alleging predatory sexual assault against a child is excessive. We conclude that defendant's contention is not properly characterized as raising a jurisdictional defect; instead, defendant's contention constitutes a challenge to the factual sufficiency of the allegations (*see People v Carter*, 147 AD3d 1514, 1515 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]; *see generally People v Iannone*, 45 NY2d 589, 600-601 [1978]). That challenge is not preserved for our review inasmuch as that part of defendant's omnibus motion seeking to dismiss the

indictment constituted only a general motion, which did not advance the specific claim now raised on appeal (see *People v Spears*, 125 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]; *People v Carey*, 92 AD3d 1224, 1224 [4th Dept 2012], *lv denied* 18 NY3d 992 [2012]), and County Court did not “expressly decide[] the question raised on appeal” in response to defendant’s motion (CPL 470.05 [2]). We decline to exercise our power to address that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *Carey*, 92 AD3d at 1224-1225).

Defendant also contends that the court should have suppressed any evidence that was seized from his residence during the execution of a search warrant issued for that property. By failing to seek a ruling on that part of his omnibus motion challenging the search warrant for the residence and by failing to object to any admission of the seized evidence at trial, defendant abandoned his challenge to that search warrant (see *People v Smith*, 147 AD3d 1527, 1528 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *People v Mulligan*, 118 AD3d 1372, 1376 [4th Dept 2014], *lv denied* 25 NY3d 1075 [2015]). Defendant’s related contention that a search warrant for a social media account was issued without probable cause and was overbroad is not preserved for our review inasmuch as defendant failed to raise that contention in his motion papers or before the suppression court (see *People v Navarro*, 158 AD3d 1242, 1243-1244 [4th Dept 2018], *lv denied* 31 NY3d 1120 [2018]; *People v Woodring*, 48 AD3d 1273, 1275 [4th Dept 2008], *lv denied* 10 NY3d 846 [2008]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]; *People v Myles*, 216 AD3d 1419, 1421-1422 [4th Dept 2023], *lv denied* 40 NY3d 936 [2023]; *Woodring*, 48 AD3d at 1275).

Defendant further contends that the court erred in admitting in evidence, over his foundation objection, two photographs depicting social media messages sent to the victim, asserting that the People failed to properly authenticate that the messages were sent by defendant. We reject that contention. Although there was no Internet service provider or other technical evidence regarding the social media messages, the messages were properly authenticated, through circumstantial evidence, as having been sent by defendant (see *People v McKoy*, 217 AD3d 1396, 1397 [4th Dept 2023], *lv denied* 40 NY3d 998 [2023]; *People v Pierre*, 41 AD3d 289, 291 [1st Dept 2007], *lv denied* 9 NY3d 880 [2007]). The testimony of the victim and her mother, the latter of whom photographed the messages af-

ter she was shown them on the victim's tablet, established that defendant's social media account username was saved on the victim's tablet under his nickname in relation to her and that defendant's personalized avatar appeared with the messages (see *McKoy*, 217 AD3d at 1397; *People v Kingsberry*, 194 AD3d 843, 844 [2d Dept 2021], *lv denied* 37 NY3d 993 [2021]; *People v Serrano*, 173 AD3d 1484, 1488 [3d Dept 2019], *lv denied* 34 NY3d 937 [2019]). The identity of the sender of the messages was also "sufficiently authenticated by the content of the . . . messages" (*People v Mencil*, 206 AD3d 1550, 1552 [4th Dept 2022], *lv denied* 38 NY3d 1152 [2022]; see *McKoy*, 217 AD3d at 1397; *People v Green*, 107 AD3d 915, 916 [2d Dept 2013], *lv denied* 22 NY3d 1088 [2014]; *Pierre*, 41 AD3d at 291). Moreover, "[t]he credibility of the authenticating witness[es] goes to the weight to be accorded the evidence, not to its admissibility" and, to the extent that defendant suggests that someone else could have sent the messages from the social media account associated with him, "the likelihood of that scenario 'presented a factual issue for the jury to resolve'" (*McKoy*, 217 AD3d at 1397-1398; see *People v Tucker*, 200 AD3d 1584, 1586 [4th Dept 2021], *lv denied* 38 NY3d 954 [2022]; *Serrano*, 173 AD3d at 1488). To the extent that defendant contends that the People failed to establish a proper foundation for the social media messages on other grounds, we conclude that defendant's contention is not preserved for our review inasmuch as defendant failed to object to the admission of the messages on those grounds (see *People v Minutolo*, 215 AD3d 1260, 1260-1261 [4th Dept 2023], *lv denied* 40 NY3d 1093 [2024]; *People v Byrd*, 214 AD3d 1321, 1323 [4th Dept 2023], *lv denied* 40 NY3d 927 [2023]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject defendant's contention that the court erred in permitting the testimony of two witnesses under the prompt outcry exception to the hearsay rule (see *People v Stuckey*, 50 AD3d 447, 448 [1st Dept 2008], *lv denied* 11 NY3d 742 [2008]; *People v Rodriguez*, 284 AD2d 952, 952 [4th Dept 2001], *lv denied* 96 NY2d 924 [2001]; see generally *People v McDaniel*, 81 NY2d 10, 16-18 [1993]). We also reject defendant's contention that the court erred in permitting the People to introduce *Molineux* evidence related to defendant's prior acts of domestic violence against the victim's mother (see *People v Cuadrado*, 227 AD3d 1174, 1180-1181 [3d Dept 2024], *lv denied* 42 NY3d 969 [2024]).

Defendant further asserts that the court erroneously

precluded him from cross-examining the victim about a prior sexually transmitted infection diagnosis, thereby depriving him of his rights to confront witnesses and present a defense. Although the People initially moved in limine to preclude such evidence, the court reserved decision after argument and indicated that it would not rule “unless and until the issue becomes ripe” during trial. Defendant, however, did not object to the court’s course of action, nor did he seek to elicit or introduce such evidence at trial, and we thus conclude that defendant’s contention is not preserved for our review (*see People v Cruz-Rivera*, 174 AD3d 1512, 1513 [4th Dept 2019], *lv denied* 34 NY3d 1127 [2020]; *People v Billip*, 65 AD3d 430, 430-431 [1st Dept 2009], *lv denied* 13 NY3d 834 [2009]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *Billip*, 65 AD3d at 431).

Next, defendant contends that the evidence is legally insufficient to support the conviction with respect to the counts of use of a child in a sexual performance as a sexually motivated felony and promoting a sexual performance by a child as a sexually motivated felony because the People were unable to produce the video on which those counts were predicated. Defendant failed to preserve that contention for our review because he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Schultz*, 266 AD2d 919, 919 [4th Dept 1999], *lv denied* 94 NY2d 906 [2000]; *People v Farbman*, 231 AD2d 588, 588 [2d Dept 1996], *lv denied* 89 NY2d 863 [1996]). In any event, that contention lacks merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), including the victim’s testimony that defendant used his cell phone to record a video of her performing oral sex on him, a photograph of a social media message sent by defendant to the victim in which defendant referred to that footage, and the evidence that defendant saved the video to a social media application designed to hide videos in an encrypted, password-protected folder, we conclude that the evidence is legally sufficient to support the conviction with respect to the aforementioned counts (*see People v Burke*, 287 AD2d 512, 514 [2d Dept 2001], *lv denied* 97 NY2d 679 [2001]; *Farbman*, 231 AD2d at 588; *see also People v Keane*, 240 AD3d 1424, 1426 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025], *denied reconsideration* 44 NY3d 1028 [2025]).

With respect to defendant’s contention that the verdict is against the weight of the evidence, we conclude at the outset

that “a different verdict would not have been unreasonable inasmuch as this case rests largely on the jury’s credibility findings with respect to the testimony of the victim and the People’s other witnesses” (*People v Harrell*, 235 AD3d 1294, 1297 [4th Dept 2025], *lv denied* 43 NY3d 1009 [2025] [internal quotation marks omitted]; see *People v Roman*, 107 AD3d 1441, 1442 [4th Dept 2013], *lv denied* 21 NY3d 1045 [2013]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Nevertheless, viewing the evidence in light of the elements of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]) and “affording the requisite ‘great deference to the jury given its opportunity to view the witnesses’” (*Roman*, 107 AD3d at 1442), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Here, “[t]he jury was entitled to credit the testimony of the People’s witnesses, including that of the victim, over the testimony of defendant’s witness[],” and we perceive no reason to disturb those credibility determinations (*People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]; see *Harrell*, 235 AD3d at 1298). Contrary to defendant’s assertion, we conclude that there was nothing about the victim’s trial testimony that was “manifestly untrue, physically impossible, contrary to experience, or self-contradictory” (*People v Mercado-Gomez*, 206 AD3d 1643, 1644 [4th Dept 2022] [internal quotation marks omitted]). In addition, defendant’s contention concerning the lack of forensic evidence corroborating the victim’s testimony is unavailing inasmuch as “the testimony of [the victim] can be enough to support a conviction” (*People v Goodson*, 144 AD3d 1515, 1516 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017] [internal quotation marks omitted]; see *Mercado-Gomez*, 206 AD3d at 1644-1645; see also *People v Hackett*, 166 AD3d 1483, 1485 [4th Dept 2018], *lv denied* 32 NY3d 1204 [2019], *denied reconsideration* 33 NY3d 949 [2019]).

Defendant further contends that he was denied effective assistance of counsel based on defense counsel’s purported failures to adequately challenge and respond to the testimony of the People’s expert regarding child sexual abuse accommodation syndrome (CSAAS). We reject that contention. “There can be no denial of effective assistance of trial counsel arising from counsel’s failure to ‘make a motion or argument that has little or no chance of success’” (*People v Caban*, 5 NY3d 143, 152 [2005]) and, here, defense counsel had no legitimate basis for arguing that the expert’s testimony constituted improper bolstering (see *People v Young*, 206 AD3d 1631, 1633 [4th Dept 2022]; *People v Meyers*, 188 AD3d 1732, 1734 [4th Dept 2020]; *People v Englert*, 130 AD3d 1532, 1533-1534 [4th Dept 2015],

lv denied 26 NY3d 967 [2015], *lv denied* 26 NY3d 1144 [2016]). To the extent that defendant asserts that defense counsel was ineffective in failing to adequately cross-examine the expert, we conclude that defendant's assertion lacks merit. The record establishes that defense counsel, on cross-examination of the expert, elicited acknowledgments that the expert "could give no evidence with respect to the ultimate issue of the case, i.e., defendant's guilt" (*Young*, 206 AD3d at 1633 [internal quotation marks omitted]), and defendant's "simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" to demonstrate that he was denied effective assistance of counsel (*People v Flores*, 84 NY2d 184, 187 [1994]; see *Young*, 206 AD3d at 1633). To the extent that defendant's assertion that defense counsel was ineffective in failing to secure opposing CSAAS testimony is reviewable on direct appeal, we conclude that it lacks merit inasmuch as defendant "has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence" (*Meyers*, 188 AD3d at 1734 [internal quotation marks omitted]; see *Young*, 206 AD3d at 1633; *Englert*, 130 AD3d at 1533). To the extent that defendant asserts that CSAAS lacks scientific validity and that defense counsel should have presented evidence to that effect either through a rebuttal expert or during cross-examination of the People's expert, we note that such "challenges to [defense] counsel's preparedness depend on matters dehors the record and are not reviewable on direct appeal" (*People v Nicholson*, 26 NY3d 813, 832 [2016]).

We reject defendant's related contention that defense counsel was ineffective in failing to cross-examine police investigators at greater length about their efforts to access the contents of defendant's cell phone, including the video. Defense counsel asked the investigators questions designed to cast doubt on the thoroughness of the investigation and highlighted the lack of evidence against defendant obtained by the investigators, and defense counsel could have reasonably determined that asking additional questions would have undermined that part of the defense strategy seeking to show that the police failed to conduct a thorough investigation (see *People v Mastin*, 232 AD3d 1268, 1270 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]; *People v Pratt*, 162 AD3d 1202, 1204 [3d Dept 2018], *lv denied* 32 NY3d 940 [2018]). Finally, we reject defendant's contention that defense counsel was ineffective in failing to impeach the victim with ostensible prior inconsistent statements or to highlight on summation purported contradictions in the victim's testimony inasmuch as such arguments would

have had “‘little or no chance of success’” (*Caban*, 5 NY3d at 152). Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

15 The People of the State of New York, Respondent, v Kente Bell, Appellant. [248 NYS3d 389]—Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 5, 2023. The judgment convicted defendant, upon a guilty plea, of attempted murder in the second degree (three counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of three counts of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]). Contrary to defendant’s contention, we conclude on this record that defendant’s waiver of the right to appeal was knowing, voluntary, and intelligent (*see People v Littlejohn*, 243 AD3d 1287, 1287-1288 [4th Dept 2025]; *see also People v Zukic*, 240 AD3d 1192, 1193 [4th Dept 2025], *lv denied* 44 NY3d 995 [2025]). Defendant’s valid waiver of the right to appeal forecloses our review of his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

16 The People of the State of New York, Respondent, v Calvin Campbell, Appellant. [247 NYS3d 867]—Appeal from a resentence of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 28, 2024. Defendant was resentenced upon a conviction of assault in the second degree.

It is hereby ordered that the resentence so appealed from is unanimously affirmed.

Memorandum: Defendant was convicted upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]) and now appeals from the resentence. We affirm.

Assuming, arguendo, that defendant’s waiver of the right to appeal is invalid or otherwise does not encompass his challenge to the severity of the resentence (*see People v Odle*, 233 AD3d 1502, 1503 [4th Dept 2024], *lv denied* 43 NY3d 965 [2025]; *People v Knorr*, 195 AD3d 1573, 1574 [4th Dept 2021], *lv denied* 37 NY3d 993 [2021]; *see generally People v Jirdon*, 159 AD3d 1518, 1519 [4th Dept 2018]), we nevertheless conclude that the resentence is not unduly harsh or severe. Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

17 The People of the State of New York, Respondent, v Jahmere A. Davis, Appellant. [247 NYS3d 869]—Appeal from a judgment of the Livingston County Court (Jennifer M. Noto, J.), rendered January 16, 2025. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

It is hereby ordered that the judgment so appealed from is unanimously affirmed. Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

18 The People of the State of New York, Respondent, v Keith Rodney, Appellant. [248 NYS3d 400]—

Crimes—Appeal—Absence of Notice of Appeal

Appeal from a resentence of the Monroe County Court (Richard M. Healy, A.J.), rendered August 22, 2022. Defendant was resented upon a conviction of murder in the second degree.

It is hereby ordered that said appeal is unanimously dismissed.

Memorandum: Defendant was convicted upon a jury verdict of six counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of murder in the second degree (Penal Law § 125.25 [1]). Defendant now appeals from a resentence pursuant to which County Court set aside the verdict with respect to all six counts of criminal possession of a weapon in the second degree inasmuch as defendant was not criminally responsible for those crimes by reason of infancy (CPL 310.85; Penal Law § 30.00), vacated the sentences imposed thereon, and resented defendant to an indeterminate term of 15 years to life imprisonment on his conviction of murder in the second degree. Inasmuch as “the resentence occurred more than 30 days after the original sentence and the only notice of appeal is from the resentence, defendant’s appeal is from the resentence only” (*People v Coble*, 17 AD3d 1165, 1165 [4th Dept 2005], *lv denied* 5 NY3d 787 [2005]; *see* CPL 450.30 [3]; *People v Shorter*, 236 AD3d 1357, 1358 [4th Dept 2025], *lv denied* 43 NY3d 1048 [2025]; *People v Lett*, 42 AD3d 970, 970 [4th Dept 2007], *lv denied* 9 NY3d 962 [2007]). Defendant’s contentions on appeal regarding the original judgment are thus “‘not properly before us inasmuch as there is no notice of appeal from the original judgment in the record . . . , nor is there otherwise any indication in the record that an appeal from that judgment was perfected’” (*People v Dexter*, 71 AD3d 1504, 1504 [4th Dept 2010], *lv denied* 14 NY3d 887 [2010]; *see People v Parrilla*, 227 AD3d 1419, 1419 [4th

Dept 2024]; *People v Williams*, 163 AD3d 1420, 1421 [4th Dept 2018]). Inasmuch as defendant does not raise any contentions regarding the resentencing, we dismiss the appeal (*see People v Lewis*, 232 AD3d 1316, 1316 [4th Dept 2024]; *Parrilla*, 227 AD3d at 1419-1420). Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

19 The People of the State of New York, Respondent, v Devon A. Wright, Appellant. [249 NYS3d 683]—

Crimes—Appeal—Waiver—Demand of People as Condition to Plea Bargain

Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered November 22, 2022. The judgment convicted defendant upon his plea of guilty of attempted assault in the first degree, assault in the third degree and criminal sexual act in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), criminal sexual act in the second degree (former § 130.45 [1]), and assault in the third degree (§ 120.00 [1]), defendant contends that his waiver of the right to appeal is unenforceable, that County Court erred in denying him youthful offender status, and that his sentence is unduly harsh and severe. We affirm.

Contrary to defendant's contentions, a waiver of the right to appeal is not unconscionable per se, it is not improper for the People to demand a waiver of the right to appeal as a condition of a plea bargain, and an appeal waiver is not rendered unenforceable due to circumstances inherent to the plea bargaining process in general (*see People v Thomas*, 34 NY3d 545, 557 [2019], *cert denied* 589 US 1302 [2020]; *People v Brinkman*, 240 AD3d 1431, 1431-1432 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]; *People v Barr*, 192 AD3d 1571, 1571 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]). Inasmuch as the record here establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent, we conclude that the waiver is valid (*see generally People v Figueroa*, 230 AD3d 1581, 1582 [4th Dept 2024], *lv denied* 42 NY3d 1079 [2025]). Defendant's valid appeal waiver forecloses our review of his challenge to the court's discretionary decision to deny youthful offender status, any request that we exercise our interest of justice jurisdiction to adjudicate him a youthful offender, and his challenge to the severity of the sentence (*see People v Malcolm*, 231 AD3d 1503, 1504 [4th Dept 2024], *lv*

denied 43 NY3d 931 [2025]; *see also* *People v Burch*, 234 AD3d 1246, 1247 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025]; *People v Stackhouse*, 214 AD3d 1303, 1303 [4th Dept 2023], *lv denied* 39 NY3d 1157 [2023]).

We note, however, that both the certificate of disposition and uniform sentence and commitment form in the record transpose the sentences imposed for assault in the third degree and criminal sexual act in the second degree and must be amended to reflect the correct sentence for each crime (*see generally* *People v Williams*, 233 AD3d 1463, 1465 [4th Dept 2024], *lv denied* 43 NY3d 1012 [2025]). Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

20 The People of the State of New York, Respondent, v Timothy Cobb, Appellant. [249 NYS3d 689]—

Motor Vehicles—Aggravated Unlicensed Operation of Motor Vehicle—Sufficiency and Weight of Evidence—Knowledge That License was Revoked

Appeal from a judgment of the Erie County Court (Susan M. Eagan, J.), rendered May 25, 2023. The judgment convicted defendant upon a nonjury verdict of aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]). Defendant contends that the evidence is legally insufficient to establish that he knew or had reason to know that his license was revoked. Even assuming, *arguendo*, that defendant preserved his contention for our review (*see generally* *People v Gray*, 86 NY2d 10, 19 [1995]), we conclude that it lacks merit. “The felony offense of first-degree aggravated unlicensed operation has a *mens rea* element. To be convicted, a defendant must know or have reason to know that [their] driving privileges have been revoked, suspended or otherwise withdrawn by the Commissioner of Motor Vehicles” (*People v Pacer*, 6 NY3d 504, 508 [2006]; *see* Vehicle and Traffic Law § 511 [1] [a]; [2] [a] [ii]; [3] [a] [i]). A defendant’s *mens rea* can be proved circumstantially (*see generally* *People v Feingold*, 7 NY3d 288, 296 [2006]).

Here, the People presented the testimony of a police witness who stated that, when he asked defendant for his license, defendant responded that it was “f . . . ed up.” The People also presented the testimony of an employee of the New York State Department of Motor Vehicles who stated that defendant’s driv-

er's license was revoked due to a prior conviction for driving while intoxicated as reflected on the driving abstract, which was admitted in evidence. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish that defendant knew or had reason to know that his driver's license was revoked (*see People v Holloman*, 151 AD3d 1872, 1872 [4th Dept 2017]; *People v Strauss*, 136 AD3d 1340, 1341 [4th Dept 2016]; *People v Lindsey*, 129 AD3d 1482, 1484 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that, although a different verdict would not have been unreasonable, it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

21 In the Matter of Bryana O'Brien, Respondent, v Jamie Frazzini, Also Known as Jamie Dommell, Appellant. [247 NYS3d 871]—Appeal from an order of the Family Court, Erie County (Thomas DiMillo, A.J.), entered September 27, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner-respondent sole custody of the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court. Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

22 In the Matter of Zyair M., Appellant. Erie County Attorney, Respondent. [252 NYS3d 854]—

Infants—Juvenile Delinquents—Placement in Residential Facility—Detention Time Credit

Appeal from an order of the Family Court, Erie County (Kara A. Buscaglia, J.), dated March 10, 2025, in a proceeding pursuant to Family Court Act article 3. The order, inter alia, revoked an order of disposition placing respondent on probation and placed him in a residential facility for a period of up to 12 months.

It is hereby ordered that the order so appealed from is unanimously modified on the law and in the interest of justice by striking the phrase “with no detention time credit” and substituting therefor the phrase “with 28 days of detention

time credit,” the New York State Office of Children and Family Services is directed to immediately release respondent from its custody if he has not already been released, and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 3, respondent appeals from an order that, inter alia, revoked a prior order of disposition placing respondent on probation and placed him in a residential facility for a period of up to 12 months. Respondent contends that Family Court erred in failing to credit him with the 28 days that he spent in detention pending disposition of this matter. Although respondent failed to preserve that contention for our review (*see Matter of Michael A.*, 151 AD3d 566, 566 [1st Dept 2017]), we nevertheless exercise our power to review it in the interest of justice (*see generally People v Williams*, 49 AD3d 1183, 1184 [4th Dept 2008]).

Family Court Act § 353.3 (5) requires that “[i]f the respondent has been in detention pending disposition, the initial period of placement ordered . . . shall be credited with and diminished by the amount of time spent by the respondent in detention prior to the commencement of the placement unless the court finds that all or part of such credit would not serve the needs and best interests of the respondent or the need for protection of the community.” “[A]bsent a specific finding that such credit would not serve the interests of the juvenile or the community, the credit for time in predisposition detention automatically accrues” (*Matter of Miranda C.*, 103 AD3d 891, 893 [2d Dept 2013]). Inasmuch as the court made no such finding here, respondent is statutorily entitled to the 28-day credit. We therefore modify the order accordingly. Moreover, because the application of the 28-day credit results in the expiration of the 12-month period of placement, we direct the New York State Office of Children and Family Services to immediately release respondent from its custody if he has not already been released (*see id.* at 894). In light of our determination, respondent’s contentions challenging the procedural and factual propriety of the residential placement are academic (*see id.*; *see generally Matter of Timar P. [James B.]*, 217 AD3d 1591, 1593 [4th Dept 2023]). Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

23 In the Matter of Dax S. and Another. Erie County Department of Social Services, Respondent; Sunshine P., Appellant. [250 NYS3d 334]—

glect—Suspended Judgment

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered January 4, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject children.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject children on the ground of permanent neglect, transferred guardianship and custody of the children to petitioner, and freed the children for adoption. We affirm.

Contrary to the mother's contention, Family Court did not abuse its discretion in declining to enter a suspended judgment. A suspended judgment "is a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; see *Matter of Danaryee B. [Erica T.]*, 151 AD3d 1765, 1766 [4th Dept 2017]; see also Family Ct Act § 633). It "is only appropriate where the parent has clearly demonstrated that [they] deserve[] another opportunity to show that [they have] the ability to be a fit parent" (*Matter of Matthew S., Jr. [Matthew S.]*, 169 AD3d 1456, 1456 [4th Dept 2019] [internal quotation marks omitted]). "The determination of whether to grant a suspended judgment must be based solely on the best interests of the child" (*id.*; see § 631).

Here, the record establishes that the mother had admitted that she neglected the children by reason of her substance use and her failure to engage in substance abuse counseling and treatment. Her service contract required her to engage in a substance abuse program, but she had not done so for over a year at the time of the dispositional hearing. The mother admitted that she continued to drink alcohol and had overdosed on some substance just a month before she testified. She also denied needing treatment for substance abuse.

A suspended judgment "is not warranted where the parent has not made sufficient progress in addressing the issues that led to the child[ren]'s removal from custody" (*Matter of Nolin X.A.C. [Nicky C.]*, 240 AD3d 1388, 1388 [4th Dept 2025]; see *Matter of London J. [Niaya W.]*, 138 AD3d 1457, 1457-1458 [4th Dept 2016], *lv denied* 27 NY3d 912 [2016]; *Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150 [4th Dept 2014], *lv denied* 23 NY3d 901 [2014]). The court's determination that it would not be appropriate to give the mother additional time

through a suspended judgment is entitled to great deference (see *Nolin X.A.C.*, 240 AD3d at 1389; *Matthew S., Jr.*, 169 AD3d at 1456). The children had been in the care of the foster parents for almost two years by the time of the dispositional hearing, and the children had bonded with the foster parents and were doing well. We conclude that the court properly determined that a suspended judgment was unwarranted (see *Matter of Patience E. [Victoria E.]*, 225 AD3d 1181, 1183 [4th Dept 2024], *lv denied* 42 NY3d 904 [2024]) and that termination of the mother's parental rights was in the best interests of the children (see *Nolin X.A.C.*, 240 AD3d at 1389). Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

24 Brian Dowd et al., Appellants, v Jeffrey Klay, Respondent. [247 NYS3d 870]—Appeal from an order of the Supreme Court, Erie County (Edward Pace, J.), dated October 23, 2024. The order, inter alia, granted the cross-motion of defendant for summary judgment dismissing the complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

25 In the Matter of Danielle Dill, Psy.D, Executive Director of Central New York Psychiatric Center, Respondent, v Brian S., Appellant. [247 NYS3d 866]—Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered January 21, 2025. The order authorized the administration of medication to respondent over his objection.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Montour, J.P., Smith, Greenwood, Nowak and Hannah, JJ.

26 The People of the State of New York, Respondent, v Lorenzo Robinson, Appellant. [251 NYS3d 460]—

Crimes—Unlawful Search and Seizure—Reasonable Suspicion—Anonymous Tip

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered August 22, 2024. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Defendant contends that Supreme Court erred in refusing to suppress tangible evidence and statements that were obtained after the police unlawfully stopped and frisked him pursuant to an insufficiently corroborated anonymous 911 call. We reject that contention. Generally, “[a]n anonymous tip cannot provide reasonable suspicion to justify a seizure, except where that tip contains . . . information suggestive of criminal behavior” (*People v Moore*, 6 NY3d 496, 499 [2006]; see *Florida v J.L.*, 529 US 266, 272 [2000]; *People v William II*, 98 NY2d 93, 99 [2002]) or is corroborated by “confirmatory observations of the police” (*People v Argyris*, 24 NY3d 1138, 1140 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* 577 US 1069 [2016]; see also *People v Williams*, 177 AD3d 1312, 1313 [4th Dept 2019]). “[T]he appropriate test” in evaluating whether there is reasonable suspicion to engage in a level three encounter based on an anonymous tip “is whether an anonymous tip is sufficiently reliable to provide reasonable suspicion under *the totality of the circumstances*” (*People v Leighton R.*, — NY3d —, —, 2025 NY Slip Op 06534, *4 [2025] [emphasis added]). Further, although that “approach involves an analysis of the *Aguilar-Spinelli* reliability and basis of knowledge factors, allowance must be made in applying them for the lesser showing required to meet the reasonable suspicion standard” (*id.* [internal quotation marks omitted]; see *Alabama v White*, 496 US 325, 328-329 [1990]). In other words, strict adherence to *Aguilar-Spinelli* is mandatory only in the probable cause context and is not required to establish reasonable suspicion (see *Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *3-4). Indeed, “reasonable suspicion [may be] established by a 911 call from an anonymous individual and the confirmatory observations by the police of information provided by the caller that was noncriminal in nature” (*id.* at —, 2025 NY Slip Op 06534, *3; see *Argyris*, 24 NY3d at 1140-1141; *People v Tantaio*, 178 AD3d 1391, 1393 [4th Dept 2019], *lv denied* 35 NY3d 945 [2020]).

Here, we conclude that the record at the suppression hearing with respect to the anonymous tip, and the steps taken by the police to corroborate it before stopping and frisking defendant, was sufficient to establish reasonable suspicion permitting the level three police encounter at issue here. Specifically, the police officer who first approached defendant during the encounter

(first officer) testified that she received a dispatch report concerning a 911 call about a menacing in progress that involved a man brandishing a gun. The dispatcher provided that officer with a detailed description of, *inter alia*, the suspect's appearance—that he was a Black man with a white beard, wearing a baseball cap and a black jacket with reflectors. The dispatcher also indicated that the suspect was accompanied by another man who was wearing, *inter alia*, orange shoes. Within a minute of receiving the dispatch, the first officer and her partner responded to the scene, which was only a half mile away from their prior location. As they arrived, the dispatcher informed them that the suspect reportedly had a handgun in his front right pocket. The officers almost immediately encountered defendant and another man on the scene, both of whom precisely matched the description provided by the dispatcher. The officers thereupon stopped defendant, and the first officer began a pat-down frisk of his body, starting on the right side of his pants. During the brief pat-down, the first officer immediately discovered the gun, noting that its handle was sticking out of defendant's pocket.

Under those facts, *i.e.*, where “[t]he police were able to corroborate [the] information [contained in the 911 call] within one minute of receiving the dispatch and [were] within [close proximity of] the reported location, [where] they observed a . . . suspect matching the description provided,” the police had reasonable suspicion to engage in a level three encounter inasmuch as, here, “[t]he *contemporaneous* nature of the report is substantial . . . and weighs in favor of the [911] caller’s veracity” (*Leighton R.*, — NY3d at —, 2025 NY Slip Op 06534, *4 [emphasis added]). We further note that the 911 caller’s report of a man brandishing a gun “necessarily [constituted a] claim[of] personal knowledge of the crime” (*id.* at —, 2025 NY Slip Op 06534, *4). Under these circumstances, “[t]he police were duty-bound to investigate the radio report of [an armed menacing], and they could not ignore their own contemporaneous observation of [an individual] matching the caller’s description and location” (*id.* at —, 2025 NY Slip Op 06534, *4).

Defendant also contends that Penal Law § 265.03 is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). We have rejected identical contentions in prior cases, holding that *Bruen* “had no impact on the constitutionality of New York State’s criminal possession of a weapon statutes” (*People v Mancuso*, 225 AD3d 1151, 1153 [4th Dept 2024], *lv denied* 43 NY3d 964 [2025] [internal quotation marks omitted]; *see People v Brinson*, 240 AD3d 1376, 1378

[4th Dept 2025]), and we perceive no reason to reach a different conclusion here. Indeed, we note that the Court of Appeals recently held “that *Bruen* did not render the state’s entire gun licensing scheme unconstitutional” inasmuch as the specific portion of the scheme that it invalidated is “severable” (*People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *3 [2025]). Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

27 The People of the State of New York, Respondent, v Taji Hunt, Appellant. [247 NYS3d 874]—

Crimes—Right to Speedy Trial—Ability to Proceed on Another Charge
Crimes—Right to Speedy Trial—Failure of Trial Court to Explicitly Rule on
Alleged Periods of Delay

Appeal from a judgment of the Oneida County Court (Robert Bauer, J.), rendered July 1, 2021. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the seventh degree.

It is hereby ordered that the case is held, the decision is reserved and the matter is remitted to Oneida County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment, entered following a jury trial on a consolidated indictment, convicting him of criminal possession of a controlled substance in the seventh degree (Penal Law former § 220.03). Defendant contends that County Court erred in refusing to dismiss the consolidated indictment on statutory speedy trial grounds (*see* CPL 30.30), arguing that the People’s total period of unreadiness for trial exceeded six months.

Contrary to defendant’s contention, we conclude that the court properly determined that the period of delay between February 6, 2020, and February 13, 2020, was not chargeable to the People. Although defendant is correct that, during that time, which was prior to the consolidation of indictment Nos. I 2019-247 and I 2020-123, the People did not possess a laboratory report establishing a weight of the controlled substance in question as required for the second count of indictment No. I 2019-247, the People “could have proceeded to trial on the other charge[] in [that] indictment” (*People v Brown*, 269 AD2d 809, 809 [4th Dept 2000], *affd* 96 NY2d 80 [2001] [internal quotation marks omitted]; *see People v Terry*, 225 AD2d 306, 307 [1st Dept 1996], *lv denied* 88 NY2d 886 [1996]).

We agree with defendant, however, that we have no power to review the court’s determination that the People are chargeable with the delay between January 15, 2020, and February 6,

2020, or, for that matter, its determination that 145 days total are chargeable to the People from the commencement of the proceeding until March 2, 2020 (*see People v Session*, 206 AD3d 1678, 1681 [4th Dept 2022]; *see also* CPL 470.15 [1]).

Defendant further contends that the court erred in failing to charge the People with two additional periods of delay, i.e., the period between September 22, 2020, and October 22, 2020, and the period between October 22, 2020, and November 13, 2020. The court, however, did not explicitly rule on the issues whether either or both of those periods were attributable to the People, and thus we are precluded from reviewing those issues on appeal (*see Session*, 206 AD3d at 1682). If both of those periods are attributed to the People, then they would exceed the applicable six-month period of 184 days (*see* CPL 30.30 [1] [a]). We therefore hold the case, reserve decision, and remit the matter to County Court to determine that part of defendant's supplemental omnibus motion seeking dismissal of the consolidated indictment pursuant to CPL 30.30 by ruling on the abovementioned outstanding issues (*see Session*, 206 AD3d at 1682; *see generally People v Ballowe*, 173 AD3d 1666, 1668 [4th Dept 2019]). Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

28 The People of the State of New York, Respondent, v Darrell Holloway, Also Known as Darrell J. Holloway, Also Known as Snoop, Appellant. [248 NYS3d 391]—Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered December 13, 2022. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). Contrary to defendant's contention, a waiver of the right to appeal is not unconscionable per se (*see People v Wilson*, 244 AD3d 1802 [4th Dept 2025]; *People v Brinkman*, 240 AD3d 1431, 1431-1432 [4th Dept 2025], *lv denied* 44 NY3d 1027 [2025]; *see also People v Thomas*, 34 NY3d 545, 557-558 [2019], *cert denied* 589 US 1302 [2020]). Further, the record establishes that defendant's waiver of the right to appeal was knowing, voluntary, and intelligent (*see Brinkman*, 240 AD3d at 1432). The valid waiver encompasses defendant's challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Hoose*, 236 AD3d

1294, 1296 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]). Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

29 The People of the State of New York, Respondent, v Craig Stanford, Appellant. [249 NYS3d 687]—

Crimes—Right to Counsel—Substitution

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 22, 2021. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

At the outset, although defendant purportedly waived his right to appeal, we conclude that there is no reason for us to address his contention in his main brief that the waiver is invalid inasmuch as defendant’s substantive contentions—both in his main brief and in his pro se supplemental brief—would survive even a valid waiver of the right to appeal or are forfeited by the plea (*see People v Crosby*, 195 AD3d 1602, 1603 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]; *People v Steinbrecher*, 169 AD3d 1462, 1463 [4th Dept 2019], *lv denied* 33 NY3d 1108 [2019]; *see generally People v Seaberg*, 74 NY2d 1, 9 [1989]).

Defendant contends in his main and pro se supplemental briefs that Supreme Court erred in denying his pro se motion seeking substitution of counsel. Initially, we note that his contention “‘is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea’” (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]). Regardless, we conclude that defendant abandoned his request for new counsel “when he ‘decid[ed] . . . to plead guilty while still being represented by the same attorney’” (*People v Wellington*, 169 AD3d 1440, 1441 [4th Dept 2019], *lv denied* 33 NY3d 982 [2019]; *see Crosby*, 195 AD3d at 1604; *People v Barr*, 169 AD3d 1427, 1427-1428 [4th Dept 2019], *lv denied* 33 NY3d 1028 [2019]). At the plea colloquy, defendant made no statements expressing dissatisfaction with counsel, and we note that at no time did the court issue an ultimatum to defendant to either “plead guilty with present counsel or proceed to trial with present counsel” (*People v Jones*, 173 AD3d 1628, 1630 [4th Dept 2019]).

Defendant's contention in his pro se supplemental brief that the court erred in denying his challenge to the legal sufficiency of the evidence before the grand jury is forfeited by the guilty plea (*see People v Hill*, 188 AD3d 1756, 1757 [4th Dept 2020], *lv dismissed* 37 NY3d 965 [2021], *denied reconsideration* 37 NY3d 1096 [2021]; *People v Rowe*, 158 AD3d 1265, 1266-1267 [4th Dept 2018], *lv denied* 31 NY3d 1017 [2018]; *see generally People v Hansen*, 95 NY2d 227, 233 [2000]). Additionally, defendant's contention in his pro se supplemental brief that "he was denied[, inter alia,] due process based upon" instances of judicial misconduct was also "forfeited as a result of his guilty plea" (*People v Alsaifullah*, 162 AD3d 1483, 1486 [4th Dept 2018], *lv denied* 32 NY3d 1062 [2018]), and, regardless, defendant failed to preserve that contention for our review (*see People v Tohafijian*, 216 AD3d 1410, 1413 [4th Dept 2023], *lv denied* 40 NY3d 937 [2023]; *People v Price*, 129 AD3d 1484, 1484 [4th Dept 2015], *lv denied* 26 NY3d 970 [2015]; *People v Brown*, 120 AD3d 1545, 1545-1546 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]).

We have considered the remaining contention in defendant's pro se supplemental brief, and we conclude that it does not warrant modification or reversal of the judgment. Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

30 The People of the State of New York, Respondent, v Anthony Burris, Appellant. [247 NYS3d 872]—Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 25, 2019. The judgment convicted defendant upon his plea of guilty of attempted criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]), defendant contends that Supreme Court abused its discretion in denying his motion to withdraw the guilty plea. "Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Long*, 183 AD3d 1275, 1276 [4th Dept 2020], *lv denied* 35 NY3d 1046 [2020], *denied reconsideration* 35 NY3d 1095 [2020] [internal quotation marks omitted]; *see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). Inasmuch as defendant tendered no such evidence on

his motion, we perceive no abuse of discretion (*see Long*, 183 AD3d at 1276; *Davis*, 129 AD3d at 1614). Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

31 The People of the State of New York, Respondent, v Christopher Walsh, Appellant. [249 NYS3d 685]—

Crimes—Possession of Weapon—Second-Degree Criminal Possession of Weapon—Weight of Evidence

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered May 16, 2022. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Contrary to defendant's contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury "failed to give the evidence the weight it should be accorded" (*id.*). Two witnesses at trial testified that they saw a man holding a handgun. Believing that man to be firing a handgun at a nearby vehicle, one of those witnesses drove her own vehicle into the man to stop him. It was undisputed that the man that witness struck was defendant. Although a handgun was not recovered, we conclude that the witnesses' testimony and police testimony with respect to the shell casings found at the scene, as well as corroborating video and physical evidence, established that defendant possessed a loaded handgun at the time of the incident (*see People v Magee*, 182 AD3d 996, 997 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). To the extent there was conflicting testimony about whether defendant possessed the handgun, we conclude that it merely "presented an issue of credibility for the jury to resolve" (*People v Ross*, 214 AD3d 1319, 1320 [4th Dept 2023] [internal quotation marks omitted]).

Defendant further contends that he was denied a fair trial because the prosecutor engaged in misconduct during summation. Defendant correctly concedes that he failed to preserve his contention with respect to the majority of the alleged instances of misconduct (*see generally People v King*, 224 AD3d

1313, 1314 [4th Dept 2024], *lv denied* 41 NY3d 1019 [2024]; *People v Watts*, 218 AD3d 1171, 1174 [4th Dept 2023], *lv denied* 40 NY3d 1013 [2023]). In any event, we conclude that any “improper remarks by the prosecutor were not so pervasive or egregious as to deny defendant a fair trial” (*King*, 224 AD3d at 1314 [internal quotation marks omitted]; see *People v Hawley*, 112 AD3d 968, 969 [2d Dept 2013], *lv denied* 23 NY3d 963 [2014]).

Defendant relatedly contends that he was denied effective assistance of counsel based on defense counsel’s failure to object to the alleged instances of prosecutorial misconduct. As noted above, defendant was not deprived of a fair trial by those instances, and we therefore further conclude that “defense counsel’s failure to object to the alleged instances of prosecutorial misconduct did not constitute ineffective assistance of counsel” (*People v Fick*, 167 AD3d 1484, 1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019] [internal quotation marks omitted]). Contrary to defendant’s further contention, defense counsel was not ineffective for failing to request a missing witness charge at trial regarding the driver of the vehicle at which defendant was allegedly firing (see generally *People v Spagnuolo*, 173 AD3d 1832, 1833 [4th Dept 2019], *lv denied* 34 NY3d 954 [2019]) inasmuch as such a request would have had “little or no chance of success” (*People v Lawrence*, 192 AD3d 1686, 1688 [4th Dept 2021] [internal quotation marks omitted]; see *People v Ross*, 118 AD3d 1413, 1416 [4th Dept 2014], *lv denied* 24 NY3d 964 [2014]).

Finally, we reject defendant’s contention that the sentence is unduly harsh and severe. Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

32 The People of the State of New York, Respondent, v Joshua Richardson, Appellant. [248 NYS3d 392]—Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered September 20, 2022. The judgment convicted defendant upon his plea of guilty of criminal possession of weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Penal Law § 265.03 is unconstitutional in light of *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). We have rejected identical contentions in prior cases, holding

that *Bruen* “had no impact on the constitutionality of New York State’s criminal possession of a weapon statutes” (*People v Mancuso*, 225 AD3d 1151, 1153 [4th Dept 2024], *lv denied* 43 NY3d 964 [2025] [internal quotation marks omitted]; see *People v Brinson*, 240 AD3d 1376, 1378 [4th Dept 2025]), and we perceive no reason to reach a different conclusion here. Indeed, we note that the Court of Appeals recently held “that *Bruen* did not render the state’s entire gun licensing scheme unconstitutional” inasmuch as the specific portion of the scheme that it invalidated is “severable” (*People v Johnson*, — NY3d —, —, 2025 NY Slip Op 06528, *3 [2025]). Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

33 In the Matter of Ash H. and Another. Oswego County Department of Social Services, Respondent; Victoria M., Appellant. [247 NYS3d 870]—Appeal from an order of the Family Court, Oswego County (Allison J. Nelson, J.), entered June 14, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

Now, upon reading and filing the stipulation of discontinuance signed by the respondent on November 6, 2025, and by the attorneys for the parties on November 23 and December 2, 2025,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

34 In the Matter of Jeffrey R. Harper, Esq., Respondent, v Brent M. Snow, Appellant, Brandie Salisbury, Respondent. [247 NYS3d 871]—

Appeal—Appealable Paper—Decision

Appeal from a decision of the Family Court, Wayne County (Arthur B. Williams, J.), entered October 10, 2024, in a proceeding pursuant to Family Court Act article 6. The decision, among other things, modified the visitation provisions of a prior order.

It is hereby ordered that said appeal is unanimously dismissed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father purports to appeal from a document denominated “Memorandum-Decision” that modified the visitation provisions of a prior order of custody and visitation. We dismiss the appeal. “[N]o appeal lies from a [mere] decision” (*Gunn v Palmieri*, 86 NY2d 830, 830 [1995]; see *Garcia v Town of Tonawanda*, 194 AD3d 1479, 1479-1480 [4th Dept

2021]). The document here is, on its face, a mere decision (*see generally* CPLR 2219 [a]), and it states in the penultimate sentence that petitioner “shall draft and submit a proposed [o]rder consistent with this decision” (*see Pino v Harnischfeger*, 42 AD3d 980, 982 [4th Dept 2007]). Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

35 James R. Caputo, Appellant, v Nathan Holt et al., Respondents, et al., Defendants. [247 NYS3d 873]—Appeal from an order of the Supreme Court, Monroe County (Vincent M. Dinolfo, J.), entered July 30, 2024. The order, inter alia, granted the motions of defendants Monroe County Clerk’s Office, Donald Cheney, Esq., and Cheney Law Firm, LLC, to dismiss the complaint against them and granted the motion of defendants Nathan Holt, Owen Billet, Premium Mortgage Corporation and ABAR Abstract Corporation for summary judgment dismissing the complaint against them.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

36 In the Matter of Miner Realty and Property Management, LLC, Respondent, v Edward Lockhart, Appellant. [247 NYS3d 875]—Appeal from an order of the Oneida County Court (Robert Bauer, J.), entered March 25, 2025. The order affirmed a judgment of the Rome City Court.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

37 In the Matter of Noah P. Onondaga County Department of Children and Family Services, Respondent; Anthony F., Appellant, et al., Respondent. [251 NYS3d 464]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Diligent Efforts of Agency

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Failure to Plan for Future of Child

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Suspended Judgment

Appeal from an order of the Family Court, Onondaga County (Julie A. Cerio, J.), entered September 9, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondents.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services

Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. We affirm.

Contrary to the father's contention, petitioner established that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[] to overcome problems that prevent the discharge of the child into their care, and informing the parent[] of [the] child's progress" (*Matter of Jemma M. [Ashley M.]*, 237 AD3d 1569, 1569-1570 [4th Dept 2025], *lv denied* 44 NY3d 908 [2025] [internal quotation marks omitted]; see § 384-b [7] [f]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Zander W. [Lisa M.]*, 222 AD3d 1395, 1396 [4th Dept 2023], *lv denied* 41 NY3d 909 [2024]). Here, petitioner established by clear and convincing evidence (see § 384-b [3] [g] [i]) that it exercised diligent efforts to encourage and strengthen the father's relationship with the child (see *Jemma M.*, 237 AD3d at 1570; *Matter of Janette G. [Julie G.]*, 181 AD3d 1308, 1308-1309 [4th Dept 2020], *lv denied* 35 NY3d 907 [2020]). Petitioner provided the father with referrals to appropriate services, supervised the father's visitation with the child, communicated with the father frequently regarding his progress toward reunification, emphasized the importance of living apart from respondent mother, advised the father that—in addition to completing the recommended services—he must also implement the skills he learned through such services, and regularly updated the father on the child's well-being. Petitioner was not required, under the circumstances of this case, to establish that it also investigated alternative placements with relatives (*cf. Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539-1540 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]).

Contrary to the further contention of the father, we conclude that, despite petitioner's diligent efforts, the father failed to plan for the child's future (see Social Services Law § 384-b [7] [a]). To "plan for the future of the child" means to "take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (§ 384-b [7] [c]). Notably, the plan must be "realistic and feasible" (*id.*) and, "[a]t a minimum, parents must take steps to correct the conditions that led to the removal of the child from their home" (*Matter of Nathaniel T.*, 67 NY2d 838, 840 [1986] [internal quotation

marks omitted]). Here, the evidence established that the father failed to make progress in a clinical visitation program, failed to make progress in the recommended domestic violence program, failed to engage in mental health treatment, failed to accept responsibility for his actions that led to the child's removal, failed to progress to unsupervised visitation with the child, and failed to develop a realistic plan to provide an adequate and stable home for the child (see *Matter of Natalee F. [Eric F.]*, 194 AD3d 1397, 1398 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]). Although the father attended some of the services that he was referred to, he failed to "benefit from the services offered and utilize the tools or lessons learned in those classes in order to successfully plan for the [child's] future" (*Matter of Albina H. [John H.]*, 229 AD3d 1169, 1170 [4th Dept 2024], *lv denied* 42 NY3d 903 [2024] [internal quotation marks omitted]; see *Matter of Tori-Lynn L. [Troy L.]*, 227 AD3d 1455, 1458 [4th Dept 2024]).

The father also contends that Family Court erred in relying on portions of certain exhibits containing the progress and visitation notes from petitioner and the agency that supervised visitation with the child because such portions did not meet the foundational requirements of the business records exception to the hearsay rule (see CPLR 4518 [a]). The father's only objection to the exhibits in question, however, concerned the admissibility of certain hearsay statements contained within the exhibits—regardless of whether the exhibits themselves qualified as business records—and that objection was sustained. We thus conclude that he did not preserve his current contention for our review (see *Matter of Britiny U. [Tara S.]*, 124 AD3d 964, 965 [3d Dept 2015]; *Matter of Cory S. [Terry W.]*, 70 AD3d 1321, 1322 [4th Dept 2010]). In any event, even assuming, arguendo, that the court erred in relying upon the alleged inadmissible evidence, we conclude that the error is harmless inasmuch as "the record otherwise contains ample evidence supporting [the] [c]ourt's determination" (*Matter of Brooklyn S. [Stafania Q.—Devin S.]*, 150 AD3d 1698, 1700 [4th Dept 2017], *lv denied* 29 NY3d 919 [2017] [internal quotation marks omitted]; see *Matter of Carmela H. [Danielle F.]*, 185 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 915 [2020]).

Finally, we reject the father's contention that the court abused its discretion in refusing to enter a suspended judgment (see *Matter of Tumario B. [Valerie L.]*, 83 AD3d 1412, 1412 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]; *Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847 [4th Dept 2010]). A

suspended judgment “is a brief grace period designed to prepare the parent to be reunited with the child” (*Matter of Michael B.*, 80 NY2d 299, 311 [1992]; see Family Ct Act § 633), and may be warranted where the parent has made sufficient progress in addressing the issues that led to the child’s removal from custody (see generally *Matter of James P. [Tiffany H.]*, 148 AD3d 1526, 1527 [4th Dept 2017], *lv denied* 29 NY3d 908 [2017]; *Matter of Sapphire A.J. [Angelica J.]*, 122 AD3d 1296, 1297 [4th Dept 2014], *lv denied* 24 NY3d 916 [2015]). Here, the evidence at the dispositional hearing established that the father had made no progress in addressing the issues that led to the removal of the child and that he still had only supervised visits with the child. We therefore conclude that the court properly determined that a suspended judgment was unwarranted, and that the best interests of the child would be served by freeing the child for adoption, thereby “provid[ing] him with prospects for permanency and some sense of the stability he deserve[s]” (*Matter of Raine QQ.*, 51 AD3d 1106, 1107 [3d Dept 2008], *lv denied* 10 NY3d 717 [2008]; see *Matter of Brandon I.J. [Daisy D.]*, 198 AD3d 1310, 1311 [4th Dept 2021], *lv denied* 38 NY3d 901 [2022]; *Elijah D.*, 74 AD3d at 1847). Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

38 Karim Courgi, Individually and as a Member of Syracuse Housing LLC and Others, Appellant, v Cushman & Wakefield 1, Inc., et al., Respondents. [247 NYS3d 876]—Appeal from an order of the Supreme Court, Onondaga County (Joseph E. Lamendola, J.), entered November 20, 2024. The order, among other things, granted defendants’ motion to dismiss the complaint in its entirety.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 30, 2026,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Curran, J.P., Bannister, Smith, Ogden and DelConte, JJ.

39 The People of the State of New York, Respondent, v Joseph T. Castiglione, Appellant. [248 NYS3d 393]—

Crimes—Sentence—Probation—Revocation

Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered April 17, 2023. The judgment revoked defendant’s sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant was convicted upon his plea of guilty of driving while ability impaired by drugs as a class E felony (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [i] [A]) and was sentenced to a period of probation. Defendant now appeals from a judgment revoking the sentence of probation and sentencing him, upon a determination that he violated the conditions of probation, to an indeterminate term of incarceration.

Contrary to defendant's contention, the People established by a preponderance of the evidence that he violated a condition of his probation (*see* CPL 410.70 [3]; *People v Bailey*, 181 AD3d 1243, 1244 [4th Dept 2020]). Although the People did not offer into evidence the terms and conditions of probation, County Court later stated when rendering its determination that it took judicial notice of them (*see generally People v Williams*, 164 AD3d 845, 845-846 [2d Dept 2018]; *People v Hill*, 148 AD3d 1469, 1470 [3d Dept 2017], *lv denied* 29 NY3d 1080 [2017]). Based on the evidence presented at the hearing, the court determined that defendant was aware of those terms and conditions and that he violated them "by absconding and fail[ing] to report to probation as required" (*see People v Pruett*, 191 AD3d 1423, 1423 [4th Dept 2021], *lv denied* 36 NY3d 1099 [2021]; *Bailey*, 181 AD3d at 1244). Present—Lindley, J.P., Curran, Ogden, Greenwood and Hannah, JJ.

40 In the Matter of Christine Villani, Appellant, v Richard Wendig, Respondent. [251 NYS3d 832]—

Parent, Child and Family—Custody—Relocation

Appeal from an order of the Family Court, Cattaraugus County (Deborah J. Scinta, R.), entered January 10, 2025, in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, denied that part of the petition seeking permission for petitioner to relocate with her daughter to Florida.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals, as limited by her brief, from an order insofar as it denied that part of her petition seeking permission to relocate with her daughter (child) to Florida. We affirm.

Contrary to the mother's contention, we conclude that Fam-

ily Court properly considered the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) in determining that she did not meet her burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests, and we further conclude that the court's determination has "a sound and substantial basis in the record" (*Matter of Hill v Flynn*, 125 AD3d 1433, 1434 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]; *see generally Matter of Rodriguez v Young*, 232 AD3d 1279, 1279 [4th Dept 2024], *lv denied* 43 NY3d 902 [2025]; *Matter of Martin v Martin*, 221 AD3d 1557, 1558 [4th Dept 2023]). "A parent seeking permission for a child to relocate with [them] has the burden of establishing by a preponderance of the evidence that the proposed relocation is in the child's best interests" (*Matter of Murphy v Peace*, 72 AD3d 1626, 1626 [4th Dept 2010]). "[E]ach relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Tropea*, 87 NY2d at 739). The relevant factors to be considered include, but are not limited to, "[a] each parent's reasons for seeking or opposing the move, [b] the quality of the relationships between the child and the custodial and noncustodial parents, [c] the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, [d] the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and [e] the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*id.* at 740-741). "[N]o single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome" (*id.* at 738), and "a court's determination regarding custody . . . issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Guillermo v Agramonte*, 137 AD3d 1767, 1769 [4th Dept 2016]).

Here, we conclude that the record supports the court's determination that it is not in the best interests of the child to allow the mother to relocate with her to Florida, where the mother wishes to live with her fiancée. Indeed, based on the evidence adduced at the hearing on the mother's petition, the court properly concluded that the mother "failed to establish that the child's life would 'be enhanced economically, emotionally and educationally' by the proposed relocation" (*Hill*, 125 AD3d at

1434; see *Matter of Shepherd v Stocker*, 159 AD3d 1441, 1442 [4th Dept 2018]). The record establishes that the child has lived in New York her whole life, and that she had connections to the community in which she grew up, and engaged in activities that were not available in Florida. The record also reflects that respondent father owns his own business and home, whereas the mother does not own her own home and has not worked since 2018, when she separated from the father. Thus, there was a sound and substantial basis for the court to conclude that, economically speaking, it would be in the child's best interests to remain with the father in New York. Further, although the mother presented some evidence that the child would be emotionally enriched by moving to Florida—i.e., she had already made a few friends there—that enrichment would come at the expense of her relationship with the father, who she would not see as often, to the detriment of the child's emotional condition. In a similar vein, we note that allowing the mother to relocate the child to Florida would also separate her from her sibling—who lives with the father in New York—and that, generally speaking, “sibling relationships should not be disrupted unless there is some overwhelming need to do so,” which is not the case here (*Matter of Curry v Reese*, 145 AD3d 1475, 1476 [4th Dept 2016] [internal quotation marks omitted]; see generally *Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]; *Salerno v Salerno*, 273 AD2d 818, 819 [4th Dept 2000]). Additionally, although the mother testified that the child could receive a superior education upon relocation, “she failed to offer any proof from which [the court] reasonably could conclude that the [Florida] school system was a significant improvement over the school system in [New York]” (*Matter of Hirschman v McFadden*, 137 AD3d 1612, 1613 [4th Dept 2016], *lv denied* 27 NY3d 909 [2016] [internal quotation marks omitted]; see *Matter of Jiggetts v Thomas*, 237 AD3d 1573, 1574 [4th Dept 2025]).

Although the mother argues that her request for a relocation is justified inasmuch as she needs a “fresh start,” away from New York, to free herself from the father's allegedly dysfunctional and harassing behavior—which she asserts severely affected her mental health—we note that the need for a fresh start, standing alone, is insufficient to warrant relocation (see *Gasdik v Winiarz*, 188 AD3d 1760, 1762 [4th Dept 2020]; *Matter of Jones v Tarnawa*, 26 AD3d 870, 871 [4th Dept 2006], *lv denied* 6 NY3d 714 [2006]). Further, it is unclear how relocating to Florida would, in actuality, resolve that problem inasmuch as, even if the mother moved to Florida, she would still have to communicate with the father about the child, and would still have to coparent with him. The record shows that

the parents already struggle with communication while residing in the same state, and it is reasonable to conclude that removing the child to Florida would not ameliorate any problems with the parents' communication issues or their ability to successfully coparent the child.

Although the record establishes that the child has a close relationship with the mother, it also establishes that she had a good relationship with the father. The record is equally clear, however, that neither parent is very supportive of the other parent's relationship with the child. Indeed, the evidence at the hearing raised serious concerns about whether the mother would allow the child to communicate with the father if she was allowed to relocate to Florida. Moreover, the record supports the conclusion that the mother is not capable of ensuring that the child will continue to have a close relationship to the father if she relocated—for example, the amount of parenting time that she proposed for the father would be insufficient to maintain the current relationship between the child and the father (*see generally Hirschman*, 137 AD3d at 1613).

The mother also contends that the court erred in excluding from evidence at the hearing certain evidence relating to the father's alleged past abuse of the mother. Even assuming, arguendo, that the court erred in excluding the evidence in question, we conclude that any such error is harmless (*see generally Matter of Higgins v Higgins*, 128 AD3d 1396, 1397 [4th Dept 2015]; *Matter of Newman v Duffy*, 125 AD3d 1474, 1475 [4th Dept 2015]). Specifically, the challenged evidence relates to just one of the *Tropea* factors and, even if that factor weighs in the mother's favor, the other factors weigh against the conclusion that it would be in the child's best interests to allow her to relocate to Florida. Present—Lindley, J.P., Curran, Ogden, Greenwood and Hannah, JJ.

41 In the Matter of Mamadou Barry, Petitioner, v Daniel F. Martuscello, III, Acting Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [247 NYS3d 873]—Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Donald G. O'Geen, A.J.], entered July 16, 2025) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various incarcerated individual rules.

It is hereby ordered that said proceeding is unanimously dismissed without costs.

Memorandum: Petitioner commenced this CPLR article 78

proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated certain incarcerated individual rules. After Supreme Court transferred this proceeding to this Court pursuant to CPLR 7804 (g), the Attorney General advised this Court that respondent has issued an administrative order reversing the determination and that all references to the disciplinary proceeding have been expunged from petitioner's record. Because petitioner has obtained the relief that he could be granted in this proceeding, the proceeding is dismissed as moot (*see Matter of Smith v Annucci*, 173 AD3d 1685, 1685 [4th Dept 2019]; *Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996]). Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

42 The People of the State of New York, Respondent, v Michael J. Desino, Appellant. [248 NYS3d 404]—

Crimes—Appeal—Preservation of Issue for Review—Plea of Guilty

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered November 13, 2024. The judgment convicted defendant upon his plea of guilty of criminal possession of a forged instrument in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25). We affirm.

At the outset, we conclude that there is no reason for us to address defendant's contention that his waiver of the right to appeal is invalid, inasmuch as defendant's substantive contention challenging the plea would survive even a valid waiver of the right to appeal (*see People v Williams*, 198 AD3d 1308, 1309 [4th Dept 2021], *lv denied* 37 NY3d 1149 [2021]; *see also People v Thompson*, 219 AD3d 1666, 1667 [4th Dept 2023], *lv denied* 41 NY3d 944 [2024]; *People v Brown*, 151 AD3d 1951, 1951-1952 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]).

Defendant contends that his plea was not knowingly, intelligently, and voluntarily entered because he did not understand the plea proceeding due to his limited education, the complexity of the rights he was forfeiting, and his lack of sufficient time to discuss the matter with counsel. By not moving to withdraw the plea or to vacate the judgment of conviction, defendant failed to preserve that contention (*see People v Seymore*, 188 AD3d 1767, 1768 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]; *Brown*, 151 AD3d at 1952). We conclude in any event

that defendant's contention is belied by his statements during the plea colloquy (*see Brown*, 151 AD3d at 1952). Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

43 Hoyte's Concrete Products, Inc., Appellant, v John DiAngelo, Also Known as Richard John DiAngelo, Respondent. [248 NYS3d 394]—

Appeal—Sufficiency of Trial Court's Findings of Fact—Remittal

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered August 28, 2024, in an action for replevin. The order, insofar as appealed from, dismissed the complaint.

It is hereby ordered that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Cayuga County, for further proceedings in accordance with the following memorandum: Plaintiff, as limited by its brief, appeals from an order entered following a nonjury trial insofar as it dismissed the complaint. Supreme Court's written decision fails to set forth "the facts it deem[ed] essential" to its determination (CPLR 4213 [b]). Under the circumstances, we conclude that the case must be held and that the decision must be reserved, and we remit the matter to Supreme Court to make the requisite findings of fact (*see State Bank of Tex. v Kaanam, LLC*, 170 AD3d 1498, 1498 [4th Dept 2019]; *Chavoustie v Stone St. Baptist Church of Chaumont*, 163 AD2d 856, 856 [4th Dept 1990]). Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

44 Victoria H. Weinke et al., Coexecutors of the Estate of Thomas L. Carlson, Deceased, Plaintiffs, v Asbestos Corporation, Ltd., a Corporation of the Province of Quebec, et al., Defendants. (Action No. 1.) Merle C. Chapin et al., Plaintiffs, v Asbestos Corporation, Ltd., a Corporation of the Province of Quebec, et al., Defendants. (Action No. 2.) Arlene M. Diermyer, Individually and as Administrator of the Estate of James R. Diermyer, Sr., Deceased, Plaintiff, v Asbestos Corporation, Ltd., a Corporation of the Province of Quebec, et al., Defendants. (Action No. 3.) Nancy A. Matikosh, Individually and as Executor of the Estate of Samuel Matikosh, Jr., Deceased, Plaintiff, v Asbestos Corporation, Ltd., a Corporation of the Province of Quebec, et al., Defendants. (Action No. 4.) Nancy M. Muir, as Executor of the Estate of Joseph L. Muir, Deceased, Respondent, v Air & Liquid Systems Corporation, as Successor by Merger to Buffalo Pumps, Inc., et al., Defendants. (Action No. 5.) Kenneth C. Zuhr et al., Plaintiffs, v Asbestos Corporation, Ltd., a Corporation of the Province of Quebec, et al., Defend-

ants. (Action No. 6.) Hedman Resources Limited, Appellant. [248 NYS3d 403]—Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered August 23, 2024, in a personal injury action. The order, inter alia, denied the motion of defendant Hedman Resources Limited to vacate a judgment obtained in action No. 5.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs (*see Richards v Hedman Resources Ltd.*, 204 AD3d 1407, 1407-1409 [4th Dept 2022]). Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

45 Mattina Property Management, Inc., Appellant, v Gabrielle A. Mattina-Alfieri, Also Known as Gabrielle A. Mattina, et al., Respondents. [247 NYS3d 876]—Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered September 10, 2024, in an action to quiet title. The order granted the motion of James S. Alfieri and Amy Frances Millard to dismiss the complaint against them.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Bannister, J.P., Montour, Smith, Nowak and DelConte, JJ.

46 The People of the State of New York, Respondent, v Wayne J. Ellison, Jr., Appellant. [247 NYS3d 906]—

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal—Discovery-Related Contention

Appeal from a judgment of the Seneca County Court (Barry L. Porsch, J.), rendered June 13, 2024. The judgment convicted defendant upon a plea of guilty of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that County Court should have dismissed the indictment pursuant to CPL 30.30 as a sanction for the People's failure to comply with their discovery obligations under CPL article 245. Although the court adjourned the trial and imposed other sanctions on the People pursuant to CPL 245.80 for their belated disclosure of certain evidence, defendant contends that dismissal of the indictment was the only appropriate sanction given the nature and scope of the People's discovery violations. By pleading guilty, however, defendant forfeited his discovery-related contention

(see *People v Weems*, 240 AD3d 1411, 1411 [4th Dept 2025]; *People v Adams*, 232 AD3d 1302, 1303 [4th Dept 2024], *lv denied* 42 NY3d 1078 [2025]; *People v Robinson*, 225 AD3d 1266, 1268 [4th Dept 2024], *lv denied* 42 NY3d 1021 [2024]). In any event, defendant's contention lacks merit because the speedy trial requirements of CPL 30.30 do not apply to homicide charges (see CPL 30.30 [3] [a]). Present—Whalen, P.J., Lindley, Ogden, Greenwood and Hannah, JJ.

47 The People of the State of New York, Respondent, v Ozeleon Pringle, Appellant. [251 NYS3d 485]—

Crimes—Sentence—Youthful Offender—Armed Felony Offense

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered September 7, 2022. The judgment convicted defendant upon his plea of guilty of attempted murder in the second degree, criminal possession of a weapon in the second degree (two counts), reckless endangerment in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), reckless endangerment in the first degree (§ 120.25), and assault in the second degree (§ 120.05 [2]). Defendant's conviction stems from his conduct in firing gunshots at a person inside a motor vehicle. The victim sustained gunshot wounds to his lower right back and upper right leg.

We reject defendant's contention that the waiver of the right to appeal is invalid. The oral colloquy, together with the written waiver, "was sufficient to support a knowing and voluntary waiver under the totality of the circumstances" (*People v Thomas*, 34 NY3d 545, 564 [2019], *cert denied* 589 US 1302 [2020]; see *People v Drake*, 195 AD3d 1442, 1442 [4th Dept 2021], *lv denied* 37 NY3d 991 [2021], *denied reconsideration* 37 NY3d 1059 [2021]).

Defendant contends that County Court erred in refusing to adjudicate him a youthful offender. Although ordinarily a valid waiver of the right to appeal forecloses appellate review of a sentencing court's discretionary decision to deny youthful offender status (see *People v Pacherille*, 25 NY3d 1021, 1023-1024 [2015]), defendant expressly reserved his right to challenge that determination on appeal.

Inasmuch as defendant was convicted of armed felony of-

fenses, “the court was required to make a threshold determination whether defendant was an eligible youth pursuant to CPL 720.10 (3) before considering the range of factors pertinent to a youthful offender determination” (*People v Glover*, 239 AD3d 1459, 1461 [4th Dept 2025], *lv denied* 44 NY3d 982 [2025]). A youth convicted of an armed felony offense is an eligible youth “if the court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant’s participation was relatively minor although not so minor as to constitute a defense to the prosecution” (CPL 720.10 [3]). Here, defendant was the sole participant in the crime, and we agree with the court that there were no mitigating circumstances bearing directly on the manner in which the crime was committed (*see People v Rivera*, 202 AD3d 1480, 1481 [4th Dept 2022], *affd* 41 NY3d 936 [2023]; *People v Blackshear*, 208 AD3d 1635, 1636 [4th Dept 2022], *lv denied* 39 NY3d 961 [2022]). Contrary to defendant’s contention, his “background . . . and drug habit do not pertain to [his] direct manner in the commission of the crime” (*People v Garcia*, 84 NY2d 336, 342 [1994]; *see People v Marshall*, 214 AD3d 1360, 1361 [4th Dept 2023], *lv denied* 40 NY3d 929 [2023]).

The valid waiver of the right to appeal encompasses defendant’s challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]). Present—Whalen, P.J., Lindley, Ogden, Greenwood and Hannah, JJ.

48 James Nims, III, et al., Respondents, v James T. Riley, M.D., et al., Appellants, et al., Defendants. [249 NYS3d 876]—

Physicians and Surgeons—Malpractice—Battle of Experts

Appeals from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 3, 2024. The order denied the motions of defendants Jefferson Anesthesiologist Services, P.C., Susan M. Walker, FNP-C, James T. Riley, M.D. and Samaritan Medical Center for summary judgment dismissing the complaint against them.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this medical malpractice action seeking damages for injuries that plaintiff James Nims, III, allegedly sustained as a result of defendants’ negligence in, inter alia, failing to timely diagnose a deep vein thrombosis and to provide appropriate treatment for that condition, defendants Susan M. Walker, FNP-C (Walker) and Jefferson Anesthesiologist Ser-

vices, P.C. (Jefferson); defendant James T. Riley, M.D.; and defendant Samaritan Medical Center appeal from an order denying their respective motions for summary judgment dismissing the complaint against them. We affirm.

In moving for summary judgment in a medical malpractice action, a defendant has “the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff’s injuries” (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017] [internal quotation marks omitted]). We conclude that defendants met their initial burden on their respective motions with respect to the alleged deviations from the accepted standard of medical care, and the burden thus “‘shift[ed] to . . . plaintiff[s] to demonstrate the existence of a triable issue of fact . . . as to the elements on which . . . defendant[s] met the prima facie burden’” (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). In opposition, however, plaintiffs submitted the affirmation of a pain management expert and the affirmation of an expert vascular surgeon, both of which “squarely oppose[d]” the affirmations of defendants’ experts, resulting in “a classic battle of the experts that is properly left to a jury for resolution” (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]; see *Thomas v Eckhert*, 229 AD3d 1237, 1239 [4th Dept 2024]).

We have considered the remaining contentions of Walker and Jefferson and conclude that they lack merit. Present—Whalen, P.J., Lindley, Ogden, Greenwood and Hannah, JJ.

49 The People of the State of New York, Respondent, v James Curtin, II, Appellant. [247 NYS3d 877]—Appeal from a judgment of the Supreme Court, Erie County (Debra L. Givens, A.J.), rendered January 10, 2024. The appeal was held by this Court by order entered July 25, 2025, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (240 AD3d 1295 [4th Dept 2025]).

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 9 and 15, and November 10, 2025,

It is hereby ordered that said appeal is unanimously dismissed upon stipulation. Present—Lindley, J.P., Montour, Ogden, Greenwood and Nowak, JJ.

50 The People of the State of New York, Respondent, v Aaron Welch, Appellant. [247 NYS3d 892]—

Crimes—Appeal—Domestic Violence Survivors Justice Act—Order Denying

Resentencing**Crimes—Sentence—Resentencing under Domestic Violence Survivors Justice Act**

Appeal from an order of the Oneida County Court (Robert Bauer, J.), dated September 30, 2022. The order, inter alia, dismissed without prejudice the application of defendant for resentencing pursuant to CPL 440.47.

It is hereby ordered that the order so appealed from is affirmed.

Memorandum: Defendant appeals from an order that, inter alia, dismissed without prejudice his application for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* CPL 440.47 [2] [d]). The DVSJA grants “courts discretion to impose less severe sentences on certain defendants who were victims of domestic violence at the time of their crimes” (*People v Krista M.G.*, 228 AD3d 1300, 1301 [4th Dept 2024], *lv denied* 42 NY3d 1036 [2024]; *see* CPL 440.47; Penal Law § 60.12). Under CPL 440.47, a defendant who committed certain qualifying crimes prior to the effective date of the DVSJA and whose sentence meets certain requirements may seek resentencing in the court in which their sentence was imposed.

As relevant here, CPL 440.47 (2) (c) provides that an application for resentencing “must include at least two pieces of evidence corroborating the [defendant’s] claim that he or she was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual[,] or psychological abuse inflicted by a member of the same family or household as the [defendant] as such term is defined in [CPL 530.11 (1)].” Paragraph (d) of CPL 440.47 (2) mandates that a court “dismiss the application without prejudice” when it determines that the defendant has not complied with the provisions of paragraph (c) of section 440.47 (2).

Here, defendant pleaded guilty in 2014 to two counts of murder in the second degree (Penal Law § 125.25 [1]) and was sentenced to consecutive terms of 20 years to life in prison on each count. The first murder victim was defendant’s ex-girlfriend, whom defendant stabbed 13 times in her head, face, and neck, among other places. The second murder victim was a man residing at the same apartment as the ex-girlfriend, who intervened in an attempt to help the ex-girlfriend when defendant was stabbing her. Neither victim was armed, and neither presented any threat to defendant, who was upset that his ex-girlfriend had ended their relationship and was seeing another man.

After serving approximately nine years of his sentence, defendant applied for resentencing pursuant to the DVSJA. In support of his application alleging that he was a victim of domestic violence, defendant submitted, among other things, an affidavit in which he claimed that various people, including the two victims, had subjected him to bullying and psychological and physical abuse for months prior to the murders. The People opposed the application, contending that defendant was not entitled to a hearing under CPL 440.47 (2) (e) because he failed to submit sufficient proof as required under subdivision (2) (c) to corroborate his claim that he was a victim of domestic violence when he committed the murders. County Court summarily “denied without prejudice” defendant’s application after determining that he did not include “at least two pieces of evidence corroborating his claim that he was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual[,] or psychological abuse inflicted by a member of the same family or household as himself as defined in CPL . . . 530.11 (1).”

As a preliminary matter, we agree with defendant that he may appeal from that part of the order dismissing his application for resentencing without prejudice. We conclude that the order constitutes “an order denying resentencing,” from which an appeal may be taken as of right (CPL 440.47 [3] [a]). Although we recognize that the Third Department has held otherwise, interpreting the statutory phrase “an order denying resentencing” to mean an order denying resentencing *after a hearing*, rather than an order summarily dismissing an application for resentencing without prejudice (*see People v Melissa OO.*, 234 AD3d 101, 103-106 [3d Dept 2024]; *People v James QQ.*, 232 AD3d 1137, 1138 [3d Dept 2024], *lv denied* 43 NY3d 964 [2025]), we do not read the statute so restrictively. As a remedial statute, the DVSJA should be “liberally construed to carry out the reforms intended and to promote justice” (McKinney’s Cons Laws of NY, Statutes § 321; *see generally People v Brown*, 25 NY3d 247, 251 [2015]). “A liberal construction . . . is one [that] is in the interest of those whose rights are to be protected, and if a case is within the beneficial intention of a remedial act it is deemed within the statute, though actually it is not within the letter of the law” (*Matter of Dewine v State of N.Y. Bd. of Examiners of Sex Offenders*, 89 AD3d 88, 92 [4th Dept 2011] [internal quotation marks omitted]; *see McKinney’s Cons Laws of NY, Statutes § 321, Comment*).

As the Third Department recognized in *Melissa OO.* (234 AD3d at 106 n 5), its reading of CPL 440.47 (3) would insulate

from judicial review orders that improperly dismiss applications that meet the evidentiary provisions of subdivision (2) (c), leaving defendants who are deserving of hearings with no legal recourse except to refile their applications, which could be improperly and repeatedly denied again. Such a narrow construction of CPL 440.47 is not compelled by the statutory language and is contrary to well established rules of construction for remedial statutes (*see Brown*, 25 NY3d at 251; *Dewine*, 89 AD3d at 92; *see also People v Sosa*, 18 NY3d 436, 440-441 [2012]). If the legislature intended to deprive defendants of the right to appeal from summary denials of applications for resentencing under the DVSJA, it should have “clearly expressed” such a limitation through unambiguous language in CPL 440.47 (3) (a) (*Brown*, 25 NY3d at 251 [internal quotation marks omitted]). Given that the legislature did not expressly exclude orders summarily dismissing applications for resentencing from the phrase “an order denying resentencing” under CPL 440.47 (3) (a), we will not read in that limitation inasmuch as it would be “at odds with the broad objectives of the remedial enactment” of the DVSJA (*Sosa*, 18 NY3d at 441).

Our statutory interpretation, i.e., that an order dismissing an application for resentencing for failure to comply with the evidentiary provisions under CPL 440.47 (2) (c) is tantamount to “an order denying resentencing” under CPL 440.47 (3) (a), is also supported by language in the statute providing that a defendant may request appointment of counsel “on *any appeals* regarding [their] application for resentencing pursuant to this section” (CPL 440.47 [3] [emphasis added]).

With respect to the merits, however, we conclude that the court properly denied defendant’s application without a hearing inasmuch as defendant failed to submit at least two pieces of evidence corroborating his claim that he was subjected to substantial physical, sexual, or psychological abuse inflicted by a member of his family or household (*see* CPL 440.47 [2] [c]). In support of his application, defendant submitted 68 pages of text messages, primarily of those between him and the ex-girlfriend he murdered, the presentence report, and a photograph showing scratches on his neck allegedly caused by his ex-girlfriend. As the court properly determined, none of the items proffered by defendant corroborated his claim that he had been the victim of “*substantial* physical, sexual[,] or psychological abuse” (*id.* [emphasis added]). Thus, defendant was not entitled to a hearing and the court properly dismissed his application without prejudice (*see People v White*, 226 AD3d 1054, 1055 [2d Dept 2024], *lv denied* 42 NY3d 931 [2024];

People v James NN., 224 AD3d 1014, 1016 [3d Dept 2024], *lv denied* 42 NY3d 927 [2024]).

All concur except Montour, J., who dissents and votes to dismiss the appeal in the following memorandum.

Montour, J. (dissenting). I respectfully dissent because I disagree with the majority's conclusion that defendant may appeal from that part of the order dismissing without prejudice his application for resentencing pursuant to the Domestic Violence Survivors Justice Act (DVSJA) (*see* CPL 440.47 [2] [d]). I am instead persuaded by the thorough statutory analysis undertaken by the Third Department in *People v Melissa OO.* (234 AD3d 101, 103-106 [3d Dept 2024]), which compellingly shows that the legislature has not authorized an appeal from such an order. I would therefore dismiss the appeal in this case.

"Appealability of determinations adverse to a defendant cannot be presumed because 'a defendant's right to appeal within the criminal procedure universe is purely statutory' " (*People v Nieves*, 2 NY3d 310, 314 [2004], quoting *People v Stevens*, 91 NY2d 270, 278 [1998]). Thus, "no appeal lies 'from a determination made in a criminal proceeding unless one is provided by the CPL' " (*Stevens*, 91 NY2d at 277), and, "in the absence of a statute expressly authorizing a criminal appeal, there is no right to appeal in a criminal case" (*People v De Jesus*, 54 NY2d 447, 449 [1981], *rearg denied* 55 NY2d 1038 [1982]). Here, the part of the order dismissing defendant's application for resentencing without prejudice "is not appealable to this Court as of right under the general statutory provisions authorizing appeals to intermediate appellate courts under CPL 450.10 nor is the order of dismissal one for which defendant could seek permission to appeal to this Court under CPL 450.15" (*Melissa OO.*, 234 AD3d at 103). Consequently, defendant's right to appeal depends upon whether CPL 440.47 expressly authorizes an appeal from an order dismissing without prejudice an application for resentencing pursuant to the DVSJA (*see Melissa OO.*, 234 AD3d at 103).

In that regard, "[t]he DVSJA, without diminishing the gravity of an offense, permits courts to impose alternative, less severe sentences in certain cases involving defendants who are victims of domestic violence' " (*People v Wendy B.-S.*, 229 AD3d 1317, 1318 [4th Dept 2024], *lv denied* 42 NY3d 1022 [2024]; *see* CPL 440.47; Penal Law § 60.12). Pursuant to step one of the statutory procedure, "[a] defendant who is confined while serving a sentence of a certain length for an offense committed prior to the effective date of the DVSJA and is eligible for an alterna-

tive sentence may request to apply for resentencing in accordance with Penal Law § 60.12” (*Wendy B.-S.*, 229 AD3d at 1318). “If the court finds that [the defendant] has not met the requirements to apply for resentencing . . . , the court shall notify [the defendant] and *dismiss [their] request without prejudice*” (CPL 440.47 [1] [d] [emphasis added]). If, however, “the court finds that the defendant has met the requirements to apply for resentencing, the court must notify the defendant that they may submit an application for resentencing” (*Wendy B.-S.*, 229 AD3d at 1318; *see* CPL 440.47 [1] [c]). At step two of the statutory procedure, the defendant’s “application for resentencing must include certain pieces of evidence pursuant to the provisions of CPL 440.47 (2) (c)” (*Wendy B.-S.*, 229 AD3d at 1318). If the court finds that the defendant has not satisfied those evidentiary provisions, “the court shall *dismiss the application without prejudice*” (CPL 440.47 [2] [d] [emphasis added]). If, however, the court finds that the defendant has complied with those provisions, it must at step three of the statutory procedure “conduct a hearing to aid in making its determination of whether the [defendant] should be resentenced in accordance with [Penal Law § 60.12]” (CPL 440.47 [2] [e]). When, after such a hearing, “the court determines that the [defendant] should be resentenced . . . , the court shall notify the [defendant] that, unless [they] withdraw[] the application or appeal[] from such order, the court will enter an order vacating the sentence originally imposed and imposing the new sentence” (CPL 440.47 [2] [g]). Conversely, when “the court determines that the [defendant] should not be *resentenced* . . . , the court shall inform [the defendant] of its decision and shall enter an order to that effect” (CPL 440.47 [2] [f] [emphasis added]).

The appeal subdivision of the statute then provides, in relevant part, that an appeal may be taken as of right “from an order *denying resentencing*,” as well as “from a new sentence imposed under” the DVSJA on the ground that the term of the new sentence is “harsh or excessive” or “unauthorized as a matter of law” and “from an order specifying and informing [the defendant] of the term of the determinate sentence the court would impose upon resentencing on the ground that the term of the proposed sentence is harsh or excessive” (CPL 440.47 [3] [emphasis added]). The legislature thus expressly authorized an appeal as of right from a post-hearing order *denying resentencing*, imposing a new sentence, or specifying the term of the new sentence that would be imposed (*see id.*; *Melissa O.O.*, 234 AD3d at 105). The legislature, however, did not authorize an appeal as of right from an order *dismissing a*

request without prejudice under step one or *dismissing an application* without prejudice under step two (see *Melissa OO.*, 234 AD3d at 105; compare CPL 440.47 [1] [d]; [2] [d], with [2] [f]; [3]).

“Where, as here, the [l]egislature specifically provides for appealability of certain orders but not others, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (*Melissa OO.*, 234 AD3d at 106 [internal quotation marks omitted]). The plain meaning of the statutory language differentiating between an order dismissing a request or an application without prejudice and an order denying resentencing (compare CPL 440.47 [1] [d]; [2] [d], with [2] [f]; [3] [a]) demonstrates that “the [l]egislature intended a different result as to the appealability of orders dismissing [a request or an application] without prejudice under step one or step two[, respectively,] and an order denying [resentencing] on the merits after a hearing under step three” (*Melissa OO.*, 234 AD3d at 106). The courts “must give effect to that intention” (*id.*). As applied to the order from which defendant seeks to appeal here, I agree with the Third Department that, inasmuch as the legislature “failed to provide for an appeal from the [dismissal] of an application for resentencing pursuant to [Penal Law § 60.12 and CPL 440.47 (2) (c)], no [such] appeal was intended” (*id.*, quoting *De Jesus*, 54 NY2d at 449). Given that “[a]ppeals in criminal cases are strictly limited to those authorized by statute,” I conclude that the present appeal “is not properly before this Court and must be dismissed” (*id.*, quoting *People v Bautista*, 7 NY3d 838, 838-839 [2006]).

I also reject the notion—advanced by the majority here—that any other portion of the statute warrants a different conclusion. Subsequent language in the appeal subdivision of the statute undoubtably states that a defendant may request assigned counsel “for the preparation of and proceedings on any appeals regarding [their] application for resentencing pursuant to this section” (CPL 440.47 [3]). Under a plain reading of the assigned counsel clause, however, the term “any appeals” (*id.*) clearly refers back to any of the types of appeals expressly authorized earlier in the appeal subdivision of the statute (see *Harbor View at Port Washington Home Owners Assn., Inc. v W.J. Harbor Ridge, LLC*, 74 AD3d 748, 749 [2d Dept 2010]; *State Univ. Constr. Fund v Kipphut & Neuman Co.*, 159 AD2d 1003, 1005 [4th Dept 1990]). The assigned counsel clause thus provides an opportunity for the defendant to exercise a particular right *within* an authorized appeal, but

that clause cannot be read as independently providing for a type of appeal that the earlier authorizing language does not.

Relatedly, in construing statutory language, “the familiar principle[] of *ejusdem generis*” (*People v Illardo*, 48 NY2d 408, 416 [1979] [internal quotation marks omitted]) requires that the courts “limit general language of a statute by specific phrases which have preceded the general language” (McKinney’s Cons Laws of NY, Statutes § 239; *see* § 238; *Illardo*, 48 NY2d at 416). Therefore, the arguably more generalized language located later in the subdivision allowing a defendant to request the assignment of counsel in any appeal “regarding [an] application for resentencing” cannot be read to overrule the more specific preceding language authorizing appeals as of right only, as relevant here, “from an order denying resentencing” (CPL 440.47 [3]; *see* McKinney’s Cons Laws of NY, Book 1, Statutes § 238). Stated differently, the legislature authorized an appeal “from an order denying resentencing” under the DVSJA and such an appeal certainly falls within the later more generalized description of one “regarding [an] application for resentencing” (CPL 440.47 [3]), but applicable principles of statutory construction dictate that the later language in the assigned counsel clause cannot be read as expanding the universe of appealable orders beyond those specifically authorized earlier in the subdivision (*see* McKinney’s Cons Laws of NY, Book 1, Statutes §§ 238, 239; *Illardo*, 48 NY2d at 416).

Furthermore, I disagree with the majority’s application of the canon of construction for remedial statutes. “While [the DVSJA] is a remedial statute and as such, should be interpreted broadly, this maxim does not allow [the courts] to stretch the statute beyond its intended coverage” (*Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 766 [1997], *rearg denied* 91 NY2d 922 [1998]). Indeed, “even a remedial statute must be given a meaning consistent with the words chosen by the [l]egislature” because “those words define the scope of the remedy that the [l]egislature deemed appropriate,” and “the role of the courts is to give effect not only to the remedy, but also to the words that delimit the remedy” (*Enright v Eli Lilly & Co.*, 77 NY2d 377, 385 n 1 [1991], *rearg denied* 77 NY2d 990 [1991], *cert denied* 502 US 868 [1991]). Inasmuch as the plain language of the DVSJA unambiguously limits appeals as of right from those orders expressly delineated in CPL 440.47 (3) and does not authorize such an appeal from an order dismissing without prejudice an application for resentencing, the courts must give effect to that limitation and refrain from extending the statute to authorize appeals beyond those authorized by the legislature (*see*

People v Brenda WW., 44 NY3d 594, 606 n 8 [2025]).

Nor are the courts permitted to cast aside the statute that the legislature wrote by declaring that it is irrational or illogical for the legislature to restrict appeals under the DVSJA to orders denying resentencing on the merits following a hearing. For starters, the legislature could, in fact, have rationally determined that it did not want to overburden the appellate courts with appeals from orders dismissing applications for resentencing without prejudice when the defendants in such circumstances have an available remedy at the trial court level, i.e., filing a new application that satisfies the evidentiary provisions of the statute (see *Melissa OO.*, 234 AD3d at 106). The legislature may have logically trusted that trial courts—placed in the role of gatekeepers under the structure of the DVSJA—would appropriately apply the statute and evaluate the evidence presented on applications for resentencing. Regardless, contrary to the majority’s tacit assertion, “the plain language of the statute is *not* ambiguous, and thus [the courts] are bound to follow it” and cannot impose their own views of the statute that they believe that the legislature should have drafted (*People v Talluto*, 39 NY3d 306, 314 [2022]). As the Third Department insightfully pointed out, although “the failure to provide for the statutory right to appeal from an order dismissing a defendant’s DVSJA resentencing application without prejudice could insulate from appellate review certain trial court determinations where a defendant has exhausted [their] potential universe of evidentiary submissions[,] . . . it is entirely within the province of the [l]egislature to provide a remedy to permit appeals in these circumstances” (*Melissa OO.*, 234 AD3d at 106 n 5). Indeed, although there is no indication here that the statute as written does not function as the legislature intended, “if the wording of the statute has created an unintended consequence, . . . it is the prerogative of the legislature, not this Court, to correct it” (*Talluto*, 39 NY3d at 314 [internal quotation marks omitted]).

For all of the foregoing reasons, I conclude that defendant’s appeal must be dismissed. Present—Lindley, J.P., Montour, Ogden, Greenwood and Hannah, JJ.

51 The People of the State of New York, Respondent, v Demetrius Williams, Appellant. [250 NYS3d 324]—

Crimes—Assault—First-Degree Assault—Second-Degree Criminal Possession of Weapon—Weight of Evidence

Crimes—Sentence—Concurrent and Consecutive Terms—Simple Weapon Possession—Possession of Weapon before Forming Specific Intent

Crimes—Right to Counsel—Effective Representation—Failure to Request Limiting Instruction

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered May 19, 2022. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). The prosecution stems from defendant's possession of a firearm and his use of that firearm to shoot a victim in the neck outside of a house party.

Viewing the evidence in light of the elements of the crimes of which defendant was convicted as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject his contention that the verdict with respect to those crimes is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Indeed, a different verdict with respect to those crimes would have been unreasonable in light of the multiple eyewitness accounts and the surveillance footage admitted at trial (*see generally Danielson*, 9 NY3d at 348).

Contrary to defendant's further contention, County Court did not err in imposing consecutive sentences. When a defendant is charged with "simple" weapon possession (Penal Law § 265.03 [3]), "[s]o long as [the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible" (*People v Brown*, 21 NY3d 739, 751 [2013]; *see People v Malloy*, 33 NY3d 1078, 1080 [2019]). Here, the evidence at trial establishes that, on the night of the shooting, defendant and others at the house party were outside several minutes before defendant pulled out the gun and shot the victim, and thus the evidence "support[s] the conclusion that defendant possessed the weapon for a sufficient period of time before forming the specific intent to [cause the victim serious physical injury]" (*Malloy*, 33 NY3d at 1080; *see People v Clinton*, 222 AD3d 1427, 1429 [4th Dept 2023], *lv denied* 41 NY3d 1017 [2024]; *People v Porteous*, 219 AD3d 757, 759 [2d Dept 2023], *lv denied* 40 NY3d 1081 [2023]).

Defendant further contends that he received ineffective assistance of counsel based upon, inter alia, defense counsel's

failure to request a *Molineux* instruction and his failure to object to statements made by the prosecutor during summation. “ ‘Although the failure to request limiting instructions may constitute ineffective assistance of counsel if the error were so serious that defendant did not receive a fair trial’ ” (*People v Orcutt*, 51 AD3d 1404, 1405 [4th Dept 2008]), here, defense counsel may have had a strategic reason for failing to request a *Molineux* limiting instruction inasmuch as he may not have wished to draw further attention to the admitted *Molineux* evidence (see *People v Case*, 197 AD3d 985, 988 [4th Dept 2021], *lv denied* 37 NY3d 1160 [2022]). Even assuming, arguendo, that any of the prosecutor’s comments during summation exceeded the bounds of propriety, we conclude that they were “not so pervasive or egregious as to deprive defendant of a fair trial” (*People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013] [internal quotation marks omitted]). Inasmuch as we conclude “that the prosecutor either did not engage in misconduct, or that any error did not deny defendant a fair trial, we conclude that defendant was not denied effective assistance of counsel based on counsel’s failure to object” (*People v Garrow*, 171 AD3d 1542, 1547 [4th Dept 2019], *lv denied* 34 NY3d 931 [2019]). Upon our review of all of defendant’s allegations of error concerning the representation provided by defense counsel, we conclude that defendant “ ‘failed to satisfy the well-settled, high burden of showing that he was deprived of a fair trial and meaningful representation sufficient to warrant a reversal’ ” (*Case*, 197 AD3d at 988, quoting *People v Flores*, 84 NY2d 184, 189 [1994]; see generally *People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe. Present—Curran, J.P., Bannister, Ogden, DelConte and Hannah, JJ.

52 Robert Mattison et al., Appellants, v State of New York et al., Respondents. (Appeal No. 1.) [248 NYS3d 401]—Appeal from an order of the Court of Claims (J. David Sampson, J.), entered March 14, 2024. The order denied the application of claimants seeking, in effect, permission to file a late claim.

It is hereby ordered that said appeal is dismissed without costs.

Same memorandum as in *Mattison v State of New York* ([appeal No. 2] 246 AD3d 1425 [4th Dept 2026]).

All concur except Curran and Hannah, JJ., who dissent and vote to affirm in the same dissenting memorandum as in *Mat-*

tison v State of New York ([appeal No. 2] 246 AD3d 1425 [4th Dept 2026]). Present—Curran, J.P., Bannister, Ogden, Del-Conte and Hannah, JJ.

53 Sharon E. Turner, Respondent, v James A. Voros, Appellant. [251 NYS3d 487]—

Negligence—Maintenance of Premises—Fall off Back Landing of Home

Appeal from an order of the Supreme Court, Erie County (John B. Licata, J.), entered September 30, 2024, in a premises liability action. The order denied the motion of defendant for summary judgment.

It is hereby ordered that the order so appealed from is reversed on the law without costs, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiff commenced this premises liability action seeking to recover damages for injuries that she sustained when she fell off the back landing of a home owned by defendant. Defendant appeals from an order that denied his motion for summary judgment dismissing the complaint. We reverse.

Plaintiff's deposition testimony, submitted by defendant on his motion, established that plaintiff rented the property in question from defendant and had resided there from 1999 through the time the incident occurred in March 2018. The back landing for the premises served as the main entrance to the residence. During the time plaintiff resided at the premises, there had not been, prior to her fall, any incidents, falls or complaints involving the back landing. Plaintiff also testified that the condition of the back landing had not changed while she resided there. Although there were marks on the landing suggesting that posts had been placed in the landing at one time, there had never been handrails on the back landing while plaintiff resided at the premises.

On the day of the incident, plaintiff exited the residence onto the landing, intending to take a walk. There were trash and recycling bins on the step between the landing and the walkway that were obstructing plaintiff's path and, when plaintiff attempted to move them, she fell. Plaintiff did not recall how she fell, but testified that before the fall her feet did not slip, twist or wobble. Plaintiff testified that, at the time of her fall, her feet did not trip or get caught on the concrete.

We conclude that defendant met his initial burden on the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendant's evidence, including plaintiff's de-

position testimony and the expert affidavit of a registered architect, established that no dangerous or defective condition existed on the property at the location where plaintiff fell and that the landing “was in compliance with the applicable codes” (*Corbett v Adelpia W. N.Y. Holdings, LLC*, 45 AD3d 1293, 1294 [4th Dept 2007]; see *Mann v AutoZone Northeast, Inc.*, 148 AD3d 1646, 1646 [4th Dept 2017]; *Zammiello v Senpike Mall Co.*, 300 AD2d 1124, 1125 [4th Dept 2002]), and defendant also “demonstrat[ed] that plaintiff could not identify the cause of her fall without engaging in speculation” (*Connors v LMAC Mgt. LLC*, 189 AD3d 2071, 2072 [4th Dept 2020]; see *Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1769-1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]).

We disagree with our dissenting colleagues that defendant’s expert affidavit is insufficient to establish that the landing was in a reasonably safe condition. Defendant’s expert set forth his experience and explained that his opinions were based on a reasonable degree of architectural, engineering, and building science certainty. During his investigation, defendant’s expert relied on materials that he averred are normally relied upon by experts in the field, including surveys, construction reports, inspection reports, and code books, and he personally visited the premises to “observe and inspect the subject exterior steps” at issue in this matter. During his review, he “found [that, inasmuch as] the subject steps [were] only configured with two risers . . . , no handrails were required.” Defendant’s expert also measured the subject steps and adjacent landing. Upon his review of the subject steps and landing, defendant’s expert found that they met the requisite conditions of being structurally sound, in good repair, properly anchored and capable of supporting imposed loads. Moreover, it was only after observing, inspecting, and measuring the relevant subject steps and landing and making the aforementioned findings that he concluded that the exterior steps and landing were not a fall hazard or otherwise in a defective, deteriorated, unsafe, hazardous or unlawful condition.

We further conclude that plaintiff failed to raise a triable issue of fact in opposition to the motion (see *Westermeyer v Whelan*, 214 AD3d 1307, 1307 [4th Dept 2023]). Plaintiff’s expert affirmation made only conclusory and speculative assertions with respect to the conclusion that a dangerous condition existed and “failed to recite the manner in which the [expert] came to [that] conclusion[]” (*Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1277 [4th Dept 2005] [internal quotation marks omitted]; see *Griffith v ETH NEP, L.P.*, 140 AD3d 451, 452 [1st Dept

2016], *lv denied* 28 NY3d 905 [2016]), and plaintiff's expert affirmation similarly made only conclusory and speculative assertions with respect to causation (see *Connors*, 189 AD3d at 2073; *Giardina v Lippes*, 77 AD3d 1290, 1291 [4th Dept 2010], *lv denied* 16 NY3d 702 [2011]). Plaintiff's expert affirmation was therefore insufficient to raise a triable issue of fact (see *Westermeyer*, 214 AD3d at 1307; *Corbett*, 45 AD3d at 1294-1295; see also *Mann*, 148 AD3d at 1646), and plaintiff's opposition papers were otherwise insufficient to raise a triable issue of fact (see generally *Zuckerman*, 49 NY2d at 562).

All concur except Bannister and DelConte, JJ., who dissent and vote to affirm in the following memorandum.

Bannister and DelConte, JJ. (dissenting). We respectfully dissent. Contrary to defendant's contention, we have repeatedly held that "compliance with regulations or a building code is not dispositive on the issue of negligence" (*Schneider v Corporate Place, LLC*, 149 AD3d 1503, 1505 [4th Dept 2017]), and thus the mere fact that a defendant has established their "compliance with such codes does not necessarily preclude a jury from finding that [a compliant step or entryway] was part of or contributed to any inherently dangerous condition existing in the area of [a plaintiff's] fall" (*Belsinger v M&M Bowling & Trophy Supplies, Inc.*, 108 AD3d 1041, 1042 [4th Dept 2013] [internal quotation marks omitted]; see *Bamrick v Orchard Brooke Living Ctr.*, 5 AD3d 1031, 1032 [4th Dept 2004]).

Here, it was defendant's burden on his motion for summary judgment dismissing the complaint to establish that "there was no dangerous or defective condition existing on the property at the location where plaintiff fell and that the [steps and landing] 'w[ere] in compliance with the applicable codes'" (*Westermeyer v Whelan*, 214 AD3d 1307, 1307 [4th Dept 2023]; see *Corbett v Adelphia W. N.Y. Holdings, LLC*, 45 AD3d 1293, 1294 [4th Dept 2007]). We agree with the majority that defendant submitted ample evidence establishing that his premises complied with the relevant building codes. Defendant's architectural expert, in his affidavit, addressed the enumerated code sections with which defendant's property was compliant; then, however, without referring to any further facts, he concluded that "there is no merit to [plaintiff's] allegations that [defendant] was negligent, careless and/or reckless." Thus, our reading of that affidavit is that defendant's expert relied solely on the lack of code violations in reaching his conclusion, and failed to address the fact that the steps and landing were unguarded or the fact that there was evidence that railings were once guarding the steps and landing. In other words, the

expert failed to specifically address whether a dangerous or defective condition existed even in the absence of any code violations. The conclusory statement in the affidavit of defendant's expert that the area of the exterior steps here—despite admittedly lacking handrails—was nonetheless not in a “defective, deteriorated, unsafe, hazardous and/or unlawful condition” failed to satisfy defendant's initial burden of establishing as a matter of law that his property was in a reasonably safe condition (*see Gorman v Mooney's 9*, 239 AD3d 1260, 1261 [4th Dept 2025]; *Bamrick*, 5 AD3d at 1032). Inasmuch as we conclude that defendant failed to satisfy his initial burden, we conclude that the motion was properly denied, regardless of the sufficiency of plaintiff's opposing papers (*see Gorman*, 239 AD3d at 1261; *Schneider*, 149 AD3d at 1505), and we would, therefore, affirm. Present—Curran, J.P., Bannister, Ogden, DelConte and Hannah, JJ.

54 Robert Mattison et al., Appellants, v State of New York et al., Respondents. (Appeal No. 2.) [251 NYS3d 468]—

State—Claim against State—Permission to File Late Claim—Appearance of Meritorious Claim

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered November 26, 2024. The order, in effect, granted claimants' motion for leave to renew and, upon renewal, adhered to a prior determination to deny claimants' application for permission to file a late claim.

It is hereby ordered that the order so appealed from is reversed on the law without costs and the application is granted upon condition that claimants shall file the proposed claim against defendants within 30 days of the date of entry of the order of this Court.

Memorandum: Claimants were allegedly injured when they were thrown from a capsizing boat during an underground boat tour at the Lockport Caves in Lockport, New York. Claimants filed an application seeking, in effect, permission to file a late claim against, among others, defendants, i.e., the State of New York (State) and the New York State Thruway Authority, pursuant to Court of Claims Act § 10 (6), alleging, inter alia, that defendants had a duty to inspect the premises, including all caves, tunnels, waterways, and boats. In appeal No. 1, claimants appeal from an order that, inter alia, denied claimants' application with respect to defendants. In appeal No. 2, claimants appeal from an order that, in effect, granted their motion for leave to renew with respect to the order in appeal No. 1 and, upon renewal, adhered to the prior determination to deny claimants' application with respect to defendants.

At the outset, we note that, in deciding claimants' motion for leave to renew, the Court of Claims considered new evidence and rejected the substantive arguments raised by claimants. Therefore, although the order in appeal No. 2 does not state as much, it is clear to this Court that the court, in effect, granted claimants' motion for leave to renew and, upon renewal, adhered to its original determination. We therefore dismiss the appeal from the order in appeal No. 1 (*see Matter of Cayuga Nation v Parker* [appeal No. 2], 229 AD3d 1065, 1066 [4th Dept 2024]; *Manes v State of New York*, 182 AD3d 1012, 1013 [4th Dept 2020], *lv denied* 35 NY3d 913 [2020]; *Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Addressing claimants' contentions in appeal No. 2, we conclude that the court abused its discretion in adhering to its prior determination to deny the application to file a late claim against defendants. It is well settled that "[a] determination by the Court of Claims to grant or deny [an application] for permission to file a late . . . claim lies within the broad discretion of that court and should not be disturbed absent a clear abuse of that discretion" (*Phillips v State of New York*, 179 AD3d 1497, 1498 [4th Dept 2020] [internal quotation marks omitted]; *see Malkan v State of New York*, 145 AD3d 1601, 1601-1602 [4th Dept 2016], *lv denied* 29 NY3d 907 [2017]). Court of Claims Act § 10 (6) "enumerates six factors to be weighed . . . in connection with a late claim [application]: (1) whether the delay was excusable; (2) whether the State had notice of the essential facts constituting the claim; (3) whether the State had an opportunity to investigate the circumstances underlying the claim; (4) whether the claim appears to be meritorious; (5) whether the delay resulted in substantial prejudice to the State; and (6) whether the [applicant] has another available remedy. This list is not exhaustive and the presence or absence of any one factor is not dispositive; rather, the [c]ourt in its discretion balances these factors in making its determination" (*Booker v State of New York*, 84 Misc 3d 590, 593 [Ct Cl 2024]; *see Bay Terrace Coop. Section IV v New York State Employees' Retirement Sys. Policemen's & Firemen's Retirement Sys.*, 55 NY2d 979, 981 [1982]).

Here, the court considered the requisite statutory factors and reasonably concluded that three of them heavily favored claimants, i.e., notice, opportunity to investigate, and lack of substantial prejudice to defendants (*see* Court of Claims Act § 10 [6]; *see also Malkan*, 145 AD3d at 1602). Upon our consideration of those factors and the remaining factors outlined in Court of Claims Act § 10 (6), we conclude that the

court abused its discretion in denying claimants' application with respect to defendants (*see generally Phillips*, 179 AD3d at 1498).

With respect to the factor weighed most heavily by the court against claimants, i.e., whether they demonstrated the appearance of a meritorious claim, we note that claimants need not establish a prima facie case at this stage of the proceedings (*see Matter of Santana v New York State Thruway Auth.*, 92 Misc 2d 1, 11-12 [Ct Cl 1977]). Rather, a claim has the appearance of merit if it is "not . . . patently groundless, frivolous or legally defective, and the record as a whole . . . give[s] reasonable cause to believe that a valid cause of action exists" (*Calverley v State of New York*, 187 AD3d 1426, 1427 [3d Dept 2020] [internal quotation marks omitted]; *see generally Santiago v State of New York*, 218 AD3d 1268, 1270 [4th Dept 2023]). Here, claimants presented evidence in support of their application that defendants may have conducted inspections of the area and the boat, particularly after a similar accident occurring years prior. Claimants also presented in support of their motion for leave to renew an affidavit of a former Director of Engineering for the City of Lockport (City) who averred, based on his personal knowledge and City maps, that the State owned the underground caves. While defendants submitted evidence in opposition to claimants' application, such evidence created a factual issue whether defendants bore responsibility for the area where the accident occurred (*see generally Tucholski v State of New York*, 122 AD3d 612, 612-613 [2d Dept 2014]). Thus, we conclude that claimants' submissions on the application and motion for leave to renew were sufficient, at this stage in the proceedings, to demonstrate that there "appears to be merit to their claim within the meaning of Court of Claims Act § 10 (6)" (*id.* at 612; *see Marcus v State of New York*, 172 AD2d 724, 724-725 [2d Dept 1991]).

Additionally, we agree with claimants that they do not necessarily have another available remedy (*see generally Marcus*, 172 AD2d at 725). Finally, while claimants may not have provided a convincing excuse for failing to timely file their claim based on law firm failure (*see Matter of Schunk v Town of York*, 200 AD3d 1669, 1670 [4th Dept 2021]), the delay here was minimal (*see Schnier v New York State Thruway Auth.*, 205 AD3d 958, 959 [2d Dept 2022]; *Matter of Smith v State of New York*, 63 AD3d 1524, 1524-1525 [4th Dept 2009]).

All concur except Curran and Hannah, JJ., who dissent and vote to affirm in the following memorandum.

Curran and Hannah, JJ. (dissenting). We respectfully dis-

sent and would affirm the orders in both appeals. Initially, we note our disagreement with the majority's conclusion that, in appeal No. 2, the Court of Claims "in effect . . . granted" claimants' motion for leave to renew. In both the body of the court's decision and order, and in its sole decretal paragraph, the court unequivocally stated that it was denying that motion. Additionally, both claimants and defendants frame their contentions on appeal around the fact that the court denied claimants' motion for leave to renew, and at no time in their briefs or at oral argument did the parties even suggest that leave to renew had been granted.

Regardless, in appeal No. 2, we agree with defendants that claimants' renewal motion was properly denied because it did not rely on any new facts as specifically required by CPLR 2221 (e) (2). "[N]ew facts' means 'facts that were unavailable at the time of [the] prior motion'" (*Angelhow v Chahfe*, 174 AD3d 1285, 1288 [4th Dept 2019]; see *Schilling v Malark*, 13 AD3d 1153, 1154 [4th Dept 2004]). Here, claimants made no argument before the court, and make no argument on appeal, that the facts upon which they relied in support of their renewal motion were "new facts" within the meaning of CPLR 2221 (e) (2) and, thus, they have failed to even allege that they had a "reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). In the absence of a reasonable justification to offer "new facts," the court could not exercise its discretion to grant claimants' motion for leave to renew (*Fusion Funding v Loftti Inc.*, 216 AD3d 1416, 1417 [4th Dept 2023]; see *2006905 Ontario Inc. v Goodrich Aerospace Can., Ltd.*, 206 AD3d 1607, 1608 [4th Dept 2022]; see also *Mura v Mura*, 133 AD3d 1324, 1325-1326 [4th Dept 2015]).

In appeal No. 1, we would affirm the order for reasons stated in the court's decision. Present—Curran, J.P., Bannister, Ogden, DelConte and Hannah, JJ.

55 In the Matter of Daniel Strollo, in His Official Capacity as the Special District Attorney of Monroe County, Petitioner, v Andrae Evans, Respondent. [247 NYS3d 880]—Proceeding pursuant to Public Officers Law § 36 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to remove respondent as the Supervisor of the Town of Irondequoit.

It is hereby ordered that said proceeding is dismissed without costs.

Memorandum: Petitioner commenced this proceeding to remove respondent from public office pursuant to Public Offi-

cers Law § 36. Inasmuch as respondent no longer holds public office, the proceeding is moot (see *Matter of Kalodukas v Berentsen*, 121 AD3d 1476, 1477 [3d Dept 2014]; *Matter of Warren v Bielecki*, 92 AD3d 1244, 1244 [4th Dept 2012]; *Matter of Copp v Lankford*, 283 AD2d 980, 980 [4th Dept 2001]).

All concur except Keane, J., who is not participating. Present—Montour, J.P., Smith, Greenwood, Nowak and Keane, JJ.

56 The People of the State of New York, Respondent, v Jimmie Wright, Appellant. [251 NYS3d 472]—

Crimes—Lesser Included Offense—Manslaughter

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered May 13, 2019. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

It is hereby ordered that the judgment so appealed from is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]). We affirm.

Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's contention that Supreme Court erred in refusing to instruct the jury on the lesser included offense of manslaughter in the second degree. A court "may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater [offense]" (CPL 300.50 [1]). It is undisputed that manslaughter in the second degree (Penal Law § 125.15 [1]) is a lesser included offense of murder in the second degree (§ 125.25 [1]), the charge for which defendant was originally indicted (see *People v Colon*, 219 AD3d 1675, 1675 [4th Dept 2023], *lv denied* 40 NY3d 1080 [2023]; see generally CPL 1.20 [37]) and, thus, "the question simply is whether on any reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count and still find him guilty on the lesser one" (*People v Hull*, 27 NY3d 1056, 1058 [2016]; see *People v Ott*, 200 AD3d 1642, 1643 [4th Dept 2021], *lv denied* 38 NY3d 953 [2022], *cert*

denied 598 US —, 143 S Ct 403 [2022]). Here, the incident occurred during an altercation between numerous individuals, and given that the victim was some distance away from the other ongoing fighting when defendant ran up to the victim from behind and hit him in the head with a baseball bat with such force to fracture his skull into multiple pieces, we conclude that there is no reasonable view of the evidence that would support a finding that defendant acted recklessly rather than intentionally (*see generally* *People v Green*, 56 NY2d 427, 434-435 [1982], *rearg denied* 57 NY2d 775 [1982]).

We reject defendant's contention that defense counsel was ineffective by failing in the pretrial omnibus motion to seek suppression of the identification testimony as unreliable inasmuch as that argument would have had little or no chance of success (*see* *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *People v Rivera*, 71 NY2d 705, 709 [1988]). There is no merit to defendant's remaining allegations of ineffective assistance of counsel (*see generally* *People v Caban*, 5 NY3d 143, 152 [2005]).

All concur except Ogden, J., who dissents and votes to reverse in accordance with the following memorandum.

Ogden, J. (dissenting). I respectfully dissent because, in my view, Supreme Court erred in declining to charge manslaughter in the second degree as a lesser included offense. I would therefore reverse the judgment and dismiss the indictment without prejudice to the People to re-present any appropriate charges to another grand jury (*see* *People v Collier*, 303 AD2d 1008, 1009 [4th Dept 2003], *lv denied* 100 NY2d 579 [2003]).

A court "may, in addition to submitting the greatest offense which it is required to submit, submit in the alternative any lesser included offense if there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater" (CPL 300.50 [1]).

Here, manslaughter in the second degree (Penal Law § 125.15 [1]) is a lesser included offense of murder in the second degree, the charge for which defendant was originally indicted (§ 125.25 [1]; *see* *People v Rivera*, 23 NY3d 112, 120 [2014]; *People v Colon*, 219 AD3d 1675, 1675 [4th Dept 2023], *lv denied* 40 NY3d 1080 [2023]; *see generally* CPL 1.20 [37]). The question therefore is whether there is a reasonable view of the evidence, examined in the light most favorable to defendant, to support a finding that he committed reckless manslaughter and not intentional murder (*see* *Rivera*, 23 NY3d at 120-121). Viewing the evidence in the light most favorable to defendant,

as we must (*see id.*), I conclude that there is a reasonable view of the evidence supporting the conclusion that defendant acted recklessly, i.e., he was aware of and consciously disregarded a substantial and unjustifiable risk but did not intend to cause the death of another person (*see* Penal Law §§ 15.05 [3]; 125.15 [1]; 125.25 [1]; *see generally* *People v Holloway*, 130 AD2d 933, 933 [4th Dept 1987], *lv denied* 70 NY2d 751 [1987]), and defendant was thus entitled to that charge. This is particularly true inasmuch as the jury acquitted defendant of murder in the second degree and instead convicted him of the lesser included offense of manslaughter in the first degree (§ 125.20 [1]; *see generally* *People v McIntosh*, 162 AD3d 1612, 1615-1616 [4th Dept 2018], *affd* 33 NY3d 1064 [2019]). I therefore conclude that the court erred in refusing to charge the jury with the requested lesser included charge of manslaughter in the second degree (*see* *People v Diaz*, 66 AD2d 752, 752 [1st Dept 1978]). Present—Lindley, J.P., Curran, Bannister, Ogden and DelConte, JJ.

57 Darlene Miller et al., Appellants, v John Ross McGrath, M.D., et al., Respondents. [247 NYS3d 898]—

Physicians and Surgeons—Malpractice—Interventional Radiology—Bronchial Artery Embolization Procedure

Physicians and Surgeons—Malpractice—Bronchial Artery Embolization Procedure—Pulmonology Consultation

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered October 24, 2024. The order granted in part the motions of defendants for summary judgment dismissing the complaint and any cross-claims against them.

It is hereby ordered that the order so appealed from is unanimously modified on the law by denying those parts of the motion of defendants John Ross McGrath, M.D., and WNY Radiology Associates, LLC, with respect to claims based on allegations that John Ross McGrath, M.D., performed the bronchial artery embolization procedure without first having the data that a completed bronchoscopy would have provided him, failed to ensure that the bronchial artery embolization procedure was medically indicated, and failed to timely issue a post-procedure note and reinstating those claims against John Ross McGrath, M.D., and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this negligence and medical malpractice action to recover damages for injuries sustained by Darlene Miller (plaintiff) in the course of a bronchial artery embolization (BAE) procedure. Plaintiff pre-

sented to defendant Buffalo General Medical Center (Buffalo General) complaining that she was coughing up blood. Defendant Carla A. Frederick, M.D., a pulmonologist employed by defendant UBMD Internal Medicine (UBMD), consulted on plaintiff's care. Frederick scheduled a bronchoscopy to locate the source of plaintiff's bleeding, but plaintiff's condition apparently improved and she was discharged without undergoing the bronchoscopy. Plaintiff returned to Buffalo General the next day after her condition worsened, and Frederick advocated for an urgent BAE procedure. Defendant John Ross McGrath, M.D., an interventional radiologist and employee of defendant WNY Radiology Associates, LLC (WNYRA), performed the BAE procedure. During or following that procedure, plaintiff suffered a spinal stroke resulting in significant injuries. No bronchoscopy was performed before the BAE procedure. McGrath left the hospital immediately after the BAE procedure concluded and had not yet written a post-surgical note by the time that plaintiff's condition precipitously worsened.

McGrath and WNYRA (collectively, WNYRA defendants) moved for summary judgment dismissing the complaint and any cross-claims against them, as did Frederick and UBMD (collectively, UBMD defendants). Plaintiffs now appeal from an order that, *inter alia*, granted those motions in part.

As an initial matter, plaintiffs' counsel consented to the dismissal of plaintiffs' claims that McGrath deviated from the standard of care by his failure to perform a bronchoscopy instead of a BAE procedure, his failure to look at imaging without haste, and his failure to obtain informed consent from plaintiff. Inasmuch as no appeal lies from that part of an order entered on consent, those contentions are not properly before this Court (*see Matter of Charity M. [Warren M.]* [appeal No. 2], 145 AD3d 1615, 1617 [4th Dept 2016]).

We agree with plaintiffs that Supreme Court erred in granting that part of the WNYRA defendants' motion with respect to claims that McGrath performed the BAE procedure without first having the data that a completed bronchoscopy would have provided him, failed to ensure that the BAE procedure was medically indicated, and failed to timely issue a post-procedure note, and we therefore modify the order accordingly. "[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]). "[T]he burden shifts to the plaintiff

to demonstrate the existence of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden” (*id.* [internal quotation marks omitted]).

Here, the WNYRA defendants met their initial burden on the motion with respect to the issues of deviation from the accepted standard of care and proximate causation through the submission of McGrath’s deposition testimony and his expert physician affidavit, which, taken together, were “detailed, specific and factual in nature” and addressed each negligence claim raised in plaintiffs’ bill of particulars (*Stradtman v Cavarretta* [appeal No. 2], 179 AD3d 1468, 1469 [4th Dept 2020] [internal quotation marks omitted]). The burden thus shifted to plaintiffs “to raise triable issues of fact by submitting an expert’s affidavit both attesting to a departure from the accepted standard of care and that [McGrath’s] departure from that standard of care was a proximate cause of the [alleged] injur[ies]” (*Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022] [internal quotation marks omitted]; see *Bubar*, 177 AD3d at 1359).

We conclude that plaintiffs raised triable issues of fact with respect to both deviation from the standard of care and proximate causation relating to certain aspects of McGrath’s pre-procedure decision to perform the BAE procedure. Specifically, plaintiffs submitted an expert physician affidavit opining that McGrath deviated from the applicable standard of care by performing the BAE procedure without first having the data that a completed bronchoscopy would have provided and by failing to ensure that the BAE procedure was medically indicated. The expert further opined that McGrath should have known that the BAE procedure was not indicated or medically justified and if not for McGrath’s negligence in that regard, the injuries suffered by plaintiff during the procedure would not have resulted. We further conclude that plaintiffs raised triable issues of fact with respect to McGrath’s failure to prepare a timely post-procedure note. Plaintiffs’ expert opined that McGrath deviated from the applicable standard of care by failing to prepare a timely post-procedure note and that the absence of a timely note hindered and delayed the evaluation of plaintiff’s status by those who treated her after the procedure. Thus, with respect to those claims against McGrath, we conclude that plaintiffs’ expert affidavit resulted in “a classic battle of the experts that is properly left to a jury for resolution” (*Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019] [internal quotation marks omitted]).

Contrary to plaintiffs' further contentions, we conclude that the court properly granted that part of the UBMD defendants' motion with respect to claims that Frederick failed to coordinate with medical providers prior to the BAE and that she failed to follow up with plaintiff after the procedure. The UBMD defendants met their initial burden through the affirmation of their expert, who averred that it was reasonable and within the standard of care for Frederick to rely on McGrath to determine whether a BAE was appropriate and that, as a consulting provider, Frederick would not have been expected to stay on or take charge of monitoring plaintiff after that procedure. Plaintiffs failed to raise an issue of fact in opposition inasmuch as their expert's opinions were conclusory and failed to explain how the alleged failures were proximate causes of plaintiff's injuries (*see O'Shea v Buffalo Med. Group, P.C.*, 64 AD3d 1140, 1141 [4th Dept 2009], *appeals dismissed* 13 NY3d 834 [2009]).

We have considered plaintiffs' remaining contentions and conclude that they are without merit. Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

58 The People of the State of New York, Respondent, v Hunter Armstrong, Appellant. [247 NYS3d 878]—

Crimes—Identification of Defendant—Confirmatory Identification by Victim

Appeal from a judgment of the Supreme Court, Onondaga County (Gordon J. Cuffy, A.J.), rendered January 25, 2024. The judgment convicted defendant upon his plea of guilty of kidnapping in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of kidnapping in the first degree (Penal Law § 135.25 [2] [a]). We reject defendant's contention that Supreme Court erred in determining that the identification of defendant by the victim was confirmatory. "A court's invocation of the 'confirmatory identification' exception is . . . tantamount to a conclusion that, as a matter of law, the witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification" (*People v Rodriguez*, 79 NY2d 445, 450 [1992]; *see People v Colon*, 196 AD3d 1043, 1045 [4th Dept 2021], *lv denied* 37 NY3d 1026 [2021]). Here, the People met their burden of establishing that the identification of defendant by the victim was confirmatory by presenting the testimony of a police detective and the recording of defendant's interview with law

enforcement, which established that the victim knew defendant well enough to consider him as “an older brother figure” (see *Colon*, 196 AD3d at 1045; *People v Gambale*, 158 AD3d 1051, 1052 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018]).

Defendant failed to preserve for our review his contention that his guilty plea was not knowing, voluntary and intelligent inasmuch as he withdrew his motion to withdraw his plea and did not thereafter move to vacate the judgment of conviction (see *People v Lorenz*, 120 AD3d 1528, 1529 [4th Dept 2014], *lv denied* 24 NY3d 1045 [2014]). This case does not fall within the rare exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]).

Defendant’s contention that he was denied effective assistance of counsel is based on matters outside the record, and thus “a CPL 440.10 proceeding is the appropriate forum for reviewing [defendant’s] claim[]” (*People v Dunn*, 229 AD3d 1220, 1223 [4th Dept 2024]).

Finally, we note that both the certificate of disposition and the uniform sentence and commitment form erroneously reflect that defendant was convicted and sentenced at a term of Onondaga County Court, and those documents must therefore be amended to reflect that he was convicted and sentenced at a term of Supreme Court, Onondaga County (see *People v Savino*, 239 AD3d 1452, 1454 [4th Dept 2025]; *People v Daniqua S.D.*, 92 AD3d 1226, 1227 [4th Dept 2012]). Present—Whalen, P.J., Smith, Greenwood, DelConte and Hannah, JJ.

59 The People of the State of New York, Respondent, v Blaine Brinson, Appellant. (Appeal No. 1.) [250 NYS3d 331]—

Crimes—Possession of Weapon—Weight of Evidence

Crimes—Disclosure—Automatic Discovery—Possession by and Due Diligence of People

Appeal from a judgment of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), rendered March 6, 2023. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ordered that the case is held, the decision is reserved, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, defendant appeals by permission of this Court from an order denying his motion pursuant to CPL 440.10 to vacate the judgment of conviction in appeal No. 1.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in appeal No. 1 that the verdict is against the weight of the evidence on the issue of defendant's possession of the subject handgun (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, when the police initiated a traffic stop of the vehicle defendant was driving, defendant led police on a pursuit that ended when defendant's vehicle struck another vehicle. Defendant then fled on foot. The front-seat passenger, the only other person in defendant's vehicle, was impeded from leaving the vehicle due to collision damage. When the passenger ultimately exited the vehicle, an officer observed a handgun in the passenger's waistband. In the course of arresting the passenger, the arresting officer observed the subject handgun on the front armrest between the driver's seat and the passenger's seat. According to expert testimony at trial, a DNA sample taken from the handgun revealed a mixture of contributors, with defendant's DNA being the major component. Based on the circumstances surrounding the recovery of the subject handgun and the corroborating DNA evidence, we conclude that the verdict is not against the weight of the evidence on the issue of possession (*see People v Campbell*, 128 AD3d 1401, 1401-1402 [4th Dept 2015], *lv denied* 26 NY3d 927 [2015]; *People v Ward*, 104 AD3d 1323, 1324 [4th Dept 2013], *lv denied* 21 NY3d 1011 [2013]; *cf. People v Hunt*, 185 AD3d 1531, 1533 [4th Dept 2020]).

Defendant further contends in appeal No. 1 that Supreme Court erred in denying that part of his motion seeking to dismiss the indictment pursuant to CPL 30.30 on the ground that the People's failure to turn over certain discovery material rendered the initial certificate of compliance invalid. Defendant specifically contended that the People possessed or were deemed to be in possession of the identified material before they filed the initial certificate of compliance (*cf. People v Campbell*, 243 AD3d 1221, 1221-1222 [4th Dept 2025]). The court orally denied the motion one day after it was filed and before the People filed their response. The court did not specifically address defendant's contention that, prior to filing the initial certificate of compliance, the People possessed or were deemed to be in possession of the material pursuant to CPL 245.20 (former [1]) and (former [2]), and it did not address whether the People had exercised due diligence as required by CPL 245.50 (former [1]) before filing that certificate of compliance.

We agree with defendant that the court erred in denying his

motion without determining those issues. CPL 245.20 (1) addresses the “initial discovery” that the People must provide to a defendant, automatically and without specific request. The initial discovery obligations implicate speedy trial rights through the application of CPL 245.50 (3), which requires the People to file a valid certificate of compliance before stating trial readiness. In order to file a valid certificate of compliance, the People must “state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery” (CPL 245.50 [former (1)]). As relevant here, the People were required to disclose material “in the possession, custody or control of the prosecution” (CPL 245.20 [former (1)]), and “all items and information related to the prosecution of a charge in the possession of any New York state or local police or law enforcement agency shall be deemed to be in the possession of the prosecution” (CPL 245.20 [former (2)]). Here, the court failed to address whether the People were in possession of or were deemed to be in possession of initial discovery before they filed the initial certificate of compliance or, if they were, whether the People nevertheless exercised due diligence before filing the initial certificate of compliance. Thus, as the People correctly concede, we must hold the case, reserve decision, and remit the matter in appeal No. 1 to Supreme Court to determine the abovementioned outstanding issues, upon further submissions if warranted, and, if the court concludes that the initial certificate of compliance was invalid, to determine whether the People were nevertheless ready within the requisite time period (*see generally People v Mosley*, 243 AD3d 1345, 1346-1347 [4th Dept 2025]; *People v Walker*, 228 AD3d 1318, 1320 [4th Dept 2024]).

In light of our determination, we do not address defendant’s remaining contentions in appeal No. 1 or his contention in appeal No. 2. Present—Whalen, P.J., Curran, Montour, Smith and DelConte, JJ.

60 The People of the State of New York, Respondent, v Blaine Brinson, Appellant. (Appeal No. 2.) [247 NYS3d 879]—Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered October 17, 2023. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ordered that the case is held, and the decision is reserved.

Same memorandum as in *People v Brinson* ([appeal No. 1] 246 AD3d 1435 [4th Dept 2026]). Present—Whalen, P.J., Curran, Montour, Smith and DelConte, JJ.

61 In the Matter of Ragnar B.-N. Oneida County Department of Family and Community Services, Respondent; Gary B.-N., Appellant. [248 NYS3d 405]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Appealability of Order Entered on Consent

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered July 2, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

It is hereby ordered that said appeal is unanimously dismissed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. We conclude that the appeal must be dismissed inasmuch as the father's contentions are directed at the order finding permanent neglect, which "was entered on consent of [the father] and thus is beyond appellate review" (*Matter of Raymond H. [Dana C.]*, 186 AD3d 1125, 1126 [4th Dept 2020] [internal quotation marks omitted]; see *Matter of Aiden T. [Melissa S.]*, 164 AD3d 1663, 1665 [4th Dept 2018], *lv denied* 32 NY3d 917 [2019]; *Matter of Bryan W.*, 299 AD2d 929, 930 [4th Dept 2002], *lv denied* 99 NY2d 506 [2003]). We note that a party may challenge whether the consent to the entry of the finding of permanent neglect was given knowingly, voluntarily and intelligently by preserving the contention through a motion to vacate the finding of permanent neglect or to withdraw their consent (see *Matter of Abigail H. [Daniel D.]*, 172 AD3d 1922, 1923 [4th Dept 2019], *lv denied* 34 NY3d 901 [2019]; *Matter of Dah'Marii G. [Cassandra G.]*, 156 AD3d 1479, 1480 [4th Dept 2017]; *Matter of Xavier O.V. [Sabino V.]*, 117 AD3d 1567, 1567 [4th Dept 2014], *lv denied* 24 NY3d 903 [2014]). Present—Whalen, P.J., Curran, Montour, Smith and DelConte, JJ.

62 Sharon Washer, Individually and as Executor of the Estate of Luther Washer, Deceased, Respondent, v The Memorial Hospital of William F. and Gertrude F. Jones, Inc., et al., Defendants, and Thomas F. Taylor, M.D., et al., Appellants. [247 NYS3d 907]—

Physicians and Surgeons—Malpractice—Negligent Reading and Report of Chest X-Rays

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered June 26, 2024. The order, insofar as appealed from, denied the motion of defendants Thomas F. Taylor, M.D., and Associated Radiologists of the Finger Lakes, P.C., for summary judgment dismissing the amended complaint and any cross-claims against them.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting in part the motion of defendants Thomas F. Taylor, M.D. and Associated Radiologists of the Finger Lakes, P.C. and dismissing the amended complaint against those defendants insofar as it asserts that defendant Thomas F. Taylor, M.D. was negligent in failing to order a CT scan and as modified the order is affirmed without costs.

Memorandum: In this medical malpractice and wrongful death action, plaintiff alleges, inter alia, that defendant Thomas F. Taylor, M.D. was negligent in connection with his reading and report of chest x-rays taken when plaintiff's decedent sought treatment at an emergency room for pain following several falls, that a proper reading and report should have resulted in the more timely detection and treatment of decedent's lung cancer, and that defendant Associated Radiologists of the Finger Lakes, P.C. (Associated Radiologists), was vicariously liable for Taylor's negligence. Taylor and Associated Radiologists (collectively, defendants) appeal from an order that, inter alia, denied their motion for summary judgment dismissing the amended complaint and any cross-claims against them.

"[A] defendant moving for summary judgment in a medical malpractice action has the [initial] burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby" (*Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019] [internal quotation marks omitted]; see *Campbell v Bell-Thomson*, 189 AD3d 2149, 2150 [4th Dept 2020]). "To meet that burden, a defendant must submit in admissible form factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [the defendant] complied with the accepted standard of care or did not cause any injury to the patient" (*Edwards v Myers*, 180 AD3d 1350, 1352 [4th Dept 2020] [internal quotation marks omitted]; see *Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]). "[T]he burden shifts to the plaintiff to demon-

strate the existence of a triable issue of fact only after the defendant . . . meets the initial burden . . . , and only as to the elements on which the defendant met the prima facie burden’ ” (*Bubar*, 177 AD3d at 1359).

We agree with defendants that Supreme Court erred in denying that part of their motion seeking dismissal of the amended complaint insofar as it asserts that Taylor “negligently fail[ed] to order a CT scan of [decedent’s] chest.” We conclude that defendants met their initial burden of establishing entitlement to judgment as a matter of law with respect to that claim (*see Nesterenko v Hall*, 239 AD3d 1314, 1315 [4th Dept 2025]). By not submitting the requisite expert medical response in opposition to defendants’ showing, plaintiff failed to raise a triable issue of fact with respect to that claim (*see id.*; *see also Webb v Scanlon*, 133 AD3d 1385, 1387 [4th Dept 2015]). We therefore modify the order accordingly.

Contrary to defendants’ further contention, the court did not err in denying their motion insofar as it sought summary judgment dismissing the remainder of the amended complaint against them. With respect to the issue of deviation from the standard of care, although defendants met their initial burden on the motion by submitting the affidavit of an expert who opined that Taylor correctly read the chest x-rays and reported his findings to decedent’s treating providers in the emergency department, we conclude that plaintiff’s expert raised a triable issue of fact sufficient to defeat the motion (*see generally Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). With respect to the issue of proximate cause, we conclude that defendants failed to meet their initial burden and thus the burden never shifted to plaintiff on that issue (*see Bubar*, 177 AD3d at 1359). Present—Whalen, P.J., Curran, Montour, Smith and DelConte, JJ.

63 Z.M., an Infant, by Deborah M., Individually and as His Mother and Natural Guardian, Respondent, v Leah Kaufman, M.D., et al., Defendants, and Crouse Hospital et al., Appellants. [247 NYS3d 891]—Appeal from an order of the Supreme Court, Onondaga County (Danielle M. Fogel, J.), entered July 22, 2024. The order, among other things, denied in part that part of a motion seeking summary judgment dismissing the complaint against defendants Crouse Hospital, Aiwa Ono, M.D., Khanh-Hein Tran, M.D. and Xue Chi, M.D.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 30 and February 2, 2026,

It is hereby ordered that said appeal is unanimously

dismissed without costs upon stipulation. Present—Whalen, P.J., Curran, Montour, Smith and DelConte, JJ.

64 The People of the State of New York, Respondent, v Stephen E. Swanton, Appellant. [248 NYS3d 395]—

Crimes—Justification—Weight of Evidence

Crimes—Sentence—Concurrent and Consecutive Terms—Predicate Felony

Appeal from a judgment of the Herkimer County Court (John H. Crandall, J.), rendered May 9, 2024. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the first degree and criminal use of a firearm in the first degree (two counts).

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by directing that all of the sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), assault in the first degree (§ 120.10 [4]), and two counts of criminal use of a firearm in the first degree (§ 265.09 [1] [a], [b]). County Court directed that the sentences for murder in the second degree and assault in the second degree were to run consecutively to each other, and concurrently with the sentences for the other crimes of which defendant was convicted.

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In particular, contrary to defendant's contention, the jury's rejection of the justification defense is not contrary to the weight of the evidence (*see People v Hollis*, 219 AD3d 1686, 1688-1689 [4th Dept 2023], *lv denied* 40 NY3d 1039 [2023]). The jury could reasonably have found, based on the testimony of the People's witnesses and the physical evidence, that the victims were not using or attempting to use deadly physical force when defendant shot them (*see generally People v St. John*, 215 AD3d 1267, 1268 [4th Dept 2023], *lv denied* 40 NY3d 999 [2023]).

We agree with defendant, however, that the court erred in directing that the sentence for the count of assault in the first degree run consecutively to the sentence imposed on the count of murder in the second degree because the murder was the predicate felony for the felony assault (*see* Penal Law § 70.25 [2]; *People v Brown*, 204 AD3d 1390, 1394 [4th Dept 2022], *lv*

denied 39 NY3d 985 [2022]; *People v Miller*, 148 AD3d 1689, 1690 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]). We therefore modify the judgment by directing that all of the sentences imposed shall run concurrently.

We have reviewed defendant's remaining contentions and conclude that none warrants reversal or further modification of the judgment. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

65 The People of the State of New York, Respondent, v Darien Govan, Appellant. (Appeal No. 1.) [250 NYS3d 327]—

Crimes—Identification of Defendant—Photographic Array—Undue Suggestiveness

Crimes—Confession—Intoxication

Crimes—Plea of Guilty—Voluntariness—Coercion by Defense Counsel

Appeal from a judgment of the Supreme Court, Monroe County (Victoria M. Argento, J.), rendered November 18, 2021. The judgment convicted defendant upon his plea of guilty of attempted murder in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). In appeal Nos. 2 and 3, defendant appeals by permission of this Court from orders denying his motions pursuant to CPL 440.10 to vacate the judgment in appeal No. 1.

In his pro se supplemental brief, defendant contends in appeal No. 1 that the waiver of the right to appeal was not made knowingly, intelligently, and voluntarily and, in his main brief, he contends in appeal No. 1 that the waiver does not encompass any suppression issues because Supreme Court stated that defendant was waiving “certain” motions or suppression decisions, thus implying that some suppression decisions survived the waiver. Even assuming, *arguendo*, that the waiver of the right to appeal is invalid (*see People v Spratt*, 239 AD3d 1325, 1325 [4th Dept 2025], *lv denied* 44 NY3d 984 [2025]) and therefore does not encompass defendant's challenges in his main and pro se supplemental briefs in appeal No. 1 to the court's suppression rulings, we conclude, for the following reasons, that those challenges are without merit.

Defendant contends in his main and pro se supplemental briefs that the People failed to meet their burden of establishing the lack of undue suggestiveness in the photo array procedure inasmuch as defendant was the only person in jail cloth-

ing. We reject that contention. Defendant wore a green and white striped shirt that was visible on only one shoulder, and there were no markings on the shirt to indicate that it was a jail uniform. As the court noted, a witness looking at defendant's photograph would not necessarily conclude that he was wearing jail garb. The photographs in the array depicted men similar in age, race, hairstyles, and physical features (see *People v Mead*, 41 AD3d 1306, 1307 [4th Dept 2007], *lv denied* 9 NY3d 963 [2007]). Because "the subjects depicted in the photo array [were] sufficiently similar in appearance so that the viewer's attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection," the photo array itself was not unduly suggestive (*People v Quinones*, 5 AD3d 1093, 1093 [4th Dept 2004], *lv denied* 3 NY3d 646 [2004]; see *People v Holmes*, 210 AD3d 1510, 1511 [4th Dept 2022], *lv denied* 39 NY3d 1073 [2023]; *People v Powell*, 26 AD3d 795, 795 [4th Dept 2006], *lv denied* 7 NY3d 793 [2006]).

Defendant failed to preserve for our review his further contention in his pro se supplemental brief that the procedure used by the police in presenting the photo array was unduly suggestive (see *People v Lundy*, 165 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *People v VanVleet*, 140 AD3d 1633, 1634 [4th Dept 2016], *lv denied* 28 NY3d 938 [2016]). In any event, contrary to defendant's contention, the police employed a "blind or blinded" procedure inasmuch as one investigator prepared the photo array and a second investigator, who did not know which person in the array was the suspect or where the suspect was in the array, administered the photo array (see CPL 60.25 [1] [c] [i], [ii]; *People v Moss*, 232 AD3d 1327, 1327-1328 [4th Dept 2024]; *People v Tyme*, 222 AD3d 783, 784 [2d Dept 2023], *lv denied* 41 NY3d 944 [2024]). Although the second investigator had viewed a surveillance video depicting the crime prior to the photo array identification procedure, he testified that the video did not have enough clarity for him to identify the suspect.

We reject defendant's further contention in his pro se supplemental brief that his statements should have been suppressed as a result of his intoxication. Defendant preserved his contention for our review only with respect to statements he made to the arresting officers and not the investigator who conducted the interview with defendant. In any event, we conclude that defendant did not provide a factual record sufficient to enable us to review his contention inasmuch as the body-worn camera footage of the two arresting officers, which

was admitted in evidence at the suppression hearing and reviewed by the court, was not provided to this Court (*see People v Brady*, 192 AD3d 1557, 1558-1559 [4th Dept 2021], *lv denied* 37 NY3d 954 [2021]; *People v Smith*, 93 AD3d 1345, 1346 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012]; *see generally People v Kinchen*, 60 NY2d 772, 773-774 [1983]). Based only on the testimony from the officers, we agree with the court that defendant was not intoxicated to a degree of mania or of being unable to understand the meaning of his statements (*see People v Mineccia*, 185 AD3d 1407, 1408 [4th Dept 2020]; *People v Iddings*, 23 AD3d 1132, 1133 [4th Dept 2005], *lv denied* 6 NY3d 776 [2006]).

We also reject defendant's contention in his pro se supplemental brief that the court erred in refusing to suppress physical evidence without conducting a hearing on the legality of the arrest. A motion to suppress may be summarily denied if the motion papers do not allege a ground constituting a legal basis for the motion, or the sworn allegations of fact do not as a matter of law support the ground alleged (*see* CPL 710.60 [3] [a], [b]; *People v Collier*, 238 AD3d 1530, 1531 [4th Dept 2025], *lv denied* 44 NY3d 981 [2025]). Here, the court did not abuse its discretion in denying, without an evidentiary hearing, that part of defendant's omnibus motion seeking to suppress a gun recovered after defendant discarded it in a park (*see Collier*, 238 AD3d at 1531).

Defendant next contends in his pro se supplemental brief in appeal No. 1 that he was denied the right to testify before the grand jury. Assuming again, *arguendo*, that the waiver of the right to appeal is invalid (*see Spratt*, 239 AD3d at 1325), we conclude that defendant's contention is forfeited by his plea of guilty (*see People v Goodwin*, 238 AD3d 1333, 1334-1335 [3d Dept 2025], *lv denied* 43 NY3d 1055 [2025]; *People v Lafferty*, 227 AD3d 1480, 1481-1482 [4th Dept 2024], *lv denied* 42 NY3d 928 [2024], *denied reconsideration* 42 NY3d 1036 [2024]; *People v Escalera*, 121 AD3d 1519, 1520 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]).

We reject defendant's contention in his main and pro se supplemental briefs in appeal No. 2 that the court erred in summarily denying his first CPL 440.10 motion seeking to vacate the judgment on the ground that his guilty plea was not knowingly, voluntarily, and intelligently entered because defense counsel coerced him into pleading guilty. Defendant's "unsupported, self-serving assertions . . . are contradicted by the transcript of the plea proceeding, at which defendant indicated that he agreed to plead guilty of his own free will

and that no one had coerced him to enter the plea” (*People v Wittkop*, 114 AD3d 1242, 1243 [4th Dept 2014], *lv denied* 23 NY3d 1069 [2014]; *see* CPL 440.30 [4] [d] [i]). Under these circumstances and considering defendant’s further statements during the plea colloquy, we conclude that there is no reasonable possibility that the allegation is true (*see* CPL 440.30 [4] [d] [ii]; *People v McCullough*, 144 AD3d 1526, 1527-1528 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *People v Atkins*, 107 AD3d 1465, 1466 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]). The court therefore properly denied defendant’s first CPL 440.10 motion without a hearing because “the motion could be determined on the trial record and defendant’s submissions on the motion” (*People v Satterfield*, 66 NY2d 796, 799 [1985]).

Finally, we have reviewed defendant’s remaining contentions raised in his pro se supplemental brief with respect to appeal Nos. 2 and 3 and conclude that they do not warrant modification or reversal of the orders. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

66 The People of the State of New York, Respondent, v Darien Govan, Appellant. (Appeal No. 2.) [247 NYS3d 884]—Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered May 4, 2023. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ordered that the order so appealed from is unanimously affirmed.

Same memorandum as in *People v Govan* ([appeal No. 1] 246 AD3d 1442 [4th Dept 2026]). Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

67 The People of the State of New York, Respondent, v Darien Govan, Appellant. (Appeal No. 3.) [247 NYS3d 884]—Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Victoria M. Argento, J.), entered January 3, 2024. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ordered that the order so appealed from is unanimously affirmed.

Same memorandum as in *People v Govan* ([appeal No. 1] 246 AD3d 1442 [4th Dept 2026]). Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

68 The People of the State of New York, Respondent, v Robert A. Hawkey, Appellant. [247 NYS3d 880]—

Crimes—Disseminating Indecent Material to Minors—Sex Offender Victim Fee

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 13, 2023. The judgment convicted defendant upon his plea of guilty of disseminating indecent material to minors in the first degree as a sexually motivated felony.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of disseminating indecent material to minors in the first degree as a sexually motivated felony (Penal Law §§ 130.91, former 235.22), defendant contends that the supplemental sex offender victim fee should be vacated, for two reasons. First, defendant contends that the fee should not have been imposed inasmuch as he was convicted of an offense contained in article 235 of the Penal Law (*see* § 60.35 [1] [b]). Second, defendant contends that the fee should be vacated inasmuch as County Court failed to pronounce its imposition at sentencing. Assuming, arguendo, that preservation is not required under the circumstances of this case (*cf. People v Guerrero*, 45 AD3d 313, 313 [1st Dept 2007], *affd* 12 NY3d 45 [2009]; *see generally People v Conceicao*, 26 NY3d 375, 381-382 [2015]; *People v Carrington*, 238 AD3d 893, 894 [2d Dept 2025]), we conclude that defendant's contentions lack merit. Here, defendant's conviction results from an offense contained in article 130 of the Penal Law, and thus the supplemental sex offender victim fee is mandated pursuant to Penal Law § 60.35 (1) (b) (*see generally People v Adames*, 227 AD3d 483, 483 [1st Dept 2024], *lv denied* 42 NY3d 969 [2024]; *People v Bradshaw*, 210 AD3d 44, 47-48 [2d Dept 2022], *lv denied* 39 NY3d 1153 [2023], *denied reconsideration* 40 NY3d 996 [2023]). Moreover, inasmuch as the supplemental sex offender victim fee is not part of the sentence, the court was not required to "pronounce [it] in . . . defendant's presence during sentencing" (*Guerrero*, 12 NY3d at 47).

We note that the uniform sentence and commitment form fails to indicate that defendant's conviction of disseminating indecent material to minors in the first degree was as a sexually motivated felony, and it must be amended accordingly (*see People v Bullard-Daniel*, 203 AD3d 1630, 1633 [4th Dept 2022], *lv denied* 38 NY3d 1069 [2022]; *see generally People v Brown*, 166 AD3d 1579, 1580 [4th Dept 2018], *lv denied* 32 NY3d 1169

[2019]). Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

69 The People of the State of New York, Respondent, v Kenton J. Jones-Watkins, Appellant. [248 NYS3d 396]—

Crimes—Appeal—Valid Waiver—Monosyllabic Responses during Plea Colloquy

Crimes—Plea of Guilty—Sufficiency of Allocution—Monosyllabic Responses

Appeal from a judgment of the Supreme Court, Yates County (Jason L. Cook, J.), rendered January 9, 2024. The judgment convicted defendant upon a plea of guilty of aggravated criminal contempt.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of aggravated criminal contempt (Penal Law § 215.52 [3]), defendant contends that his waiver of the right to appeal is invalid because he provided monosyllabic answers to Supreme Court’s questions during the waiver colloquy, and that his guilty plea was involuntarily entered because he gave monosyllabic responses to many questions during the plea colloquy. We affirm.

Initially, we conclude that defendant validly waived his right to appeal. The court’s explanation of the appeal waiver tracked the appropriate model colloquy (*see* NY Model Colloquies, Waiver of Right to Appeal; *see generally* *People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* 589 US 1302 [2020]) and, contrary to defendant’s contention, the waiver was not rendered invalid by defendant’s monosyllabic responses during the waiver colloquy (*see* *People v Hoose*, 236 AD3d 1294, 1295 [4th Dept 2025], *lv denied* 44 NY3d 993 [2025]; *People v Burch*, 234 AD3d 1246, 1246-1247 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025]).

Defendant’s contention that his monosyllabic responses to the court’s inquiries during the plea colloquy rendered his plea involuntary “is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by the valid waiver of the right to appeal” (*People v Tapia*, 158 AD3d 1079, 1079 [4th Dept 2018], *lv denied* 31 NY3d 1088 [2018] [internal quotation marks omitted]; *see* *People v Kosmetatos*, 178 AD3d 1433, 1433-1434 [4th Dept 2019], *lv denied* 35 NY3d 994 [2020]; *People v Rodriguez*, 173 AD3d 1840, 1841 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]). In any event, it is well settled that a defendant’s monosyllabic responses to the court’s questions during a plea colloquy do not render the resulting plea

invalid (*see People v Stehm*, 227 AD3d 1463, 1464 [4th Dept 2024]; *People v Pryce*, 148 AD3d 1629, 1630 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]). Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

70 The People of the State of New York, Respondent, v Dionedre B. Wyatt, Appellant. [247 NYS3d 882]—

Crimes—Possession of Weapon—Second-Degree Criminal Possession of Weapon—Sufficiency of Evidence—Place of Business of Defendant—Possession of Appropriate Firearm Licence

Crimes—Right to Counsel—Effective Representation—Unlawful Police Encounter

Appeal from a judgment of the Monroe County Court (Michael L. Dollinger, J.), rendered June 5, 2024. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by remitting the matter to Monroe County Court for a suppression hearing and as modified the judgment is affirmed in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arises from an encounter during which a police officer discovered a gun in defendant's front pocket while in a gas station convenience store after the officer received information from a 911 call that a person matching defendant's description was observed with a cell phone or a gun.

Defendant contends that his conviction is not supported by legally sufficient evidence because the People failed to establish that the gas station convenience store was not defendant's place of business. We reject that contention. Here, the evidence at trial established that defendant possessed the weapon outside of the gas station convenience store and, thus, even assuming, arguendo, that the gas station convenience store was defendant's place of business, we conclude that the evidence of possession outside of the gas station convenience store is legally sufficient to support the conviction (*see People v Anderson*, 236 AD3d 1424, 1425 [4th Dept 2025], *lv denied* 43 NY3d 1006 [2025]; *People v Hawkins*, 110 AD3d 1242, 1242-1243 [3d Dept 2013], *lv denied* 22 NY3d 1041 [2013]). We further reject defendant's contention that his conviction is not supported by legally sufficient evidence because the People failed to prove that he did not have a license for the gun. Defendant, and not the People, had the burden of asserting, as a defense, that he possessed an appropriate firearms license, and defendant did

not do so (*see People v David*, 41 NY3d 90, 96 [2023]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that defense counsel was ineffective by failing to move to suppress the gun on the ground that the police encounter was unlawful (*see People v Carter*, 142 AD3d 1342, 1343 [4th Dept 2016]; *see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]). Here, suppression of the gun would have been dispositive of the sole count of the indictment of which defendant was convicted (*see Carter*, 142 AD3d at 1343; *see also People v Evans*, 243 AD3d 1338, 1339 [4th Dept 2025]).

To prevail on his claim of ineffective assistance of counsel, defendant "must demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure to pursue colorable claims," and "[o]nly in the rare case will it be possible, based on the trial record alone, to deem [defense] counsel ineffective for failure to pursue a suppression motion" (*People v Carver*, 27 NY3d 418, 420 [2016] [internal quotation marks omitted]; *see People v Roots*, 210 AD3d 1532, 1533-1534 [4th Dept 2022]). We conclude that the record establishes that defense counsel could have presented a colorable argument that the police officer's actions were either not justified at the inception of the encounter or otherwise not reasonably related in scope to the circumstances presented (*see De Bour*, 40 NY2d at 215). Here, the officer's encounter with defendant was based on a 911 call from a security guard at a nearby restaurant who said that he observed a man who had what "looks like a black phone, but then again . . . looks like a gun." The security guard provided a description of the individual, and the guard said that he could not be sure, but that he thought the man might have been part of a dispute that had taken place at the restaurant earlier in the day. Notably, County Court held a *Huntley* hearing at which the arresting officer testified, but the testimony of the officer as well as his body cam footage, which was admitted at the hearing, presented a "'close [question] under [the] complex *De Bour* jurisprudence'" regarding the legality of the police encounter (*Carter*, 142 AD3d at 1343, quoting *People v Clermont*, 22 NY3d 931, 934 [2013]).

We further conclude from this record that defense counsel's failure to seek suppression of the gun was not part of a legitimate pretrial strategy. The record reflects that defense counsel,

or at least stand-in counsel, requested a probable cause hearing, but then failed to follow through with that request. Further, the court informed defendant on two occasions leading up to the *Huntley* hearing that he would have the chance to challenge the legality of the police encounter. There is no discernible reason why that hearing could not have been expanded to afford defense counsel an opportunity to make such a challenge had defense counsel merely requested permission to do so.

In light of the foregoing, we conclude that “‘defendant is entitled to a suppression hearing’ with respect to the legality of the police encounter” (*Carter*, 142 AD3d at 1343, quoting *People v Bilal*, 27 NY3d 961, 962 [2016]), and we therefore conditionally modify the judgment by remitting the matter to County Court for further proceedings (*see id.*; *see generally Clermont*, 22 NY3d at 934; *Evans*, 243 AD3d at 1339). In the event that defendant prevails at the suppression hearing, the judgment is reversed and the indictment is dismissed and, if the People prevail, then the judgment “should be amended to reflect that result” (*Clermont*, 22 NY3d at 932; *see Evans*, 243 AD3d at 1339; *People v Layou*, 114 AD3d 1195, 1198-1199 [4th Dept 2014]; *see also People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070 [2016], *denied reconsideration* 28 NY3d 932 [2016]).

We reject defendant’s contention that the sentence is unduly harsh and severe. Finally, we have considered defendant’s remaining contention and conclude that it does not warrant further modification or reversal of the judgment. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

71 In the Matter of Julie A. Vito, Respondent, v Kyle A. Dugan, Appellant. (Appeal No. 1.) [252 NYS3d 382]—

Parent, Child and Family—Family Offense Proceeding—Second-Degree Harassment

Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), dated September 6, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole legal and physical custody of the subject children.

It is hereby ordered that the order so appealed from is unanimously affirmed.

Memorandum: In these consolidated appeals arising from proceedings pursuant to Family Court Act article 6 and article 8, respondent father appeals, in appeal No. 1, from an order of fact-finding and disposition that, among other things, granted

petitioner mother sole legal and physical custody of the subject children, with supervised visitation to the father. In appeal No. 2, the father appeals from an order of protection issued against him. The two orders were issued on the same day following a combined hearing on the petitions.

Contrary to the father's contention with respect to both appeals, Family Court did not abuse its discretion in denying his request for an adjournment. It is well settled that "[t]he granting [or denial] of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Anthony M.*, 63 NY2d 270, 283 [1984]; see *Matter of Jazmine M. [Willie R.]*, 185 AD3d 1457, 1458 [4th Dept 2020], *lv denied* 36 NY3d 902 [2020]), and we perceive no basis to conclude that the court abused its discretion in denying the father's belated request to adjourn the proceedings on the morning of the hearing.

Contrary to the father's contention in appeal No. 2, the record supports the court's conclusion that the mother met her burden of establishing by a preponderance of the evidence that he committed acts constituting the family offense of harassment in the second degree (see Penal Law § 240.26 [1]; *Matter of Mathis v Robinson*, 233 AD3d 1524, 1525 [4th Dept 2024], *lv denied* 43 NY3d 904 [2025]; *Matter of Harvey v Harvey*, 214 AD3d 1462, 1463 [4th Dept 2023]). Here, the court credited the testimony of the maternal aunt, who testified that she observed the father physically and verbally berate the mother and the children and, on one occasion, observed the father grab the mother by the neck. Inasmuch as "[t]he determination whether respondent committed a family offense [is] a factual issue for the court to resolve, and [the] court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record" (*Matter of Martin v Flynn*, 133 AD3d 1369, 1370 [4th Dept 2015] [internal quotation marks omitted]), we perceive no reason to disturb the court's conclusion here.

Finally, we reject the father's contention in appeal No. 1 that the court erred in requiring that his visitation be supervised. "Courts have broad discretion in determining whether visits should be supervised" (*Matter of Muriel v Muriel*, 228 AD3d 1345, 1347 [4th Dept 2024] [internal quotation marks omitted]; see *Matter of Campbell v January*, 114 AD3d 1176, 1177 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]), and that determination "will not be disturbed as long as there is a sound and substantial basis in the record to support it" (*Matter of Procopio v Procopio*, 132 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26

NY3d 915 [2015] [internal quotation marks omitted]). Here, the court's determination to impose supervised visitation is supported by a sound and substantial basis in the record. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

72 In the Matter of Julie A. Vito, Respondent, v Kyle A. Dugan, Appellant. (Appeal No. 2.) [248 NYS3d 396]—Appeal from an order of the Family Court, Livingston County (Kevin Van Allen, J.), dated September 6, 2024, in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

It is hereby ordered that the order so appealed from is unanimously affirmed.

Same memorandum as in *Matter of Vito v Dugan* ([appeal No. 1] 246 AD3d 1450 [4th Dept 2026]). Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

73 In the Matter of John H., Appellant, v State of New York, Respondent. [251 NYS3d 474]—

Crimes—Sex Offenders—Civil Commitment or Supervision—Dangerous Sex Offender Requiring Confinement—Weight of Evidence

Appeal from an order of the Supreme Court, Oneida County (Gerard J. Neri, J.), entered February 7, 2025, in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued the confinement of petitioner to a secure treatment facility.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement under section 10.03 (e) and directing that he continue to be confined to a secure treatment facility (*see* § 10.09 [h]). We affirm.

At an annual review hearing, the State has the burden to prove, by clear and convincing evidence, that the individual who is the subject of the hearing is currently a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.09 [d], [h]). A person may be found to be a dangerous sex offender requiring confinement if that person “suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit

sex offenses if not confined to a secure treatment facility” (§ 10.03 [e]). The statute defines a mental abnormality as “a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes [them] to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct” (§ 10.03 [i]; see *Matter of Charles B. v State of New York*, 192 AD3d 1583, 1585 [4th Dept 2021], *lv denied* 37 NY3d 913 [2021]).

Petitioner failed to preserve for our review his contention that respondent failed to establish by sufficient evidence that he suffers from a mental abnormality, inasmuch as he did not move for a directed verdict on the specific grounds raised on appeal (see *Matter of John R. v State of New York*, 242 AD3d 1571, 1572 [4th Dept 2025]; see generally *Matter of State of New York v Robert R.*, 217 AD3d 1413, 1414 [4th Dept 2023]). To the extent that petitioner contends that the weight of the evidence does not support Supreme Court’s finding that he suffers from a mental abnormality (see Mental Hygiene Law § 10.03 [i]), we reject that contention. Here, respondent’s evidence at the hearing consisted of, inter alia, the report and testimony of a licensed psychologist who opined that petitioner suffered from narcissistic personality disorder, as well as other specified paraphilic disorders, which predispose him to commit sex offenses and result in his having serious difficulty in controlling such conduct (see *Matter of Wayne J. v State of New York*, 184 AD3d 1133, 1135 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]; *Matter of Akgun v State of New York*, 148 AD3d 1613, 1613-1614 [4th Dept 2017]).

We similarly reject petitioner’s contention that the determination that he remains a dangerous sex offender requiring confinement is otherwise against the weight of the evidence (see Mental Hygiene Law § 10.03 [e]). Respondent’s expert concluded that, as a result of petitioner’s mental condition, disease, or disorder, he had such a strong predisposition to commit sex offenses and such an inability to control his behavior that he is likely to commit sex offenses if not confined to a secure treatment facility. Among other things, the testimony at the hearing established that petitioner made little progress in sex offender treatment, that he continued to hold cognitive distortions and had not yet developed either the skills to manage his paraphilic interests or a comprehensive plan for avoiding his risk for recidivism in the community, and that he generally lacked insight into his condition (see *Matter of Kerry K. v*

State of New York, 225 AD3d 1122, 1124 [4th Dept 2024], *lv denied* 42 NY3d 901 [2024]; *Matter of Francisco R. v State of New York*, 214 AD3d 1409, 1410 [4th Dept 2023]). Notably, petitioner did not present any evidence refuting the opinion of respondent's expert with regard to petitioner's mental abnormality or whether he remains a dangerous sex offender, and we see no reason to disturb the court's decision to credit the testimony of respondent's expert (*see generally Kerry K.*, 225 AD3d at 1124; *Matter of State of New York v Richard F.*, 180 AD3d 1339, 1340 [4th Dept 2020]; *Matter of State of New York v Connor*, 134 AD3d 1577, 1578 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]).

Petitioner failed to preserve for our review his contention that the court improperly admitted hearsay evidence that included the opinion from a report of a witness who was unavailable to testify inasmuch as petitioner failed to object when respondent's expert testified regarding the unavailable witness's diagnosis of petitioner contained in the report (*see Matter of State of New York v Dennis K.*, 27 NY3d 718, 741 [2016], *cert denied* 580 US 1023 [2016]).

Finally, we reject petitioner's contention that he received ineffective assistance of counsel. Inasmuch as petitioner "is subject to civil confinement, the standard for determining whether effective assistance of counsel was provided in criminal matters is applicable here" (*Matter of State of New York v Robert T.*, 214 AD3d 1405, 1406 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]). Contrary to his contention, we conclude that petitioner failed to meet "his burden on appeal to demonstrate the absence of strategic or other legitimate explanations for his attorney's alleged deficiencies" (*Matter of State of New York v Steven A.*, 193 AD3d 1344, 1345 [4th Dept 2021], *lv denied* 37 NY3d 911 [2021]; *see Matter of State of New York v Juan U.*, 187 AD3d 1606, 1608 [4th Dept 2020], *lv denied* 36 NY3d 906 [2021]). Rather, "viewing the evidence, the law, and the circumstances of this case as a whole and at the time of the representation," we conclude that petitioner received effective assistance of counsel (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1440 [4th Dept 2015], *lv denied* 25 NY3d 911 [2015]; *see Juan U.*, 187 AD3d at 1609). Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

74 In the Matter of Jeffrey Hierro, Appellant, v Daniel F. Martuscello, III, Acting Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [247 NYS3d 885]—

Limitation of Actions—When Cause of Action Accrues—Proceeding against

Body or Officer—When Determination to be Reviewed Becomes Final and Binding upon Petitioner

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Melissa Lightcap Cianfrini, A.J.), entered October 31, 2024, in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and respondent is granted 20 days from service of the order of this Court with notice of entry to serve and file an answer.

Memorandum: Petitioner appeals from a judgment that granted respondent's pre-answer motion to dismiss as untimely petitioner's CPLR article 78 petition seeking to annul a determination, following a tier II disciplinary hearing, that he violated an incarcerated individual rule. We reverse.

A proceeding pursuant to CPLR article 78 must be commenced within four months after the determination to be reviewed becomes "final and binding upon the petitioner" (CPLR 217 [1]). Here, the determination in question "became final and binding upon petitioner once he received notice of it" (*Matter of Wiegand v Crandall*, 118 AD3d 1355, 1356 [4th Dept 2014]), and it was respondent's burden to "establish[] such date" (*Matter of Feldman v New York State Teachers' Retirement Sys.*, 14 AD3d 769, 770 [3d Dept 2005]). As petitioner contends, and respondent correctly concedes, respondent failed to establish when petitioner actually received the results of his administrative appeal and, thus, respondent failed to meet his burden of establishing that the statute of limitations began to run more than four months prior to the commencement of the proceeding (see *Matter of Mintz v City of Rochester*, 200 AD3d 1650, 1652 [4th Dept 2021]; cf. *Feldman*, 14 AD3d at 770).

We further agree with petitioner and respondent that the court erroneously concluded that the matter was rendered moot by petitioner's release to parole; as petitioner and respondent agree, petitioner remains in the custody of the Department of Corrections and Community Supervision. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

75 Adrian Rogers, Respondent, v DS Restoration & Residential Services Co. et al., Appellants, et al., Defendant. (Appeal No. 1.) [251 NYS3d 818]—

**Labor—Safe Place to Work—Elevation-Related Hazard—Status as Contractor
Labor—Safe Place to Work—Elevation-Related Hazard—Covered Activity—
Cleaning Gutters on Residential Home**

Labor—Safe Place to Work—Industrial Code Violation—Ladders and Ladders—Missing Rubber Boot on Stabilizer Leg

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered September 4, 2024, in a Labor Law and common-law negligence action. The order, among other things, denied the motion of defendants DS Restoration & Residential Services Co. and Lenard C. Dabney for summary judgment dismissing plaintiff's complaint against them.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting the motion of defendants DS Restoration & Residential Services Co. and Lenard C. Dabney in part and dismissing the Labor Law § 241 (6) cause of action against them except insofar as it is premised on the alleged violation of 12 NYCRR 23-1.21 (b) (4) (iv), and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained when he fell from a ladder while cleaning gutters on a residential home. DS Restoration & Residential Services Co. and Lenard C. Dabney (defendants) moved for summary judgment dismissing the complaint and all cross-claims against them. Supreme Court, *inter alia*, denied that motion, and defendants now appeal.

We reject defendants' contention that the court erred in denying that part of their motion with respect to the Labor Law § 240 (1) cause of action. "Labor Law § 240 (1) imposes a non-delegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute" (*Soto v J. Crew Inc.*, 21 NY3d 562, 566 [2013]). "To recover, the plaintiff must have been engaged in a covered activity—the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*id.*, quoting § 240 [1]).

First, contrary to defendants' contention, they did not establish as a matter of law that they were not contractors within the meaning of the statute. "An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors" (*Stiegman v Barden & Robeson Corp.* [appeal No 2], 162 AD3d 1694, 1697 [4th Dept 2018] [internal quotation marks omitted]; see *Prevost v Associated Materials, LLC*, 239 AD3d 1235, 1236-1237 [4th Dept 2025]). "[T]he core inquiry is whether the defendant had the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition" (*Stiegman*, 162 AD3d

at 1697 [internal quotation marks omitted]; see *Prevost*, 239 AD3d at 1237). Defendants' "status as contractors is dependent on their right to exercise control, not whether they in fact did so" (*Barker v Union Corrugating Co.*, 187 AD3d 1544, 1546 [4th Dept 2020] [internal quotation marks omitted]).

Here, defendants submitted evidence that the property owner, i.e., defendant Renee Pokszywka, hired defendants to work on the gutters. They also submitted plaintiff's deposition, wherein he testified that Dabney asked him if he could assist Dabney with the job. Although there was no written contract between them, plaintiff testified that there was a verbal agreement similar to prior jobs where Dabney would pay plaintiff in cash for his work. We conclude that there is a triable issue of fact whether defendants had the authority to exercise control over the work and were contractors within the meaning of the statute (see generally *id.*; *Rauls v DirecTV, Inc.*, 113 AD3d 1097, 1098-1099 [4th Dept 2014]).

Second, contrary to defendants' contention, they did not establish as a matter of law that plaintiff was not engaged in activity covered by the statute. Defendants contend that the work constituted routine maintenance, which is not a covered activity, whereas plaintiff contends that the work constituted repair, which is a covered activity. "[I]t is well settled that the statute does not apply to routine maintenance in a non-construction, non-renovation context" (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1415 [4th Dept 2011]; see *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). "Whether a particular activity constitutes a 'repair' or routine maintenance must be decided on a case-by-case basis, depending on the context of the work" (*Dos Santos v Consolidated Edison of N.Y., Inc.*, 104 AD3d 606, 607 [1st Dept 2013]; see *Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728 [4th Dept 2010]). "[D]eline[e]ating between routine maintenance and repairs is frequently a close, fact-driven issue . . . , and [t]hat distinction depends upon whether the item being worked on was inoperable or malfunctioning prior to the commencement of the work . . . , and whether the work involved the replacement of components damaged by normal wear and tear" (*Cullen v AT&T, Inc.*, 140 AD3d 1588, 1589 [4th Dept 2016] [internal quotation marks omitted]; see *Esposito*, 1 NY3d at 528; *Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1282 [4th Dept 2015]).

We conclude that defendants did not meet their initial burden inasmuch as the evidence submitted in support of their motion raises triable issues of fact whether plaintiff was engaged in repair or routine maintenance. The evidence,

including the deposition testimony of Pokszywka and Dabney, established that Pokszywka, who thought that there may be birds nesting behind the gutter, hired defendants to work on the gutter. Both Pokszywka and Dabney testified that the work consisted primarily of cleaning the gutters, and Dabney testified that when he discovered a hole in the fascia board, he left the worksite to purchase a piece of flashing to cover the hole, which would not entail removing the gutter. While he was away from the worksite, plaintiff climbed the ladder to continue cleaning the gutter and fell when birds stirred in the hole and he shifted his weight to the left, which caused the ladder to slide and plaintiff to fall. Defendants also submitted the affidavit of their expert engineer, who opined that “[t]he hole or space at the top of the fascia board is a common issue caused by normal wear and tear.”

In further support of their motion, however, defendants submitted the deposition testimony of plaintiff, who testified that the cleaning work was incidental to more extensive repair work. He explained that the work entailed cleaning the gutter, removing the gutter, removing and replacing the fascia board, and then reinstalling the gutter. Moreover, even assuming, arguendo, that defendants met their initial burden, we conclude that plaintiff raised a triable issue of fact in opposition. Plaintiff’s expert engineer opined that the hole in the area of the soffit and fascia was not the result of normal wear and tear considering that the roof was less than 10 years old, and further opined that the most common reasons for soffit and fascia rot are improper installation of drip edges and gutters. He opined that those types of repairs to areas of rot require the clearing out of rotted wood and installation of new wood, which is more extensive than simple maintenance. We conclude that there is a triable issue of fact whether plaintiff was engaged in routine maintenance by installing flashing to a hole that developed due to normal wear and tear (*see Azad v 270 5th Realty Corp.*, 46 AD3d 728, 729-730 [2d Dept 2007], *lv denied* 10 NY3d 706 [2008]), or whether the work being performed by plaintiff at the time of the accident was necessary to restore the proper functioning of the roof and gutter (*see Verhoef v Dean*, 233 AD3d 1491, 1491-1492 [4th Dept 2024]; *Davidson v Ambrozewicz*, 12 AD3d 902, 902-903 [3d Dept 2004]).

Third, contrary to defendants’ contention, they failed to establish that Labor Law § 240 (1) was not violated. It is well settled that “evidence that [a] ladder was structurally sound and not defective ‘is not relevant on the issue of whether it was properly placed’ ” (*Calloway v American Park Place, Inc.*, 221

AD3d 1473, 1474 [4th Dept 2023]; see *Petit v Board of Educ. of W. Genesee School Dist.*, 307 AD2d 749, 749-750 [4th Dept 2003]). In support of their motion, defendants submitted the deposition of plaintiff, who testified that the ladder shifted or slid when he leaned his weight to the left. Defendants also failed to meet their initial burden of establishing that plaintiff was the sole proximate cause of his injuries (see *Verdugo v Fox Bldg. Group, Inc.*, 218 AD3d 1179, 1180 [4th Dept 2023]; see also *Harris v Tesmer Bldrs., Inc.*, 197 AD3d 911, 912 [4th Dept 2021]).

We reject defendants' contention that the court erred in denying that part of their motion with respect to the Labor Law § 241 (6) cause of action to the extent it is based upon an alleged violation of 12 NYCRR 23-1.21 (b) (4) (iv). That regulation provides that, "[w]hen work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used" (12 NYCRR 23-1.21 [b] [4] [iv]).

Here, defendants failed to meet their initial burden of establishing that they did not violate the regulation, that the regulation was not applicable to the facts of this case, or that such violation was not a proximate cause of plaintiff's injuries (see *Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1448, 1449-1450 [4th Dept 2013]; *Piazza v Frank L. Ciminelli Constr. Co., Inc.*, 2 AD3d 1345, 1349 [4th Dept 2003]). In support of their motion, defendants submitted the opinion of their expert that the regulation was not violated because the top of the ladder was secured against side slip by mechanical means, i.e., a stand-off stabilizer, and the bottom of the ladder had safety feet. Defendants, however, also submitted the deposition of plaintiff, who testified that the rubber boot on a stabilizer leg was missing. Plaintiff further testified that the purpose of the boot was to "help protect the house, and then the ridges are for the stability so that it has grip." Defendants' expert provided only an equivocal opinion, stating that "[a] single missing boot would not *appreciably* change the stability and safety of the standoff on a properly placed ladder in a stable environment when utilized by a person exercising reasonable safety prac-

tices” (emphasis added). We note that plaintiff has abandoned his reliance on all other regulations in his bill of particulars by failing to address them either in the motion court or on appeal (see *Fladd v Installed Bldg. Prods., LLC*, 134 AD3d 1480, 1482 [4th Dept 2015]). We therefore modify the order accordingly (see *Alati v Divin Bldrs., Inc.*, 137 AD3d 1577, 1579 [4th Dept 2016]; *Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 1386 [4th Dept 2013]).

We reject defendants’ contention that the court erred in denying that part of their motion with respect to the Labor Law § 200 and common-law negligence causes of action. Where “a plaintiff’s injuries stem from the manner in which the work was being performed, no liability attaches to a defendant under the common law or under Labor Law § 200 unless it is shown that the [defendant] had the authority to supervise or control the performance of the work” (*Triest v Nixon Equip. Servs., Inc.* [appeal No. 2], 224 AD3d 1364, 1366 [4th Dept 2024] [internal quotation marks omitted]; see generally *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Here, defendants failed to meet their burden inasmuch as their own submissions raise triable issues of fact whether Dabney actually directed or controlled the work that resulted in plaintiff’s injuries (see *Triest*, 224 AD3d at 1366).

Finally, we reject defendants’ contention that the court abused its discretion in considering the affidavit of plaintiff’s attorney in opposition to the motion on the ground that it exceeded the word limit set forth in 22 NYCRR 202.8-b (former [a]) (see generally *Hart v City of Buffalo*, 218 AD3d 1140, 1151 [4th Dept 2023]). The single affidavit was submitted in response to two summary judgment motions and in support of plaintiff’s cross-motion, and was meant to be helpful to the court by avoiding the duplication of information in three separate affidavits. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

76 Adrian Rogers, Respondent, v DS Restoration & Residential Services Co. et al., Appellants, et al., Defendant. (Appeal No. 2.) [247 NYS3d 887]—Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered November 14, 2024, in a Labor Law and common-law negligence action. The order denied the motion of defendants DS Restoration & Residential Services Co. and Lenard C. Dabney seeking leave to reargue their June 6, 2024 motion for summary judgment relating to plaintiff’s Labor Law § 240 (1) cause of action.

It is hereby ordered that said appeal is unanimously dismissed without costs (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]). Present—Lindley, J.P., Banister, Greenwood, Nowak and Hannah, JJ.

77 Lashawna Nuciola, Respondent, v Rochester Regional Health, Doing Business as Rochester General Hospital, et al., Appellants, et al., Defendants. [251 NYS3d 481]—

Hospitals—Malpractice—Failure to Diagnose and Treat Duodenal Ulcer—Proximate Cause

Appeal from an order of the Supreme Court, Monroe County (Sam L. Valleriani, J.), entered March 27, 2025, in a medical malpractice action. The order, insofar as appealed from, denied that part of the motion of defendants-appellants seeking summary judgment dismissing plaintiff's amended complaint against them.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the amended complaint is dismissed in its entirety.

Memorandum: In this medical malpractice action, plaintiff alleged in her amended complaint, as amplified by her bill of particulars, that Rochester Regional Health, doing business as Rochester General Hospital, and Kevin P. Raville, M.D. (defendants) failed to timely diagnose and treat a duodenal ulcer and, specifically, that defendants failed to order a CT scan of her abdomen when she experienced pain that was refractory to narcotic pain medication. Defendants appeal from an order that, inter alia, denied their motion insofar as it sought summary judgment dismissing the amended complaint against them. We reverse the order insofar as appealed from.

On a summary judgment motion in a medical malpractice action, a defendant bears the initial burden “of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff’s injuries” (*Shakyra M. v Strittmatter*, 240 AD3d 1197, 1198 [4th Dept 2025] [internal quotation marks omitted]; *see Bubar v Brodman*, 177 AD3d 1358, 1359 [4th Dept 2019]). Here, we conclude that defendants met their initial burden with respect to both issues. Defendants submitted an expert affirmation that “address[ed] each of the specific factual claims of negligence raised in plaintiff’s . . . bill of particulars . . . and was detailed, specific and factual in nature” (*Lewis v Sulaiman*, 217 AD3d 1443, 1444 [4th Dept 2023] [internal quotation marks omitted]; *see Bubar*, 177 AD3d

at 1360-1361; *cf. Wulbrecht v Jehle*, 89 AD3d 1470, 1471 [4th Dept 2011]) and, moreover, defendants' evidence established that any such departure from the applicable standard of care did not proximately cause plaintiff's alleged injuries (*see generally Page v Niagara Falls Mem. Med. Ctr.*, 174 AD3d 1318, 1319 [4th Dept 2019], *lv denied* 34 NY3d 908 [2020]). Thus, "the burden shifted to plaintiff[] to raise triable issues of fact by submitting an expert's affidavit both attesting to a departure from the accepted standard of care and that defendants' departure from that standard of care was a proximate cause of the injur[ies]" (*Ziemendorf v Chi*, 207 AD3d 1157, 1157-1158 [4th Dept 2022]).

"Even assuming, arguendo, that plaintiff[] raised triable issues of fact with respect to whether defendants deviated from the accepted standard of care," we conclude that "the opinion of plaintiff[s] expert with respect to the issue of proximate cause was insufficient to defeat defendants' motion for summary judgment" (*id.* at 1158). Indeed, plaintiff's expert did not refute the opinion of defendants' expert that plaintiff's duodenal ulcer perforated after she was discharged from the hospital, nor did plaintiff's expert opine that, had the CT scan shown the presence of a non-perforated duodenal ulcer, defendants could have taken some action to treat it or prevent it from perforating (*see generally Humbolt v Parmeter*, 196 AD3d 1185, 1188 [4th Dept 2021]). Inasmuch as plaintiff's expert "failed to offer anything other than a conclusory assertion that defendants' deviation from accepted standards of medical care caused plaintiff's injuries" (*Ziemendorf*, 207 AD3d at 1158), Supreme Court erred insofar as it denied defendants' motion. Present—Lindley, J.P., Bannister, Greenwood, Nowak and Hannah, JJ.

78 The People of the State of New York, Respondent, v Eric K. Khauka, Appellant. [251 NYS3d 478]—

Crimes—Robbery—Sufficiency and Weight of Evidence—Identification
Crimes—Disclosure—Remedies or Sanctions for Non-Compliance—Belated Disclosure of Criminal History of Accomplice

Appeal from a judgment of the Ontario County Court (Fredderick G. Reed, A.J.), rendered March 17, 2022. The judgment convicted defendant upon a jury verdict of robbery in the second degree (two counts) and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]) and one count of assault in the third degree (§ 120.00 [1]).

Defendant contends that the evidence is legally insufficient to support the conviction on the issue of his identity as one of the three men involved in the subject crimes. We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish defendant's identity as one of the three people who committed the robbery (*see People v Rainey*, 231 AD3d 1533, 1534 [4th Dept 2024], *lv denied* 43 NY3d 932 [2025]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Among other things, video of the incident and testimony from those who observed it reflected that a man wearing a ski mask, generally fitting defendant's description, had been involved in the robbery. Less than two hours after the robbery, the police stopped a vehicle that contained defendant, his two accomplices, the victim's property, and, next to defendant, a black knit face mask. Furthermore, one of the accomplices testified at trial as to defendant's involvement in the crime. To the extent that defendant contends that the accomplice testimony was not sufficiently corroborated, we conclude that the other evidence at trial sufficiently "tend[ed] to connect . . . defendant with the commission of the crime[s] in such a way as [could] reasonably satisfy the jury that the accomplice [was] telling the truth" (*People v Reome*, 15 NY3d 188, 192 [2010] [internal quotation marks omitted]; *see People v Gause*, 230 AD3d 1573, 1575 [4th Dept 2024], *lv denied* 43 NY3d 930 [2025]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied effective assistance of counsel as a result of defense counsel's failure to make a motion to dismiss the indictment based on the alleged denial of his statutory right to a speedy trial (*see* CPL 30.30 [1] [a]). A failure of defense counsel to assert a meritorious statutory speedy trial claim "is, by itself, a sufficiently egregious error to render a defendant's representation ineffective" (*People v Sweet*, 79 AD3d 1772, 1772 [4th Dept 2010] [internal quotation marks omitted]; *see People v Bailey*, 195 AD3d 1486, 1487 [4th Dept 2021], *lv denied* 37 NY3d 990 [2021]). A defendant is not required, however, to show that such a motion would have been meritorious in order to prevail on an ineffective assistance of counsel claim; the defendant must demonstrate only that there was an "absence of strategic or other legitimate explanations for counsel's failure to pursue [a] colorable [motion]" (*People v Carver*, 27 NY3d 418, 420 [2016] [internal

quotation marks omitted]). We conclude here that the record on appeal is inadequate to enable us to determine whether a CPL 30.30 motion would have been “colorable . . . and, if so, whether [defense] counsel had a strategic or legitimate reason for failing to [make the motion]” (*People v Heverly*, 230 AD3d 1534, 1535 [4th Dept 2024], *lv denied* 42 NY3d 1053 [2024]). Thus, defendant’s contention “is appropriately raised by way of a motion pursuant to CPL article 440” (*People v Henderson*, 234 AD3d 1254, 1256 [4th Dept 2025] [internal quotation marks omitted]; *see People v Alverado*, 178 AD3d 1465, 1466 [4th Dept 2019], *lv denied* 35 NY3d 940 [2020]).

Contrary to defendant’s further contention, County Court did not abuse its discretion in denying his motion to preclude the testimony of his accomplice due to the People’s belated disclosure of the accomplice’s criminal history (*see generally People v Everson*, 240 AD3d 1343, 1345 [4th Dept 2025]). If a party demonstrates that they were prejudiced by a belated disclosure, the discovery sanction or remedy to be imposed for such a violation must be “appropriate” (CPL 245.80 [1] [former (a)]). Even absent a showing of prejudice, however, the party “shall be given reasonable time to prepare and respond to the new material” (*id.*). Here, defendant made no specific showing of prejudice. We therefore conclude that no sanction was required (*see People v Phillips*, 239 AD3d 1421, 1423-1424 [4th Dept 2025], *lv denied* 44 NY3d 1012 [2025]; *People v Caruso*, 219 AD3d 1682, 1684 [4th Dept 2023]). Further, the court provided defense counsel an opportunity to review the material and specifically asked defense counsel if he wanted an adjournment to further review it. Defense counsel responded that an adjournment was not necessary and opted to proceed (*see generally Caruso*, 219 AD3d at 1684).

Finally, we conclude that the sentence is not unduly harsh or severe. Present—Montour, J.P., Smith, Ogden, Greenwood and DelConte, JJ.

79 In the Matter of Alejandro G.-P. Erie County Department of Social Services, Respondent; Neidy P., Appellant. (Appeal No. 1.) [247 NYS3d 886]—

Parent, Child and Family—Abused or Neglected Child—Propensity of Boyfriend to Commit Violence

Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 23, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent had neglected the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from two orders, one for each of the subject children, that, among other things, adjudged that the mother neglected the subject children. We affirm.

Contrary to the mother's contention, Family Court properly determined that she neglected the children. To establish neglect, "petitioner was required to show, by a preponderance of the evidence, first, that [the] child[ren]'s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship" (*Matter of Landen S. [Timothy S.]*, 227 AD3d 1465, 1465-1466 [4th Dept 2024] [internal quotation marks omitted]; see *Nicholson v Scopetta*, 3 NY3d 357, 368 [2004]). The court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Landen S.*, 227 AD3d at 1466 [internal quotation marks omitted]).

Here, the record establishes that the mother left one of her children in the care of her live-in boyfriend and that the child sustained bruising and a cut on the arm as a result. The mother knew of the boyfriend's propensity to commit violence, and therefore she should have known that he was an unsuitable caregiver, which may form the basis for a finding of neglect (see *Matter of Trinity E. [Robert E.]*, 137 AD3d 1590, 1591 [4th Dept 2016]). Moreover, the exposure of the children to domestic violence between the mother and her boyfriend is an additional basis for a finding of neglect (see *id.*; *Matter of Michael G.*, 300 AD2d 1144, 1144 [4th Dept 2002]). Finally, the mother's decision to violate a court order and abscond with the children during the pendency of this proceeding also supports a finding of neglect inasmuch as it is an action that falls below the minimum degree of care of a parent and impaired the children emotionally (see generally Family Court Act § 1012 [f] [i]; *Matter of Trebor UU.*, 279 AD2d 735, 737 [3d Dept 2001]). We therefore conclude that the court's findings of neglect have a sound and substantial basis in the record (see generally *Matter of Shakema R. v Mesha B.*, 236 AD3d 1383, 1386 [4th Dept 2025], *lv denied* 43 NY3d 906 [2025]). Present—Montour, J.P., Smith, Ogden, Greenwood and DelConte, JJ.

80 In the Matter of Neymar G.-P. Erie County Department of Social Services, Respondent; Neidy P., Appellant. (Appeal No. 2.) [247 NYS3d 888]—Appeal from an order of the Family Court, Erie County (Kelly A. Brinkworth, J.), entered December 23, 2024, in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent had neglected the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of Alejandro G.-P. (Neidy P.)* (246 AD3d 1464 [4th Dept 2026]). Present—Montour, J.P., Smith, Ogden, Greenwood and DelConte, JJ.

81 In the Matter of Matthew Olmsted, Respondent, v Desiree Olmsted, Appellant. [252 NYS3d 353]—

Parent, Child and Family—Custody—Judicial Notice of Prior Proceedings

Appeal from an order of the Family Court, Cayuga County (Jon E. Budelmann, A.J.), entered April 22, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued the parties' joint legal custody of the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent father and respondent-petitioner mother each filed petitions seeking modification of the parties' custody arrangement, whereby the parties had joint legal custody of the subject child and the mother had residential custody of the child. The mother appeals from an order that, inter alia, continued joint legal custody and granted the father increased visitation. We reject the mother's contention that Family Court erred in relying on facts outside the record in making its determination. It is well settled that "a court has the power to take judicial notice of its own prior proceedings" (*Matter of Gugino v Tsvasman*, 118 AD3d 1341, 1342 [4th Dept 2014]; see *Matter of Aryn C. [Chelsea K.]*, 144 AD3d 1690, 1690 [4th Dept 2016]; see also *Matter of Hermann v Williams*, 179 AD3d 1545, 1546 [4th Dept 2020]). The record does not support the mother's contention that the court relied on allegations in prior petitions that were withdrawn in making its determination.

Contrary to the mother's further contentions, the court's determination that the parties would have joint decision-making

regarding the child's medical and health issues is supported by a sound and substantial basis in the record (*see generally Matter of Dickes v Johnston*, 213 AD3d 1247, 1248-1249 [4th Dept 2023], *lv denied* 39 NY3d 913 [2023]), and the court gave the appropriate weight to the child's wishes (*see generally Matter of Krier v Krier*, 178 AD3d 1372, 1373 [4th Dept 2019]; *Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]).

We agree with the mother that the court improperly disclosed information obtained from the *Lincoln* hearing. We must "remind the court that the disclosure of any statement made by a child during a confidential *Lincoln* hearing is improper, regardless of how innocuous that statement may appear to be" (*Kaleta v Kaleta*, 225 AD3d 1293, 1295 [4th Dept 2024]). We conclude, however, that the error does not justify disturbing an otherwise valid determination (*see generally Matter of Carter v Work*, 100 AD3d 1557, 1558 [4th Dept 2012]; *Matter of Rivera v LaSalle*, 84 AD3d 1436, 1437 [3d Dept 2011]). Present—Montour, J.P., Smith, Ogden, Greenwood and DelConte, JJ.

82 Donna Fino, as Administrator, CTA of the Estate of Caroline Hlat, Deceased, Plaintiff, v Macy's Retail Holdings, Inc., Respondent, and Gallagher Elevator Company, Incorporated, Appellant, et al., Defendant. [248 NYS3d 800]—

Indemnity—Contractual Indemnification—Personal Injury—Misleveled Elevator

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 17, 2024. The order granted the motion of defendant Macy's Retail Holdings, Inc. seeking summary judgment dismissing the complaint and cross-claim against it and for an order directing defendant Gallagher Elevator Company, Incorporated, to contractually defend and indemnify it.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In 2014, plaintiff's decedent was injured while exiting an allegedly misleveled elevator located in premises leased by defendant Macy's Retail Holdings, Inc. (Macy's) and exclusively serviced by defendant Gallagher Elevator Company, Incorporated (Gallagher). Supreme Court granted Macy's motion for summary judgment dismissing the complaint and Gallagher's cross-claim against it and for an order directing Gallagher to contractually defend and indemnify Macy's. Gallagher appeals from the portion of the order directing it to defend and indemnify Macy's. We affirm.

Contrary to Gallagher's contention, the court properly granted that part of Macy's motion with respect to Gallagher's contractual obligation to provide Macy's with a defense and indemnification. We reject Gallagher's contention that it has no such obligation because Macy's was not originally a party to the 1992 contract containing the operative defense and indemnification clause between Gallagher and Macy's predecessor-in-interest. Gallagher's president testified without contradiction that the contract was subsequently assigned to Macy's and that both parties thereafter operated pursuant to its terms (*see generally Pearl St. Parking Assoc. LLC v City of Buffalo*, 227 AD3d 1471, 1473-1474 [4th Dept 2024]).

We also reject Gallagher's contention that its contractual obligation to provide Macy's with a defense and indemnification requires a finding that Gallagher was negligent. The unambiguous intent of the clause is to provide a defense and indemnification for "any and all claims (whether meritorious or not) . . . arising out of the performance or non-performance of maintenance services" (*see ZRAJ Olean, LLC v Erie Ins. Co. of N.Y.*, 134 AD3d 1557, 1560 [4th Dept 2015], *lv denied* 29 NY3d 915 [2017]).

Contrary to Gallagher's further contention, there is no triable issue of fact whether Macy's was negligent. Although the subject elevator was older and had not been upgraded, Gallagher's president testified that it was common for older elevators to remain in operation because those installed in "the old days were built much better than they are today," and the record establishes that Macy's "had an exclusive maintenance contract with . . . an elevator company . . . to inspect, maintain and repair the elevator and had neither actual nor constructive notice of a defective condition" (*Browning v Meadowlands Professional Park*, 254 AD2d 725, 725 [4th Dept 1998]; *see Tashjian v Strong & Assoc.*, 225 AD2d 907, 909 [3d Dept 1996]).

Finally, we reject Gallagher's contention that the contractual defense and indemnification clause violates General Obligations Law § 5-322.1. While "[a]n indemnification agreement will be deemed void and unenforceable [under General Obligations Law § 5-322.1] if the party seeking indemnification was itself negligent" (*Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 1387 [4th Dept 2013] [internal quotation marks omitted]), "[w]ithout a finding of negligence [against that party] . . . , General Obligations Law § 5-322.1's prohibition against indemnif[ication] . . . is inapplicable" (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]). Present—Montour, J.P., Smith, Ogden, Greenwood and DelConte, JJ.

83 In the Matter of Town of Fremont, Petitioner, v New York State Board on Electric Generation Siting and the Environment et al., Respondents. [252 NYS3d 355]—

Appeal—Academic and Moot Questions—Siting of Major Electric Generating Facilities—Completion of Construction

Public Utilities—Siting of Major Electric Generating Facility—Wind Power—Modification of Order of Board—Setback Requirement and Maximum Generating Capacity Limit

Public Utilities—Siting of Major Electric Generating Facility—Wind Power—Waiver of Local Laws—Setbacks and Turbine Height Restrictions

Proceeding pursuant to Public Service Law § 170 (1) (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department) to, inter alia, set aside portions of the rehearing decision of respondent New York State Board on Electric Generation Siting and the Environment.

It is hereby ordered that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Memorandum: Baron Winds LLC (Baron Winds), a respondent in this proceeding, submitted an application pursuant to Public Service Law article 10 to the New York State Board on Electric Generation Siting and the Environment (Board), also a respondent in this proceeding, seeking approval of a project involving the construction of a wind-powered electric generating facility consisting of numerous wind turbines in several towns in Steuben County. In response to the application, the Board issued a “Certificate of Environmental Compatibility and Public Need” (certificate) in September 2019 that authorized Baron Winds, subject to certain conditions, to construct and operate a wind farm consisting of up to 68 turbines with heights of approximately 492 feet and a total maximum generating capacity of 242 megawatts.

Baron Winds subsequently submitted a petition to the Board in March 2020 seeking to amend the certificate (amendment petition) by, in effect, dividing the project into two construction phases. The Board issued an order (first phase order) granting the amendment petition, thereby authorizing Baron Winds to install during the first phase of construction in the Towns of Cohocton, Dansville, and Wayland up to 33 turbines, 26 of which could have an increased maximum height of 650 feet, with a maximum generating capacity of up to 166.6 megawatts. Thereafter, Baron Winds and Baron Winds II LLC (Baron Winds II), another respondent in this proceeding (collectively, Baron Winds respondents), submitted a second amendment petition to the Board in September 2022 seeking to further amend the certificate with respect to the second phase of construction in the Town of Fremont (Fremont), the petitioner in this

proceeding. Following an evidentiary hearing, the Board issued an order (second phase order) in July 2024 granting the second amendment petition in part by, among other things, concluding that the 1,500-foot setback distance for non-participating property owners was sufficiently protective of those residences and was consistent with Board precedent, maintaining total maximum generating capacity of 242 megawatts for the entire project, and waiving the turbine height restriction in Fremont's local law. Fremont sought rehearing, and the Board subsequently issued a rehearing decision in March 2025 that granted rehearing, clarified portions of the second phase order, and ultimately adhered to its determination granting the Baron Winds respondents' second amendment petition.

Fremont commenced this CPLR article 78 proceeding against the Board and New York State (collectively, State respondents) and the Baron Winds respondents, initiated in this Court pursuant to Public Service Law § 170 (1), seeking, *inter alia*, to set aside portions of the rehearing decision. We confirm the determination, and therefore we dismiss the amended petition.

Preliminarily, we reject the contention of the Baron Winds respondents that the proceeding is moot by virtue of their completion of the second phase of construction and Fremont's failure to seek injunctive relief. "Although 'construction of the underlying project can render a challenge of this type moot when the petitioner has not made any attempt to preserve its rights pending judicial review,'" that cannot be said here (*Matter of Michalak v Zoning Bd. of Appeals of Town of Pomfret*, 286 AD2d 906, 906 [4th Dept 2001]; *see generally Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172-173 [2002]). The record establishes that the Baron Winds respondents were "placed on notice that if they proceeded with construction, it would be at their own risk" during the pendency of Fremont's petition for rehearing (*Matter of Watch Hill Homeowners Assn. v Town Bd. of Town of Greenburgh*, 226 AD2d 1031, 1032 [3d Dept 1996], *lv denied* 88 NY2d 811 [1996]), and that Fremont opposed the request of Baron Winds II to proceed with the second phase of construction during the pendency of the Board's determination on rehearing, objected to the Board's delay in rendering such a determination, and did not delay in commencing this proceeding to challenge the rehearing decision of the Board (*see Michalak*, 286 AD2d at 906). Contrary to the Baron Winds respondents' related contention, we conclude that the circumstances here "fail to reflect a prejudicial 'neglect in promptly asserting a claim' by [Fremont] that would warrant applying the doctrine of

laches” (*Matter of Micklas v Town of Halfmoon Planning Bd.*, 170 AD3d 1483, 1485 [3d Dept 2019]; see *Michalak*, 286 AD2d at 906).

On the merits, Fremont contends that the Board violated Public Service Law § 170 (1) by failing to timely decide its application for a rehearing. We note at the outset that, contrary to the State respondents’ assertion, Fremont has standing to challenge the timeliness of the Board’s rehearing decision (see *id.*; *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991]). We nonetheless agree with the Baron Winds respondents and the State respondents that, although the Board delayed in rendering its rehearing decision, Fremont is not entitled to any relief because the time limitation in the statute is directory only, not mandatory (see *Matter of Rochester Gas & Elec. Corp. v Maltbie*, 272 App Div 162, 165-166 [3d Dept 1947]; see generally *Matter of Syquia v Board of Educ. of Harpursville Cent. School Dist.*, 80 NY2d 531, 535-536 [1992]), and Fremont has failed to show that it suffered substantial prejudice from the minimal delay (see generally *Matter of Dickinson v Daines*, 15 NY3d 571, 577 [2010]).

Fremont further contends that the Board’s rehearing decision is arbitrary and capricious and an abuse of discretion because, according to Fremont, the Board modified the setback requirement and maximum generating capacity limit established in the second phase order without a sound basis. Initially, contrary to the assertion of the Baron Winds respondents, we conclude under the circumstances of this case that Fremont’s contention is properly before us inasmuch as it exhausted its administrative remedies with respect thereto (see Public Service Law § 170 [1]; *Matter of Sapienza v City of Buffalo*, 197 AD3d 914, 915 [4th Dept 2021]; cf. *Matter of Town of Cambria v New York Off. of Renewable Energy Siting*, 228 AD3d 1336, 1341 [4th Dept 2024], *lv denied* 42 NY3d 912 [2025]; *Matter of Coalition of Concerned Citizens v New York State Bd. on Elec. Generation Siting & the Env’t.*, 199 AD3d 1310, 1314 [4th Dept 2021], *appeal dismissed* 37 NY3d 1168 [2022]).

We nonetheless reject Fremont’s contention on the merits. Our “scope of review is limited to whether the decision and opinion of the [B]oard, *inter alia*, are . . . supported by substantial evidence in the record and matters of judicial notice properly considered and applied in the opinion . . . , are made in accordance with proper procedure[,] . . . and are not arbitrary, capricious or an abuse of discretion” (*Coalition of Concerned Citizens*, 199 AD3d at 1312 [internal quotation marks omitted]). “[W]here, as here, the judgment of the agency

involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

Contrary to Fremont's assertion, the Board's rehearing decision was not arbitrary and capricious or an abuse of discretion with respect to the setback distance for non-participating property owners. The second phase order specifically agreed with the position of the Baron Winds respondents that the 1,500-foot setback distance for non-participating property owners was sufficiently protective of those residences and was consistent with Board precedent. It was therefore not arbitrary and capricious or an abuse of discretion for the Board to clarify in its rehearing decision that, notwithstanding any additional inconsistent language in the second phase order, the Board did not intend to set a more restrictive setback than that required under applicable local law and that application of that local law required a setback distance of 1,500 feet measured from any non-participating residence (see *Cambria*, 228 AD3d at 1339-1341; *Coalition of Concerned Citizens*, 199 AD3d at 1312-1313). We thus conclude that "although the record contains some conflicting evidence 'and room for choice exists[,] there is a rational basis for the [Board's] determination'" regarding the setback requirement (*Coalition of Concerned Citizens*, 199 AD3d at 1313).

Contrary to Fremont's further assertion, the Board's rehearing decision was not arbitrary and capricious or an abuse of discretion with respect to the generating capacity authorized under the second phase order. The certificate approved a total maximum generating capacity of 242 megawatts for the entire project. The first phase order allowed a maximum generating capacity of up to 166.6 megawatts in the first phase while retaining the total maximum capacity for the entire project. The first phase order also noted that any amendment for the second phase would be considered in terms of the cumulative impacts with the first phase, and it is undisputed that the first phase, as constructed, operated at a maximum generating capacity of 122 megawatts. It was therefore not arbitrary and capricious or an abuse of discretion for the Board to conclude in its rehearing decision that the Baron Winds respondents could operate the second phase at a generating capacity of 117 megawatts without amendment to the certificate because the combined operative generating capacity of the two phases would not exceed the total maximum generating capacity of 242 megawatts permitted in the certificate (see *Cambria*, 228

AD3d at 1339-1341; *Coalition of Concerned Citizens*, 199 AD3d at 1312-1313). We thus conclude that there is a rational basis for the Board's determination regarding the generating capacity authorized under the second phase order (see *Coalition of Concerned Citizens*, 199 AD3d at 1313).

Fremont also contends that the Board unlawfully waived Fremont's local laws regarding setbacks and turbine height restrictions and that the Board's choice to do so was arbitrary and capricious and an abuse of discretion. We reject that contention. To the extent that Fremont asserts that the statutory provision allowing the Board to waive application of a local law (Public Service Law § 168 [3] [e]) violates the home rule provision of the New York State Constitution (NY Const, art IX, § 2), we conclude that Fremont's assertion lacks merit inasmuch as the statutory provision empowering the Board to preempt local laws "is a general law, applying uniformly to all municipalities . . . , and energy infrastructure siting is a matter of State concern" (*Matter of Town of Copake v New York State Off. of Renewable Energy Siting*, 216 AD3d 93, 105 [3d Dept 2023], *appeal dismissed* 41 NY3d 990 [2024], *reconsideration dismissed* 42 NY3d 1034 [2024]; see *Matter of Citizens for Hudson Val. v New York State Bd. on Elec. Generation Siting & Envt.*, 281 AD2d 89, 95 [3d Dept 2001]; see generally *County of Onondaga v State of New York*, 44 NY3d 639, 651-654 [2025]). Contrary to Fremont's assertion, we conclude that the Board did not act in an arbitrary and capricious manner or abuse its discretion in electing not to apply the turbine height restrictions of the local law after considering the requisite factors and finding that application of those restrictions would be unreasonably burdensome in view of the existing technology (see § 168 [3] [e]; [4]; *Cambria*, 228 AD3d at 1340-1341). Finally, contrary to Fremont's assertion, we conclude that the Board did not act in an arbitrary and capricious manner or abuse its discretion in determining that no waiver of the 1,500-foot setback requirement in the local law was necessary (see *Coalition of Concerned Citizens*, 199 AD3d at 1315). Present—Montour, J.P., Smith, Ogden, Greenwood and DelConte, JJ.

84 Troy Blackchief et al., Respondents, v Patrick J. Prim, III, Defendant, and Timothy J. Herbst et al., Appellants. [251 NYS3d 483]—

Motor Vehicles—Imputing Driver's Negligence to Owner—Stolen Vehicle

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 26,

2024. The order denied the motion of defendants Timothy J. Herbst and Renee L. Herbst for summary judgment dismissing the complaint against them.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the motion of defendants Timothy J. Herbst and Renee L. Herbst is granted, and the complaint against them is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Troy Blackchief (plaintiff), an on-duty police officer, who was struck by a vehicle owned by defendants Timothy J. Herbst and Renee L. Herbst (collectively, defendants). At the time of the accident, plaintiff was assisting in a police pursuit of defendants' vehicle, which had been stolen from defendants' residential driveway by defendant Patrick J. Prim, III.

We agree with defendants that Supreme Court erred in denying their motion seeking summary judgment dismissing the complaint against them. Defendants met their initial burden on the claim of permissive use by submitting the police report regarding the theft, video and still images capturing the theft, affirmations from defendants attesting to the theft, and documentation reflecting the undisputed nature of Prim's related criminal guilty plea (*see Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 175-176, 180 [2006]; *Calhoun v Maclin*, Sup Ct, Erie County, Feb. 7, 2023, Chimes, J., index No. 801838/2022, *affd for reasons stated below* 219 AD3d 1714 [4th Dept 2023]; *Stevens v Calspan-Corp.*, 292 AD2d 809, 810 [4th Dept 2002]). Defendants further met their initial burden on the claim that they violated Vehicle and Traffic Law § 1210 (a) by establishing that the statute is inapplicable to the instant case. Defendants' vehicle "had not been kept in a parking lot" or any other area to which the statute applies (*Stevens*, 292 AD2d at 810 [internal quotation marks omitted]; *see* Vehicle and Traffic Law §§ 129-b, 1100 [a]). In opposition, plaintiffs failed to raise a material issue of fact as to either the lack of permissive use or the applicability of Vehicle and Traffic Law § 1210 (a), and they failed to demonstrate that facts essential to oppose the motion exist and might be obtained by additional discovery (*see Bratge v Simons*, 173 AD3d 1623, 1624 [4th Dept 2019]; *Stevens*, 292 AD2d at 810). Present—Montour, J.P., Smith, Ogden, Greenwood and DelConte, JJ.

85 The People of the State of New York, Respondent, v Jermaine Baker, Appellant. [249 NYS3d 333]—

Crimes—Sentence—Probation—Violation of Conditions of Interim Proba-

tion—Burden of Proof

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered September 13, 2022. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of criminal sexual act in the third degree (Penal Law former § 130.40 [2]). Under the terms of defendant's plea agreement and, if he successfully completed it, defendant would be permitted to withdraw his plea and instead plead guilty to one count of endangering the welfare of a child (§ 260.10 [1]). The People alleged that defendant violated the conditions of his interim probation and, after a hearing, defendant's interim probation was revoked and he was sentenced to a term of incarceration.

As defendant contends, and the People correctly concede, defendant's "waiver of the right to appeal does not encompass his contention that [County] Court erred in imposing an enhanced term of incarceration based on postplea conduct" (*People v Lopez*, 204 AD3d 1529, 1529 [4th Dept 2022]; see *People v Streeter*, 71 AD3d 1463, 1464 [4th Dept 2010], *lv denied* 14 NY3d 893 [2010]). However, we reject defendant's contention that the People were required to establish, pursuant to CPL 410.70 (3), that defendant violated the conditions of his interim probation by a preponderance of the evidence. Contrary to defendant's contention, "[t]he procedures set forth in CPL 410.70 do not apply where, as here, there has been no sentence of probation" (*People v McIntosh*, 213 AD3d 1266, 1267 [4th Dept 2023]; *People v Rollins*, 50 AD3d 1535, 1536 [4th Dept 2008], *lv denied* 10 NY3d 939 [2008]). Rather, "because interim probation is imposed prior to sentencing, the presentence procedures set forth in CPL 400.10 apply" (*People v Boje*, 194 AD3d 1367, 1368 [4th Dept 2021], *lv denied* 37 NY3d 970 [2021]; see *Rollins*, 50 AD3d at 1536), notwithstanding the fact that "[t]he court and the parties . . . improperly characterized the procedure to revoke the interim probation supervision as a violation of probation hearing" (*Rollins*, 50 AD3d at 1535-1536). Consistent with CPL 400.10 (3), the court here conducted a summary hearing that was sufficient to "enable the court to determine that defendant failed to comply with the terms and conditions of his interim probation supervision" (*Rollins*, 50 AD3d at 1536) and, in any event, the evidence adduced was sufficient even if viewed under the standard set forth in CPL 410.70 (3).

Defendant contends that, even if he violated the conditions of his interim probation, the court abused its discretion in revoking his interim probation and imposing a sentence on the pleaded-to offense of criminal sexual act in the third degree (Penal Law former § 130.40 [2]), because a conviction of that offense results in statutorily mandated registration under the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq.*). Defendant maintains that the court had discretion to continue his interim probation and, presumably, to allow him to withdraw his plea to criminal sexual act in the third degree and plead instead to an offense that does not require SORA registration. However, defendant never requested that the court exercise such discretion, nor did defendant move to withdraw his plea, and therefore defendant's contention is not preserved for our review (*see generally People v Edwards*, 239 AD3d 1478, 1478 [4th Dept 2025], *lv denied* 44 NY3d 1010 [2025]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see CPL 470.15 [3] [c]*).

We have reviewed defendant's remaining contention and conclude that it lacks merit. Present—Curran, J.P., Bannister, Nowak, DelConte and Hannah, JJ.

86 The People of the State of New York, Respondent, v Chet DeWolf, Appellant. [248 NYS3d 406]—

Crimes—Appeal—Valid Waiver

Appeal from a judgment of the Wayne County Court (Richard M. Healy, J.), rendered February 22, 2024. The judgment convicted defendant upon his plea of guilty of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). We affirm.

Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Williams*, 228 AD3d 1316, 1316 [4th Dept 2024], *lv denied* 42 NY3d 972 [2024], *denied reconsideration* 42 NY3d 1055 [2024]; *see generally People v Thomas*, 34 NY3d 545, 559-564 [2019], *cert denied* 589 US 1302 [2020]). Moreover, on this record, defendant's "monosyllabic affirmative responses to questioning by [County Court] do not render his [waiver of the right to appeal] unknowing and involuntary" (*People v Burch*, 234 AD3d 1246, 1246-1247 [4th Dept 2025], *lv*

denied 43 NY3d 1006 [2025] [internal quotation marks omitted]).

Defendant's valid waiver of the right to appeal precludes our review of his contention that the court erred in refusing to suppress defendant's statements to a law enforcement officer (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Duzant*, 15 AD3d 860, 861 [4th Dept 2005], *lv denied* 5 NY3d 761 [2005]) and his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *Burch*, 234 AD3d at 1247). Present—Curran, J.P., Bannister, Nowak, DelConte and Hannah, JJ.

87 In the Matter of Alexander Kates, Petitioner, v Daniel F. Martuscello, III, Acting Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [248 NYS3d 397]—

Prisons and Incarcerated Individuals—Discipline—Tier II Disciplinary Hearing—Right to Call Witnesses
Prisons and Incarcerated Individuals—Discipline—Tier II Disciplinary Hearing—Substantial Evidence

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Donald O'Geen, A.J.], entered Apr. 23, 2025) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various incarcerated individual rules.

It is hereby ordered that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated incarcerated individual rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing direct order]) and 109.12 (7 NYCRR 270.2 [B] [10] [iii] [movement regulation violation]).

We reject petitioner's contentions that the Hearing Officer improperly denied his request to call certain witnesses to testify at the hearing. "Although an [incarcerated individual] has a 'conditional right' to call witnesses . . . , an [incarcerated individual] is not entitled to call witnesses whose testimony is immaterial or redundant" (*Matter of Burroughs v Corey*, 235 AD3d 1251, 1252 [4th Dept 2025]; *see Matter of Ballard v Kickbush*, 165 AD3d 1587, 1589 [4th Dept 2018], *appeal dismissed* 32 NY3d 1182 [2019]). Here, the proposed testimony of the various witnesses was irrelevant (*see Matter of Jackson v Annucci*, 122 AD3d 1288, 1288-1289 [4th Dept 2014]).

Contrary to petitioner's further contention, the misbehavior report, together with petitioner's statement that his actions were accurately described in the misbehavior report, constitutes substantial evidence supporting the determination that he violated incarcerated individual rules 106.10 and 109.12 (see *Matter of Griswold v Goord*, 39 AD3d 908, 909 [3d Dept 2007]; *Matter of Melvin v Smith*, 143 AD2d 525, 525 [4th Dept 1988]). Present—Curran, J.P., Bannister, Nowak, DelConte and Hannah, JJ.

88 The People of the State of New York, Appellant, v Joshua Taylor, Also Known as Moriah Taylor, Respondent. [247 NYS3d 909]—

Animals—Cruelty to Animals—Sufficiency of Indictment—Leaving Kittens Outside during Snowstorm

Appeal from an order of the Erie County Court (James F. Bargnesi, J.), dated January 28, 2025. The order, insofar as appealed from, reduced the first and second counts of an indictment.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law, counts 1 and 2 of the indictment are reinstated, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order insofar as it reduced counts 1 and 2 of the indictment from aggravated cruelty to animals (Agriculture and Markets Law § 353-a) to overdriving, torturing and injuring animals; failure to provide proper sustenance (§ 353) based on the alleged legal insufficiency of the evidence before the grand jury.

Initially, we note that County Court erred in reducing the counts without a written motion requesting such relief. “A motion to dismiss an indictment pursuant to [CPL] 210.20 must be made in writing and upon reasonable notice to the people” (CPL 210.45 [1]; see *People v Graham*, 135 AD2d 1115, 1115 [4th Dept 1987], *lv denied* 71 NY2d 896 [1988]). “The procedural requirements of CPL 210.45 must be adhered to even when consideration of the dismissal is upon the court's own motion” (*People v Pichkur*, 52 AD2d 852, 852 [2d Dept 1976]; see *People v Littles*, 188 AD2d 255, 256 [1st Dept 1992], *lv denied* 81 NY2d 842 [1993]). Unless those requirements have been waived by the People, “[t]he failure . . . to comply with the statutory mandates requires a reversal” (*People v Vega*, 80 AD2d 867, 868 [2d Dept 1981]).

In any event, we agree with the People that the grand jury evidence is legally sufficient to support the two counts of ag-

gravated cruelty to animals. The grand jury “must have before it evidence legally sufficient to establish a prima facie case, including all the elements of the crime, and reasonable cause to believe that the accused committed the offense to be charged” (*People v Jensen*, 86 NY2d 248, 251-252 [1995]). Legally sufficient evidence is defined as “‘competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof’ ” (*People v Swamp*, 84 NY2d 725, 730 [1995], quoting CPL 70.10 [1]). “The reviewing court must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted . . . would warrant conviction” (*id.*; see *Jensen*, 86 NY2d at 251).

“A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, [they] intentionally kill[] or intentionally cause[] serious physical injury to a companion animal with aggravated cruelty” (Agriculture and Markets Law § 353-a [1]). “[A]ggravated cruelty” is defined as “conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner” (*id.*). According to the evidence before the grand jury, defendant placed three kittens, approximately eight weeks old, into a knotted pillowcase and left them outside on a balcony during a snowstorm. The kittens were discovered under several feet of snow after defendant’s roommate called emergency services. Defendant had told the roommate not to worry about the kittens because they were “going to kitty heaven.” The treating veterinarian testified that two of the kittens died due to “[h]ypothermia and possibly asphyxiation or hypoxia,” while the third survived. A second veterinarian, who performed a necropsy on the deceased kittens, opined that the kittens’ cause of death was hypothermia and that the kittens would have suffered while they were inside the pillowcase in the cold. The kittens were healthy prior to being placed in the pillowcase.

We conclude that the evidence before the grand jury was legally sufficient to establish that defendant, with no justifiable purpose, intentionally killed the kittens and that defendant did so with aggravated cruelty inasmuch as defendant killed the kittens in a manner that inflicted extreme pain on the dying animals (see *People v Napoli*, 167 AD3d 1080, 1081 [3d Dept 2018]) or did so in a manner likely to prolong the animals’ suffering (see generally *People v Moors*, 140 AD3d 1207, 1208-1209 [3d Dept 2016], *lv denied* 28 NY3d 934 [2016]).

To the extent that the court reduced the counts on its own finding that defendant could not form the requisite intent, that

was improper weighing of the evidence inasmuch as “consideration of a potential defense of mental disease or defect should rest exclusively with the petit jury” (*People v Lancaster*, 69 NY2d 20, 29 [1986], *cert denied* 480 US 922 [1987]; *see generally People v Campbell*, 69 AD3d 645, 646 [2d Dept 2010]).

We therefore reverse the order insofar as appealed from, reinstate the first two counts of the indictment, and remit the matter to Erie County Court for further proceedings on the indictment. On this appeal by the People, we have no authority to consider the contentions raised by defendant in the responsive brief (*see People v Karp*, 76 NY2d 1006, 1008-1009 [1990]; *People v Woodruff*, 4 AD3d 770, 773 [4th Dept 2004]) Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

89 The People of the State of New York, Respondent, v Jack Davies, Appellant. [251 NYS3d 827]—

Crimes—Sex Offenders—Sex Offender Registration Act—Upward Departure

Appeal from an order of the Supreme Court, Erie County (Betty Calvo-Torres, A.J.), dated March 26, 2025. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*).

We conclude that Supreme Court did not abuse its discretion in granting the People’s request for an upward departure (*see generally People v DeCapua*, 179 AD3d 1460, 1461 [4th Dept 2020], *lv denied* 35 NY3d 906 [2020]). It is well settled that a court may grant an upward departure from a sex offender’s presumptive risk level when the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]; *People v Gillotti*, 23 NY3d 841, 861-862 [2014]), the existence of “an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]; *see People v Morin*, 232 AD3d 1241, 1241 [4th Dept 2024], *lv denied* 43 NY3d 903 [2025]; *People v Vaillancourt*, 112 AD3d 1375, 1376 [4th Dept 2013], *lv denied* 22 NY3d 864 [2014]). Here, the People met their burden of establishing by clear and convincing evidence the existence of aggravating factors not adequately accounted for in the risk assessment instrument, including defendant’s pattern of procuring sexually explicit images from

children by threats and extortion. Although defendant's out-of-state conviction was for sexually offending against only one victim, a 12-year-old boy, the court properly considered the case summary, which detailed multiple uncharged, predatory online actions against other children (*see People v Mingo*, 12 NY3d 563, 572-573 [2009]; *People v Craig*, 45 AD3d 1365, 1365-1366 [4th Dept 2007], *lv denied* 10 NY3d 702 [2008]; *People v Lewis*, 45 AD3d 1381, 1381 [4th Dept 2007], *lv denied* 10 NY3d 703 [2008]).

We further reject defendant's contention that an upward departure was precluded by the fact that he received a low-risk score on an alternate risk assessment instrument, the Stable-2007, which conflicted with the high-risk assessment from the Static-99 (*see People v Pagan*, 240 AD3d 1447, 1448-1449 [4th Dept 2025]; *People v Rolon*, 210 AD3d 708, 708-709 [2d Dept 2022], *lv denied* 39 NY3d 907 [2023]; *People v Curry*, 158 AD3d 52, 60 [2d Dept 2017], *lv denied* 31 NY3d 905 [2018]).

We have reviewed defendant's remaining contentions and conclude that they lack merit. Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

90 In the Matter of Amiyah C. Onondaga County Department of Children and Family Services, Respondent; Marcus C., Appellant, et al., Respondent. [247 NYS3d 888]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Diligent Efforts of Agency

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Failure to Plan for Future of Child

Appeal from an order of the Family Court, Onondaga County (Christina F. DeJoseph, J.), entered July 29, 2024, in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, terminated his parental rights with respect to the subject child on the ground of permanent neglect.

Contrary to the father's contention, petitioner established that it exercised diligent efforts to encourage and strengthen the parent-child relationship, as required by Social Services Law § 384-b (7) (a). "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parent[] to overcome

problems that prevent the discharge of the child into their care, and informing the parent[] of [the] child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; see § 384-b [7] [f]). Here, petitioner developed a comprehensive service plan for the father, which included mental health treatment, domestic violence services, anger management counseling, substance abuse evaluation, and clinical visitation services. Petitioner also communicated to the father its concern with his continued volatile relationship with the child's mother.

Contrary to the further contention of the father, we conclude that, despite petitioner's diligent efforts, the father failed to plan for the child's future. "[T]o plan for the future of the child' shall mean to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (Social Services Law § 384-b [7] [c]). Here, the father failed to complete or make adequate progress in the services that petitioner recommended, including mental health services, and he continued his relationship with the mother (see *Matter of Albina H. [John H.]*, 229 AD3d 1169, 1170 [4th Dept 2024], *lv denied* 42 NY3d 903 [2024]). Furthermore, Family Court properly drew the strongest possible negative inference against the father after he failed to testify at the fact-finding hearing (see *Matter of Ariana F.F. [Robert E.F.]*, 202 AD3d 1440, 1442 [4th Dept 2022]).

We reject the father's contention that he was denied effective assistance of counsel. Here, we conclude that "the record, viewed in totality, reveals that the father received meaningful representation" (*Matter of Carter H. [Seth H.]*, 191 AD3d 1359, 1360 [4th Dept 2021]; see *Matter of Nykira H. [Chellsie B.-M.]*, 181 AD3d 1163, 1165 [4th Dept 2020]).

The father failed to preserve for our review his contention that the court should have granted a suspended judgment (see *Matter of Matilda B. [Gerald B.]*, 187 AD3d 1677, 1679 [4th Dept 2020], *lv denied* 36 NY3d 905 [2021]), and, in any event, a suspended judgment was not warranted under the circumstances (see *Matter of Moses K.B. [Ezra B.B.]*, 239 AD3d 1479, 1479-1480 [4th Dept 2025]; *Matter of Mea V. [Brandon V.]*, 235 AD3d 1242, 1243 [4th Dept 2025]).

We have reviewed the father's remaining contentions and conclude that they lack merit. Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

91 In the *Matter of Brenda L. Hernandez*, Appellant, v Jason P. McGowan, Respondent. [248 NYS3d 398]—

Parent, Child and Family—Custody—Primary Physical Residency—Education

Appeal from an order of the Family Court, Monroe County (Nicole E. Bayly, R.), entered September 20, 2024, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued joint legal custody with respect to the subject child and modified the prior custody order by granting respondent-petitioner primary physical residency of the child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this Family Court Act article 6 proceeding, petitioner-respondent mother appeals from an order that, inter alia, modified the parties' prior order of custody to provide that respondent-petitioner father have primary physical residency of the subject child for educational purposes and have residency of the child on school nights during the school year. We affirm.

Preliminarily, we note that the parties do not dispute that there has been a change in circumstances sufficient to warrant an inquiry into whether a modification of the prior custody order is in the child's best interests (*see generally Matter of Cooley v Roloson*, 201 AD3d 1299, 1299-1300 [4th Dept 2022]), inasmuch as they filed competing petitions alleging such a change in circumstances (*see Matter of Muriel v Muriel*, 179 AD3d 1529, 1529 [4th Dept 2020]; *Matter of Nordee v Nordee*, 170 AD3d 1636, 1636-1637 [4th Dept 2019], *lv denied* 33 NY3d 909 [2019]).

"Generally a court's determination regarding custody and visitation issues, based on its first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Warren v Miller*, 132 AD3d 1352, 1354 [4th Dept 2015] [internal quotation marks omitted]). Here, the mother repeatedly failed to ensure that the child arrived at school on time, despite the fact that, at the time, the mother did not work in the mornings on many of the days that the child was late. We conclude that there is a sound and substantial basis in the record to support Family Court's determination that it is in the child's best interests to modify the custody arrangement so that the child could remain "in the school district in which the [father] lived and to provide [the mother] with reduced parenting time during the school year and increased parenting time when school was not in session" (*Matter of Verne v Hamilton*, 191 AD3d 1433, 1434 [4th Dept 2021]). Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

92 Stacy A. Lampack et al., Respondents, v Richard A. Andrews, Appellant/Third-Party Plaintiff-Appellant. Lewis

County, Third-Party Defendant-Respondent. (Appeal No. 1.) [247 NYS3d 891]—Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered September 20, 2024, in a premises liability action. The order denied the motion of defendant-third-party plaintiff to set aside a verdict.

It is hereby ordered that said appeal is unanimously dismissed without costs.

Same memorandum as in *Lampack v Andrews* ([appeal No. 2] 246 AD3d 1484 [4th Dept 2026]). Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

93 Stacy A. Lampack et al., Respondents, v Richard A. Andrews, Appellant/Third-Party Plaintiff-Appellant. Lewis County, Third-Party Defendant-Respondent. (Appeal No. 2.) [252 NYS3d 363]—

Negligence—Snow and Ice—Liability of Tenant for Removal

Appeal from an order of the Supreme Court, Lewis County (James P. McClusky, J.), entered December 19, 2024, in a premises liability action. The order purportedly denied the motion of defendant-third-party plaintiff seeking leave to reargue a prior motion.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, defendant-third-party plaintiff's motion pursuant to CPLR 4404 (a) is granted, the third-party complaint is reinstated, and a new trial is granted in accordance with the following memorandum: Plaintiffs commenced this premises liability action seeking damages for injuries allegedly sustained by Stacy A. Lampack (plaintiff) when she slipped and fell on ice outside a building owned by defendant-third-party plaintiff, Richard A. Andrews (defendant), and leased by plaintiff's employer, third-party defendant, Lewis County (County). Defendant then filed a third-party complaint against the County alleging, inter alia, that plaintiff's injuries were a result of the County's negligence and that the County was required to indemnify defendant pursuant to the terms of the premises lease. The case proceeded to a bifurcated trial on liability and, after the parties rested, the County moved pursuant to CPLR 4401 for judgment as a matter of law. Supreme Court granted the County's motion and dismissed defendant's third-party complaint in its entirety. Plaintiff's complaint was then submitted to the jury, which rendered a verdict finding that plaintiff was not negligent, that defendant was negligent, and that defendant's negligence was a substantial factor in causing plaintiff's injuries. Defendant moved, pursuant to CPLR 4404 (a), for, inter alia, a new trial

on the third-party complaint on the ground that there were questions of fact whether defendant was entitled to contractual indemnification from the County.

In appeal No. 1, defendant appeals from an order that denied defendant's CPLR 4404 (a) motion. In appeal No. 2, defendant appeals from a subsequent order in which the court purportedly denied defendant's motion pursuant to CPLR 2221 for leave to reargue his CPLR 4404 (a) motion.

Initially, we conclude that the court in fact granted leave to reargue and, upon reargument, adhered to its prior determination, thus rendering the order in appeal No. 2 appealable as of right (*see* CPLR 5701 [a] [2] [viii]; *Matter of Jean G.S.*, 59 AD3d 998, 998 [4th Dept 2009]; *Grasso v Schenectady County Pub. Lib.*, 30 AD3d 814, 816 n 1 [3d Dept 2006]). We further conclude that the appeal from the order in appeal No. 1 should be dismissed inasmuch as that order is superseded by the order in appeal No. 2 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

In appeal No. 2, defendant contends that the court erred in granting judgment as a matter of law to the County and that a new trial is warranted under CPLR 4404 (a). We agree. "In determining a motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmoving party and resolve all issues of credibility in favor of the nonmoving party . . . , and may grant the motion only if there is no rational process by which the jury could find for the [nonmoving party] as against the moving" party (*Wolf v Persaud*, 130 AD3d 1523, 1524 [4th Dept 2015]; *see also Dennis v Cerrone*, 192 AD3d 1572, 1572-1573 [4th Dept 2021]). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in [the] light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; *see Shelters v City of Dunkirk Hous. Auth.*, 126 AD3d 1329, 1329 [4th Dept 2015]).

Here, the premises lease obligated the County to remove snow and also to indemnify defendant for the County's "negligence, whether active or passive in its use or occupancy of the [p]remises." Viewing the trial evidence in the light most favorable to defendant and affording him every favorable inference, we conclude that there was a rational process by which the jury could find for defendant against the County. There are three theories under which a jury could have concluded that the County was negligent. First, based on the evidence at trial,

the jury could rationally find that the County created a dangerous condition that was a substantial factor in causing plaintiff's fall through installation of the gutter over the entryway (*see generally Harkins v Tuma*, 182 AD3d 678, 680 [3d Dept 2020]; *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1318 [4th Dept 2012]). Second, the jury could rationally find that the County, as the possessor of the premises, was negligent in failing to remedy the dangerous condition in front of the employee entrance, given that it had "actual knowledge of a recurring dangerous condition in the area where plaintiff fell that would place it on constructive notice of [the] alleged dangerous condition" (*Irwin v St. John the Evangelist Church of Greece*, 229 AD3d 1108, 1109 [4th Dept 2024]; *see generally Phillips v Henry B's, Inc.*, 85 AD3d 1665, 1666-1667 [4th Dept 2011]). Third, the jury could rationally find that the County did not fulfill its contractual snow removal obligation on the day of the incident (*see Shelters*, 126 AD3d at 1329-1330).

To the extent that the court concluded that defendant "had undertaken responsibility for the [icy] condition" by agreeing to build a canopy over the entryway where plaintiff's fall took place, we conclude that this fact alone did not, as a matter of law, relieve the County of liability for negligence.

We therefore reverse the order in appeal No. 2, grant defendant's motion pursuant to CPLR 4404 (a), reinstate the third-party complaint, and grant a new trial to determine whether the County bears any liability for causing plaintiff's injuries and, if so, what percentage of fault is attributable to the County (*see generally Lifson v City of Syracuse*, 104 AD3d 1210, 1211 [4th Dept 2013]; *Marus v Village Med.*, 51 AD3d 879, 881 [2d Dept 2008]). Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

94 In the Matter of Thomas A. Miller, Also Known as Thomas A. Miller Oil Co., Petitioner, v Sean C. Mahar, Interim Commissioner, New York State Department of Environmental Conservation, et al., Respondents. [252 NYS3d 361]—

Gas and Oil—Gas and Oil Lease—Duty to Plug Abandoned Wells—Ownership

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Cattaraugus County [Ronald D. Ploetz, A.J.], entered Nov. 12, 2024) to review a determination of respondents. The determination, among other things, found that petitioner had violated 6 NYCRR 555.1.

It is hereby ordered that the determination is confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul a determination of respondent Sean C. Mahar, the Interim Commissioner of respondent New York State Department of Environmental Conservation (DEC). As limited by his brief, petitioner challenges that part of the determination concluding that petitioner was responsible for plugging 19 previously unknown wells (U wells) discovered during inspections of two parcels of land for which he leased the subsurface mineral rights. Petitioner contends that oil and gas wells are deemed personal property in New York State and that the DEC failed to introduce substantial evidence that the U wells belonged to him. We reject petitioner's contention and confirm the determination.

"[J]udicial review of an administrative determination made after a hearing at which evidence was taken is limited to whether the determination is supported by substantial evidence based upon the entire record" (*Matter of Tip-A-Few, Inc. v Caliva*, 196 AD3d 1040, 1040-1041 [4th Dept 2021] [internal quotation marks omitted]; see CPLR 7803 [4]; *Matter of Klein v City of N.Y. Dept. of Fin. Parking Violations Bur.*, 189 AD3d 1238, 1239 [2d Dept 2020]). Further, "[t]he construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] [internal quotation marks omitted]; see *Tip-A-Few, Inc.*, 196 AD3d at 1041).

The governing statutory and regulatory scheme is contained in Environmental Conservation Law article 23 (see generally *Matter of Western Land Servs., Inc. v Department of Env'tl. Conservation of State of N.Y.*, 26 AD3d 15, 16-17 [3d Dept 2005], *lv denied* 6 NY3d 713 [2006]; cf. *Wagner v Mallory*, 169 NY 501, 505-506 [1902]; *Matter of Hazelwood Oil Co.*, 195 App Div 23, 25 [4th Dept 1920]). Under the effective statute and regulation, both the "owner" and the "operator" of a parcel of land from which oil or gas have been extracted are responsible for, inter alia, the plugging of abandoned oil and gas wells on that parcel (see ECL 23-0305 [8] [d], [e]; 6 NYCRR 555.1). Further, ECL 23-0101 (11) defines an "[o]wner" as "the person who has the right to drill into and produce from a pool or a salt deposit and to appropriate the oil, gas or salt [they] produce[] either for [themselves] or others, or for [themselves] and others" and 6 NYCRR 550.3 (ab) defines an "[o]perator" as "any person who is in charge of the development of a lease or the operation of a producing well." Here, the DEC established that petitioner

held exclusive mineral rights leases for the parcels of land upon which the subject U wells were located and was also the operator of the known wells on those parcels of land. Thus, contrary to petitioner's contention, we conclude that the determination was supported by substantial evidence in the record and was rational (see *Matter of Ecology Sanitation Corp. v New York State Dept. of Envtl. Conservation*, 241 AD3d 1561, 1563 [2d Dept 2025]; *Tip-A-Few, Inc.*, 196 AD3d at 1040-1041). Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

95 The People of the State of New York ex rel. Roberto Concepcion, Appellant, v Amy Titus, Superintendent, Orleans Correctional Facility, Respondent. [248 NYS3d 399]—

Habeas Corpus—When Remedy Available—Denial of Release to Parole Supervision

Appeal from a judgment of the Supreme Court, Orleans County (Sanford A. Church, A.J.), entered July 18, 2023, in a habeas corpus proceeding. The judgment dismissed the petition and denied the request of petitioner to convert the proceeding to a CPLR article 78 proceeding.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner, an incarcerated individual in state prison, commenced this habeas corpus proceeding pursuant to CPLR article 70, contending that he is entitled to immediate release from custody because the Board of Parole (Board) improperly denied his request for release to parole supervision. Petitioner appeals from an order that dismissed the petition and denied his request to convert the matter into a CPLR article 78 proceeding, and we now affirm.

Because “the remedy for an improper denial of parole would be remittal to the Board and not immediate release” (*People ex rel. Borrell v New York State Bd. of Parole*, 85 AD3d 1515, 1516 [3d Dept 2011], *lv denied* 17 NY3d 718 [2011], *rearg denied* 18 NY3d 904 [2012], *lv dismissed & rearg dismissed* 19 NY3d 991 [2012], *reconsideration denied* 24 NY3d 1115 [2015]; see *People ex rel. Daniels v Beaver*, 303 AD2d 1025, 1025 [4th Dept 2003]), Supreme Court properly determined that habeas corpus relief is unavailable to petitioner.

Moreover, inasmuch as petitioner had not exhausted administrative remedies when he filed the petition (see *Matter of Robinson v Bennett*, 300 AD2d 715, 716 [3d Dept 2002]) and failed to name or serve the Board or the Department of Corrections and Community Supervision as a respondent (see *Matter of Montes v New York State Dept. of Corr. & Community*

Supervision, 223 AD3d 1131, 1132 [3d Dept 2024]), we cannot conclude that the court abused its discretion in denying petitioner's alternative request to convert the habeas corpus proceeding into a CPLR article 78 proceeding. Under the circumstances of this case, the petition would have been subject to dismissal even if the proceeding had been converted to its proper form under CPLR 103 (c).

We have reviewed petitioner's remaining contentions and conclude that they lack merit. Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

96 Frederick Driscoll, Plaintiff, v NY District Assemblies of God, Defendant/Third-Party Plaintiff-Respondent. Lakes Church, Lakes Church-Auburn, Third-Party Defendant-Appellant. [247 NYS3d 901]—Appeal from an order of the Supreme Court, Onondaga County (Gerard J. Neri, J.), entered August 22, 2024, in a personal injury action. The order, insofar as appealed from, denied the motion of third-party defendant to dismiss the third-party complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 15, December 4 and 10, 2025,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

97 Kyle K. Jarosz, Respondent, v Sidelines Sports, Respondent, and Front Row Sports et al., Appellants. [247 NYS3d 901]—Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered February 24, 2025. The order denied the motion of defendants Front Row Sports and Supersports—The Hockey & Skating Company, LLC, doing business as Front Row Sports USA for summary judgment dismissing the complaint against them and for common-law indemnification against defendant Sidelines Sports.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 22, 2025,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

98 Melba Hicks, Respondent, v Unitrin Advantage Insurance Company, Appellant. [252 NYS3d 367]—

Disclosure—Penalty for Failure to Disclose—Striking of Answer

Appeal from an order of the Supreme Court, Niagara County (Mario A. Giacobbe, A.J.), entered October 18, 2024, in a breach of contract action. The order granted the motion of plaintiff to strike defendant's answer and for a default judgment and denied the cross-motion of defendant for a protective order.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this breach of contract action seeking no-fault benefits under an insurance policy issued by defendant, her automobile insurance carrier, following a motor vehicle accident. Prior to the accident, plaintiff had been employed full time, earning \$10 per hour. Defendant partially denied plaintiff's claim for lost wages, and plaintiff now seeks \$24,229.20 from defendant, pursuant to no-fault insurance law. After defendant failed to respond to plaintiff's discovery demands, including, inter alia, interrogatories, as well as her good faith demand letter, plaintiff filed a motion to compel responses pursuant to CPLR 3124. After serving incomplete discovery responses, defendant consented to a conditional preclusion order directing it to submit complete responses within 60 days. On the eve of the 60-day deadline, defendant served supplemental discovery responses, which were again incomplete, and then yet again served incomplete supplemental discovery responses after the deadline passed. Plaintiff moved for sanctions pursuant to CPLR 3126, seeking an order striking the answer and entering a default judgment in her favor, and defendant opposed the motion and cross-moved for a protective order pursuant to CPLR 3103. Supreme Court granted plaintiff's motion for sanctions and denied defendant's cross-motion. Defendant now appeals, and we affirm.

"It is well settled that [t]rial courts have broad discretion in supervising disclosure and, absent a clear abuse of that discretion, a trial court's exercise of such authority should not be disturbed" (*Carpenter v Browning-Ferris Indus.*, 307 AD2d 713, 715 [4th Dept 2003] [internal quotation marks omitted]; see *Allen v Wal-Mart Stores, Inc.*, 121 AD3d 1512, 1513 [4th Dept 2014]). "The nature and degree of a sanction to be imposed on a motion pursuant to CPLR 3126 is within the discretion of the court, and the striking of a pleading is appropriate only upon a clear showing that a party's failure to comply with a discovery demand or order is willful, contumacious, or in bad faith" (*Almontaser v Roswell Park Cancer Inst. Corp.*, 239 AD3d 1432, 1432 [4th Dept 2025] [internal quotation marks omitted]; see *Mosey v County of Erie*, 117 AD3d 1381, 1384 [4th Dept 2014]; see generally *Prattico v City of Rochester*, 197 AD3d 882, 883-

884 [4th Dept 2021]). “The willful or contumacious character of a party’s conduct can be inferred from the party’s *repeated* failure to respond to demands or to comply with discovery orders” (*Pezzino v Wedgewood Health Care Ctr., LLC*, 175 AD3d 840, 841 [4th Dept 2019] [internal quotation marks omitted]; see generally *Zletz v Wetanson*, 67 NY2d 711, 713 [1986]). “Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse” (*Hann v Black*, 96 AD3d 1503, 1504-1505 [4th Dept 2012] [internal quotation marks omitted]).

Here, plaintiff established on her motion that defendant repeatedly failed to comply with her discovery demands and the conditional preclusion order, and that those failures were willful, contumacious, and in bad faith (see *Prattico*, 197 AD3d at 884; *Peterson v New York Cent. Mut. Fire Ins. Co.*, 174 AD3d 1386, 1388 [4th Dept 2019]; cf. *McGirr v Zurbrick*, 217 AD3d 1462, 1465-1466 [4th Dept 2023], *lv denied* 41 NY3d 902 [2024]; see generally *Zletz*, 67 NY2d at 713). Thus, plaintiff met her initial burden on the motion, thereby shifting the burden to defendant to offer a reasonable excuse (see *Allen*, 121 AD3d at 1513). In opposition, defendant did not offer a reasonable excuse but, rather, contended that the discovery demands that it failed to respond to are not relevant. Contrary to defendant’s contention, the demands that it failed to respond to sought evidence of potential bias on the part of defendant’s independent medical examination physicians and thus are relevant to a proper inquiry (see *Dominicci v Ford*, 119 AD3d 1360, 1361 [4th Dept 2014]; see generally *Salm v Moses*, 13 NY3d 816, 818 [2009]). We therefore conclude that the court did not abuse its discretion in granting the motion for sanctions pursuant to CPLR 3126.

We have considered defendant’s remaining contention and conclude that it does not warrant modification or reversal of the order. Present—Whalen, P.J., Lindley, Ogden, Nowak and DelConte, JJ.

99 The People of the State of New York, Respondent, v Steven Searles, Appellant. [247 NYS3d 890]—Appeal from a judgment of the Monroe County Court (Caroline E. Morrison, J.), rendered May 3, 2024. The judgment convicted defendant, upon a plea of guilty, of attempted assault in the second degree.

It is hereby ordered that said appeal is unanimously dismissed.

Memorandum: Defendant appeals from a judgment convict-

ing him, upon a plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Defendant's sole contention consists of a challenge to the legality of the minimum period of the indeterminate sentence of imprisonment imposed by County Court. As defendant correctly asserts and the People correctly concede, defendant's contention would survive even a valid waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Seaberg*, 74 NY2d 1, 10 [1989]; *People v Balkum*, 288 AD2d 910, 910 [4th Dept 2001]). Consequently, we need not address the validity of the appeal waiver (*see People v Smith* [appeal No. 2], 237 AD3d 1531, 1532 [4th Dept 2025]). Nonetheless, defendant's challenge to the legality of the minimum period of the indeterminate sentence was rendered moot by his release to parole supervision (*see Balkum*, 288 AD2d at 910), and we conclude that the exception to the mootness doctrine does not apply (*see Smith*, 237 AD3d at 1532; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). We therefore dismiss the appeal. Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

100 The People of the State of New York, Respondent, v Ashton O., Appellant. [247 NYS3d 911]—

Infants—Adolescent Offenders—Qualifying Age

Appeal from an adjudication of the Wayne County Court (Richard M. Healy, J.), rendered April 24, 2024. Defendant was adjudicated a youthful offender upon his plea of guilty of hazing in the first degree and forcible touching.

It is hereby ordered that the adjudication so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Wayne County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a youthful offender adjudication based upon his plea of guilty of hazing in the first degree (Penal Law § 120.16) and forcible touching (§ 130.52 [1]). We reverse.

Defendant, who was 15 years old at the time of the incident, was indicted on three counts, including one count of aggravated sexual abuse in the first degree (Penal Law § 130.70 [1] [a]), a felony. Defendant was arraigned in County Court (Youth Part). The People brought a motion pursuant to CPL 722.23 to prevent removal of the case to Family Court and alleged that defendant was an adolescent offender. The court granted the People's motion. Thereafter, the court granted that part of defendant's omnibus motion seeking dismissal of the felony count of aggravated sexual abuse in the first degree on the basis of

legally insufficient evidence before the grand jury, and the People indicated that they would not seek leave to represent the felony charge. Thereafter, defendant pleaded guilty to the two remaining misdemeanor counts and was adjudicated a youthful offender.

As the People correctly concede, reversal is required inasmuch as the court lacked jurisdiction to render such an adjudication. Defendant did not qualify as an adolescent offender because he was 15 years old at the time of the incident (*see* CPL 1.20 [44]), and therefore the court erred when it considered and granted the People's motion to prevent removal of the matter to Family Court (*see* CPL 722.23). Furthermore, inasmuch as defendant did not qualify as a juvenile offender (*see* CPL 1.20 [42]) and could not be held criminally responsible for the remaining misdemeanor counts due to his age, defendant was subject to the jurisdiction of Family Court and the matter should have been transferred to Family Court for a determination whether defendant should be adjudicated a juvenile delinquent (*see* CPL 210.30 [7]; Family Ct Act §§ 301.2 [1]; 302.1 [1]).

Although the felony charge was dismissed on the ground of legally insufficient evidence before the grand jury and the People have declined to seek leave to represent that charge, we reject defendant's contention that the remaining charges of the indictment must be dismissed where, as here, the court lacked jurisdiction to adjudicate the matter and such adjudication was a nullity (*see Matter of Cunningham v Dwyer*, 302 AD2d 888, 889 [4th Dept 2003], *appeal dismissed* 99 NY2d 649 [2003], *rearg denied* 100 NY2d 577 [2003]; *see generally People v Harris*, 182 AD3d 992, 994 [4th Dept 2020], *lv denied* 35 NY3d 1066 [2020]; *People ex rel. Aurnou v Strack*, 286 AD2d 690, 691 [2d Dept 2001], *lv denied* 97 NY2d 607 [2001], *rearg denied* 97 NY2d 726 [2002], *cert denied* 536 US 926 [2002]). We therefore reverse the adjudication, vacate the plea, and remit the matter to County Court (Youth Part) for the entry of an order removing the action to Family Court.

In light of our determination, defendant's remaining contentions are academic. Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

101 In the Matter of LaLisa Craig, Appellant, v Adam Thomas, Sr., Respondent. [251 NYS3d 839]—

Parent, Child and Family—Custody—Grandparent

Appeal from an order of the Family Court, Wayne County (Arthur B. Williams, J.), entered September 3, 2024, in a

proceeding pursuant to Family Court Act article 6. The order, inter alia, granted respondent-petitioner sole legal and residential custody of the subject children.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the petition of petitioner-respondent LaLisa Craig is reinstated, and the matter is remitted to Family Court, Wayne County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent maternal grandmother and respondent-petitioner father filed petitions seeking custody of the father's twin girls after the death of their mother. Family Court effectively dismissed the grandmother's petition upon determining that she failed to establish extraordinary circumstances and granted the father custody of the children, with visitation to the grandmother. The grandmother appeals, and we reverse.

Initially, we agree with the grandmother that a subsequent order entered on consent that granted custody of the children to the grandmother does not render this appeal moot. A consent order does not by itself constitute a judicial finding or an admission of extraordinary circumstances (*see Matter of Sevilla v Torres*, 235 AD3d 1303, 1304 [4th Dept 2025]; *Matter of Byler v Byler*, 185 AD3d 1403, 1404 [4th Dept 2020]; *Matter of Driscoll v Mack*, 183 AD3d 1229, 1230 [4th Dept 2020], *lv denied* 35 NY3d 910 [2020]). Thus, the grandmother's challenge to the court's finding of no extraordinary circumstances is not affected by the subsequent order entered on consent (*see generally Matter of Gorski v Phalen* [appeal No. 2], 187 AD3d 1670, 1671 [4th Dept 2020]; *Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585 [4th Dept 2014]).

It is well settled that, to have standing to seek custody, a nonparent must demonstrate "extraordinary circumstances, illustratively, surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time" (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 546 [1976]; *see Matter of Adams v John*, 227 AD3d 1395, 1397 [4th Dept 2024]). If extraordinary circumstances exist, "the disposition of custody is influenced or controlled by what is in the best interest of the child" (*Bennett*, 40 NY2d at 544). In other words, "[t]he nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child" (*Adams*, 227 AD3d at 1397 [internal quotation marks omitted]).

We agree with the grandmother that she met her burden of

establishing the existence of extraordinary circumstances. The extraordinary circumstances analysis “must consider the cumulative effect of all issues present in a given case and not view each factor in isolation” (*Matter of Byler v Byler*, 207 AD3d 1072, 1074 [4th Dept 2022], *lv denied* 39 NY3d 901 [2022] [internal quotation marks omitted]; see *Matter of Lachenauer v Lachenauer-Myers*, 236 AD3d 1309, 1309-1310 [4th Dept 2025]).

The evidence here established that, in 2018, the father was arrested and incarcerated until 2022. During that time, the children resided with the mother in the grandmother’s home until October 2021, when the grandmother moved out. The father never saw the children while he was incarcerated, rarely spoke with them, and never sent them cards, letters, or gifts. When the father was released from incarceration, the mother asked him to take custody of the children, which he did starting in July or August 2022; the grandmother visited with the children on the weekends. The mother died less than a year later, and the children lived with the grandmother during the summer of 2023. In September 2023, the parties filed petitions seeking custody of the children, and the court granted the grandmother temporary custody of the children, with the father having visitation. From that time until the conclusion of the hearing in July 2024, the father did not visit with the children and rarely communicated with them.

We conclude that the cumulative effect of the father’s extended incarceration, his failure to maintain contact with the children during that time, the children’s resulting bond with the grandmother, and the father’s failure to maintain contact with the children during the pendency of the hearing, is sufficient to establish extraordinary circumstances (see *Matter of Robert XX. v Susan YY.*, 202 AD3d 1389, 1390 [3d Dept 2022], *lv denied* 38 NY3d 907 [2022]; *Matter of Ciriaco v Hall*, 191 AD3d 872, 873-874 [2d Dept 2021]; *Matter of Moynihan v Cohen*, 181 AD3d 965, 967 [2d Dept 2020]). We therefore reverse the order, reinstate the grandmother’s petition, and remit the matter to Family Court to make a determination regarding the best interests of the children, following an additional hearing if necessary. Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

102 Frances Gregg et al., Appellants, v Community Care Companions, Inc., et al., Respondents. [252 NYS3d 379]—

Labor—Hours and Wages—Failure to Provide Wage Notices—Standing to Sue Labor—Hours and Wages—Failure to Provide Wage Notices—Compensation for Working Split Shifts and Spread of Hours—Sufficiency of Pleading

Labor—Hours and Wages—Liability of Corporate Officers for Violations—Control over Day-to-Day Operations

Appeal from an order of the Supreme Court, Erie County (Raymond W. Walter, J.), entered February 7, 2025. The order granted defendants' motion to dismiss plaintiffs' amended complaint.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the amended complaint is reinstated.

Memorandum: Plaintiffs, current and former home care workers employed by defendant Community Care Companions, Inc. (CCC), commenced this action against CCC and defendants Alexander J. Caro and Mark Gatien, who are corporate officers of CCC, alleging that defendants failed to provide plaintiffs with wage notices and to compensate plaintiffs for working split shifts and a spread of hours in violation of Labor Law § 195 (1) and 12 NYCRR 142-2.4. Plaintiffs now appeal from an order that granted defendants' pre-answer motion to dismiss the amended complaint on the grounds that plaintiffs lack standing and failed to sufficiently plead their causes of action under Labor Law § 195 (1) and 12 NYCRR 142-2.4, and that Caro and Gatien, as corporate officers, cannot be individually liable under New York Labor Law. We reverse.

Initially, we agree with plaintiffs that Supreme Court erred in granting the motion with respect to the Labor Law § 195 (1) cause of action for lack of standing inasmuch as plaintiffs had statutory standing and were not required to allege actual injury (*see* Labor Law §§ 195 [1]; 198 [1-b]; *see also* *Matter of Town of Bedford v Village of Mount Kisco*, 33 NY2d 178, 185 [1973], *rearg denied* 34 NY2d 668 [1974]).

We also agree with plaintiffs that the court erred in granting the motion with respect to the Labor Law § 195 (1) and 12 NYCRR 142-2.4 causes of action pursuant to CPLR 3211 (a) (7). “On a motion to dismiss pursuant to CPLR 3211 (a) (7), [this Court] must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff . . . the benefit of every possible favorable inference” (*Van Ostrand v Latham*, 222 AD3d 1382, 1383 [4th Dept 2023] [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Here, accepting the facts as alleged in the amended complaint as true and according plaintiffs the benefit of every possible favorable inference (*see Stevens v Perrigo*, 122

AD3d 1430, 1431 [4th Dept 2014]), we conclude that plaintiffs sufficiently alleged facts to support plaintiffs' claims that defendants did not provide plaintiffs with notice containing the information required under Labor Law § 195 (1) and that defendants failed to pay plaintiffs as required under 12 NYCRR 142-2.4 (*see generally Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 [2017]).

Finally, we agree with plaintiffs that the court erred in granting that part of the motion seeking dismissal of the amended complaint against Caro and Gatien. "[C]orporate . . . officers generally may not be subjected to civil liability for corporate violations of the Labor Law absent allegations that such persons exercised control of the corporation's day-to-day operations by, for example, hiring and firing employees, supervising employee work schedules, and determining the method and rate of pay" (*Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660, 663 [2d Dept 2020]; *see Interstate Home Loan Ctr., Inc. v United Mtge. Corp.*, 206 AD3d 708, 710 [2d Dept 2022]). Here, the amended complaint adequately alleged that Caro and Gatien exercised control over the day-to-day operations of CCC inasmuch as they had final decision-making authority over all organization matters within CCC, including the hiring, firing, and discipline of all personnel, their wage rates and method of pay, and the terms and conditions of their employment. Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

103 In the Matter of Cuba Lake Committee for Fair Assessments et al., Respondents, v Town of Cuba et al., Appellants. [251 NYS3d 836]—

Taxation—Assessment—Methodology

Appeal from a judgment (denominated order) of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), entered July 16, 2024, in a proceeding pursuant to CPLR article 78 and declaratory judgment action. The judgment, insofar as appealed from, declared the 2023 Town of Cuba tax assessment roll null and void and reinstated the 2022 tax assessment roll.

It is hereby ordered that the judgment insofar as appealed from is unanimously reversed on the law without costs, the petition-complaint is denied in its entirety, and judgment is granted in favor of respondents-defendants as follows:

It is Adjudged and Declared that the 2023 tax assessment roll is valid.

Memorandum: Petitioners-plaintiffs (petitioners) commenced this hybrid CPLR article 78 proceeding and declaratory judg-

ment action seeking, inter alia, to annul and declare unenforceable the 2023 tax assessment roll of respondent-defendant Town of Cuba (Town) on various grounds, including that the methodology used in determining the 2023 tax assessment roll was arbitrary or capricious and unconstitutional. Respondents-defendants (respondents) filed an answer seeking dismissal of the petition-complaint (petition). Respondents now appeal from a judgment that effectively granted the petition insofar as it sought a declaration that the 2023 final tax assessment roll is null and void and reinstatement of the 2022 final tax assessment roll until such time as the Town performs a new reassessment. We reverse the judgment insofar as appealed from.

We agree with respondents that, contrary to petitioners' assertion, Supreme Court erred in determining that petitioners overcame the presumption of validity attached to the property valuation and that the methodology used was arbitrary and capricious. "The cardinal principle of property valuation for tax purposes, set forth in the State Constitution, is that property '[a]ssessments shall in no case exceed full value'" (*Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon*, 88 NY2d 724, 729 [1996], quoting NY Const, art XVI, § 2). "The concept of 'full value' is typically equated with market value, or what 'a seller under no compulsion to sell and a buyer under no compulsion to buy' would agree to as the subject property's price" (*id.*). "In view of this market-oriented definition of full value, the assessment of property value for tax purposes must take into account any factor affecting a property's marketability" (*id.*). Nonetheless, "while property must be assessed at market value, there is no fixed method for determining that value" (*Matter of Allied Corp. v Town of Camillus*, 80 NY2d 351, 356 [1992], *rearg denied* 81 NY2d 784 [1993]). "The ultimate purpose of valuation . . . is to arrive at a fair and realistic value of the property involved so that all property owners contribute equitably to the public fisc. Any fair and nondiscriminating method that will achieve that result is acceptable" (*id.*; see *Commerce Holding Corp.*, 88 NY2d at 731).

Where, as here, "the challenge is based upon the method employed in the assessment of several properties rather than the overvaluation or undervaluation of [a] specific propert[y], a taxpayer may . . . mount a collateral attack on the taxing authority's action through either a declaratory judgment action or a proceeding pursuant to CPLR article 78'" (*Matter of Cayuga Grandview Beach Coop. Corp. v Town Bd. of Town of Springport*, 51 AD3d 1364, 1364 [4th Dept 2008], *lv denied* 11

NY3d 702 [2008] [emphasis omitted]; see *Matter of Estrellita LLC v Town Bd. of Town of Alexandria*, 60 AD3d 1363, 1363 [4th Dept 2009]). “An assessor’s property valuation resulting in a local tax assessment is presumptively valid” (*Matter of Abele v Dimitriadis*, 53 AD3d 969, 971 [3d Dept 2008], *lv denied* 12 NY3d 706 [2009]; see *Matter of Scarsdale Comm. for Fair Assessments v Albanese*, 202 AD3d 966, 969 [2d Dept 2022]; *Matter of Hudson Prop. Owners’ Coalition, Inc. v Slocum*, 92 AD3d 1198, 1199 [3d Dept 2012]; see generally *Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 187 [1998]). “To overcome the presumption, property owners must present substantial evidence of overvaluation through proof based on sound theory and objective data” (*Abele*, 53 AD3d at 971 [internal quotation marks omitted]; see *Scarsdale Comm. for Fair Assessments*, 202 AD3d at 969; *Hudson Prop. Owners’ Coalition, Inc.*, 92 AD3d at 1199-1200). When property owners “fail[] to rebut the presumption, the municipality’s assessor has no obligation to go ‘forward with proof of the correctness of [its] valuation,’ and the petition is to be dismissed” (*Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 175 [2014]).

Here, petitioners “failed to submit any evidence, such as ‘a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser’ . . . , showing that the method employed . . . failed to achieve uniformity, was discriminatory or was otherwise improper” (*Hudson Prop. Owners’ Coalition, Inc.*, 92 AD3d at 1200). Petitioners instead merely asserted that the professional real estate appraisal and consulting firm hired by the Town to perform the reassessment had used a flawed methodology and, in support of that assertion, primarily relied upon “land assessment analysis” reports prepared by a non-expert property owner, petitioner-plaintiff Harry W. Keeley, who claimed, with minimal explanation of his method, that his analyses showed anomalies in the Town’s assessment (*see id.*). We agree with respondents that these “self-generated and unverified [analyses] lack[] the type of evidentiary value necessary to rebut the presumption” (*Matter of Channin v Minoia*, 221 AD3d 1119, 1121 [3d Dept 2023]). We conclude that petitioners’ submissions in support of the petition “fell woefully short of demonstrating any infirmity in the formula used by the [firm] in assessing the properties” (*Hudson Prop. Owners’ Coalition, Inc.*, 92 AD3d at 1200).

Moreover, we agree with respondents that, contrary to the court’s conclusion, the record establishes that the firm

rationally employed a market value method of valuation that included a comparative property analysis of residential sales and necessarily took into account the affect on marketability of those properties located on leased land (*see generally* RPTL 302 [1]; *Commerce Holding Corp.*, 88 NY2d at 729). We conclude that, “[a]lthough petitioners take issue with how [the firm] arrived at [its] calculations, . . . their conclusory [and unsubstantiated] assertion that the methodology used was arbitrary was insufficient to defeat the presumption that the assessment was valid” (*Matter of Eanniello v Morris*, 234 AD2d 642, 643 [3d Dept 1996]).

Finally, we conclude that petitioners failed to establish that the other violations of law they have alleged would warrant invalidation of the entire 2023 assessment roll (*see generally Matter of Hellerstein v Assessor of Town of Islip*, 37 NY2d 1, 13-14 [1975]). Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

104 In the Matter of the P. & E. T. Foundation. John N. Blair, Esq., Appellant; Cynthia T. Doyle et al., Respondents. [251 NYS3d 829]—

Courts—Jurisdiction—Declaratory Relief—Surrogate’s Court

Appeal from an order of the Surrogate’s Court, Erie County (Acea M. Mosey, S.), entered November 1, 2024. The order, among other things, denied petitioner’s motion seeking an order declaring that the parties had entered a final and binding settlement contract.

It is hereby ordered that the order so appealed from is unanimously vacated on the law without costs.

Memorandum: This appeal arises from a petition and amended petition pursuant to, inter alia, SCPA 1420 seeking construction of certain trust documents related to the P. & E. T. Foundation (Foundation), a charitable trust, as well as a subsequent petition pursuant to SCPA 2102 (6) and 2107 (2) seeking, inter alia, to enjoin Cynthia T. Doyle, Robert M. Doyle, Mollie T. Byrnes, John H. Byrnes, Peter Byrnes, Mollie Doyle, Donna Owens, James Weiss, and David Welbourn (collectively, respondents) from removing petitioner as attorney trustee for the Foundation. Following the latter of those petitions, the parties engaged in mediation. In October 2022, respondents provided petitioner with two “global settlement proposals” designed to address all of the parties’ outstanding issues and “completely remove[] [petitioner] and his family members from any involvement with the Tower entities and family.” Although petitioner purportedly accepted one of those settlement propos-

als, a dispute arose as to whether the proposal had been withdrawn prior to its acceptance. Following that dispute, mediation continued. In April 2023, the parties signed a “Mediator Settlement Proposal Final,” a second global settlement proposal that addressed many of the same concerns as the October 2022 proposals with additional and amended terms. A dispute arose, however, as to whether a signature from the Office of the Attorney General was required before the April 2023 proposal became binding.

Petitioner thereafter moved by order to show cause seeking, inter alia, an order “[d]eclaring that the terms recited in that certain [April 2023 proposal] . . . constitute a final and binding settlement contract,” or, in the alternative, “declaring that the ‘first proposal’ in that certain [October 2022 proposal] . . . accepted by [p]etitioner . . . constitutes a final and binding settlement contract.” Surrogate’s Court effectively denied the motion and determined that neither proposal was enforceable. Petitioner appeals. We vacate the order on the ground that the Surrogate lacked the authority to entertain the relief requested by petitioner’s order to show cause (*see generally Matter of Allen v Fiedler*, 96 AD3d 1682, 1682 [4th Dept 2012], *lv denied* 19 NY3d 815 [2012]; *Matter of Byrnes v County of Monroe*, 122 AD2d 549, 549 [4th Dept 1986]).

CPLR 3001 vests the authority to grant declaratory relief in Supreme Court. Thus, “[u]nless there is some other provision conferring declaratory jurisdiction on the particular court . . . the court will not have it” (Patrick M. Connors, *Prac Commentaries*, McKinney’s Cons Laws of NY, CPLR C3001:20; *see generally Kimmel v State of New York*, 29 NY3d 386, 393 [2017]; *Byrnes*, 122 AD2d at 550; *Wikarski v State of New York*, 91 AD2d 1174, 1174 [4th Dept 1983]). Even where the subject matter of a particular case falls within the subject matter generally heard by a court of limited jurisdiction, requests for declaratory relief must, nevertheless, typically be heard in Supreme Court (*see North Waterside Redevelopment Co. v Febbraro*, 256 AD2d 261, 262 [1st Dept 1998], *lv dismissed* 93 NY2d 888 [1999]).

That being said, so long as Surrogate’s Court possesses jurisdiction over a particular matter, the Surrogate “[i]n the exercise of [their] jurisdiction . . . shall have all of the powers that the supreme court would have in like actions and proceedings” (SCPA 209 [10]). The statute, for example, expressly grants the Surrogate the power to “determine” certain things regarding, inter alia, estate property and trusts (SCPA 209 [4], [6], [10]). Thus, courts have concluded that, although not necessarily in

the form of a declaratory judgment, the Surrogate has the authority to make determinations as to the rights to or ownership of estate or trust property (*see Matter of Mastroianni*, 105 AD3d 1136, 1137-1138 [3d Dept 2013]; *Carmel v Shor*, 250 AD2d 475, 476 [1st Dept 1998]; *Matter of Greenwold*, 236 AD2d 400, 401 [2d Dept 1997]; *Matter of Langfur*, 198 AD2d 355, 355-356 [2d Dept 1993]).

Without deciding the precise extent or scope of the Surrogate's authority to entertain requests for declaratory or quasi-declaratory relief, we conclude that the Surrogate lacked such authority under the circumstances of this case. Both the October 2022 and April 2023 proposals underlying petitioner's request for declaratory relief represented attempts at a global settlement resolving a myriad of issues that had arisen between the parties and their families, much of which extended beyond the relief contemplated by the petitions before the Surrogate. The October 2022 and April 2023 proposals had terms regarding, *inter alia*, payment of attorney fees, payments owed to petitioner, payments petitioner would waive, claims pending against petitioner in other actions, releases from personal liability, health insurance for petitioner, and certain things that the parties agreed to do post-settlement. Both proposals explicitly referenced a separate action pending in federal court, stating that the federal action would be dismissed against petitioner and another individual who was not a party to this proceeding.

Even assuming, *arguendo*, that the Surrogate possessed authority to make declarations or determinations related to certain aspects of the October 2022 or April 2023 proposals, we conclude that substantive portions of those proposals involved disputes that were not properly before the Surrogate and thus the requested relief, *i.e.*, a declaration that either of the proposals were binding, must be sought in an action in the Supreme Court (*see generally Matter of Trump*, 68 Misc 3d 593, 595 [Sur Ct, Queens County 2020]). Indeed, as noted, both the October 2022 and April 2023 proposals, among other things, effectively settled a separate action over which the Surrogate lacked jurisdiction. Because the matters outside of the Surrogate's jurisdiction were inextricably intertwined with the other terms of the proposals, we conclude that the Surrogate lacked the authority to grant declaratory relief or otherwise determine the validity or enforceability of either the October 2022 or April 2023 proposals (*see Matter of Berkowitz*, 2016 NY Slip Op 30164[U], *4 [Sur Ct, NY County 2016]). Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

105 Darwin S. Putnam, Respondent, v Patsy D. Putnam, Individually and as Executor of the Estate of Darwin L. Putnam, Deceased, Appellant, et al., Defendant. [247 NYS3d 903]—

Trusts—Constructive Trust—Construction of Home and Business in Reliance
on Oral Promise to Convey Title of Real Property
Pleading—Sufficiency of Pleading—Undue Influence
Pleading—Sufficiency of Pleading—Fraud

Appeal from an order of the Supreme Court, Herkimer County (Mark R. Rose, J.), entered July 5, 2024. The order denied in part the motion of defendants to dismiss plaintiff's second amended complaint.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion seeking to dismiss the third cause of action to the extent it asserts a claim for fraud against defendant Patsy Darlene Putnam, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against his parents, defendants Darwin L. Putnam (decedent) and Patsy Darlene Putnam, individually (Patsy), and his brother, Jon Putnam (Jon), seeking monetary damages and title to 18 acres of the family farm (subject property). Decedent died during the pendency of this action, and Patsy in her capacity as executor of his estate was substituted for decedent as a defendant (Estate). Defendants moved to dismiss the second amended complaint, and Supreme Court denied the motion with respect to the second and third causes of action. Patsy, individually and as executor of the Estate (defendant), appeals, and we modify.

"When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiff[] with the benefit of every favorable inference . . . Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018] [internal quotation marks omitted]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Pottorff v Centra Fin. Group, Inc.*, 192 AD3d 1552, 1553 [4th Dept 2021]).

We reject defendant's contention that the court erred in denying the motion with respect to the second cause of action, for constructive trust, against Patsy and the Estate. A constructive trust is applied in situations where "an unfulfilled promise to convey an interest in land induces another, in the context of a

confidential or fiduciary relationship, to make a transfer resulting in unjust enrichment” (*McGrath v Hilding*, 41 NY2d 625, 628-629 [1977]). The purpose of a constructive trust is to prevent unjust enrichment (see *Simonds v Simonds*, 45 NY2d 233, 242 [1978]). “Generally, there are four requirements for the imposition of a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment” (*Aubertine v Aubertine*, 240 AD3d 1360, 1361 [4th Dept 2025]; see *Barker v Gervera*, 236 AD3d 1318, 1325 [4th Dept 2025]; *Matter of Chicola*, 224 AD2d 1005, 1005-1006 [4th Dept 1996]). Courts do not rigidly apply these elements but use them as flexible guidelines (see *Simonds*, 45 NY2d at 241; *Aubertine*, 240 AD3d at 1361; *Barker*, 236 AD3d at 1325).

Here, plaintiff alleged in the second amended complaint that decedent, his father, promised to grant him title to the subject property so that plaintiff could build his home. Plaintiff further alleged that he had occupied the subject property for over 10 years, constructed his home, and used an adjacent building and a barn for his business. He alleged that he relied upon decedent’s oral promise when he built his home and operated his business on the subject property and that defendants would be unjustly enriched in the event of a removal of plaintiff from the subject property. As defendant correctly contends, plaintiff did not allege an actual transfer of the subject property, but only the promise to do so. However, “‘courts have extended the transfer element to include instances where funds, time and effort were contributed in reliance on a promise to share in some interest in property, even though no transfer [of that property] actually occurred’” (*Aubertine*, 240 AD3d at 1361-1362; see *Canas v Oshiro*, 221 AD3d 650, 652 [2d Dept 2023]). We conclude that plaintiff’s allegations were sufficient to state a cause of action for constructive trust (see generally *Aubertine*, 240 AD3d at 1362; *Estate of Uddin v Miah*, 229 AD3d 764, 766-767 [2d Dept 2024]).

We reject defendant’s further contention that the court erred in denying the motion with respect to the third cause of action against Patsy insofar as it alleges undue influence. Defendant contends that there is no substantive cause of action for undue influence in New York, but we rejected a similar contention in *Barker* and concluded that “New York courts have invalidated deeds on the ground of undue influence . . . or have otherwise entertained the theory of undue influence to challenge a deed or contract” (236 AD3d at 1323). “To establish undue influence, a party is required to establish that an individual was actually

constrained to act against [their] own free will and desire by identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred” (*id.* at 1324 [internal quotation marks omitted]; see *Salitsky v D’Attanasio*, 214 AD3d 567, 568 [1st Dept 2023]).

Plaintiff alleged in the second amended complaint that Patsy and Jon took advantage of decedent’s failing health to have him rescind his agreement to transfer the subject property to plaintiff and instead transferred it to Patsy. We conclude that plaintiff’s allegations were sufficient to state a claim for undue influence (*see generally Barker*, 236 AD3d at 1324).

We agree with defendant, however, that the court erred in denying the motion with respect to the third cause of action insofar as it alleges fraud against Patsy, and we therefore modify the order accordingly. “The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; see *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). In a cause of action based upon fraud, “the circumstances constituting the wrong shall be stated in detail” (CPLR 3016 [b]).

Here, plaintiff does not allege what the material misrepresentation was or how plaintiff justifiably relied upon it. It appears from the heading of the third cause of action that it is asserted against Patsy and Jon for “fraud acted upon” decedent, resulting in damages to plaintiff. However, it is well settled that “under New York law, . . . third-party reliance does not satisfy the reliance element of a fraud claim” (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016], *rearg denied* 28 NY3d 956 [2016]). Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

106 The People of the State of New York, Respondent, v Jerwie L. Singleton, Appellant. [251 NYS3d 825]—

Crimes—Sex Offenders—Sex Offender Registration Act—Risk Factor Assessment—Juvenile Delinquency Adjudication

Crimes—Sex Offenders—Sex Offender Registration Act—Automatic Override—Clinical Assessment Establishing Mental Illness Decreased Ability to Control Behavior

Appeal from an order of the Ontario County Court (Brian D. Dennis, J.), dated June 18, 2024. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ordered that the order so appealed from is

unanimously reversed on the law without costs and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: On appeal from an order determining that he is a level three risk and a sexually violent offender pursuant to the Sex Offender Registration Act (SORA) (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing points for his criminal history based upon a prior juvenile delinquency adjudication. We agree. Defendant was assessed 10 points under risk factor 8 for his age at the time of his first sex crime based on a juvenile delinquency adjudication when he was 15 years old, and the court rejected defendant's challenge to the assessment of points under that risk factor. We have repeatedly held, however, that a juvenile delinquency adjudication may not be considered a crime for purposes of assessing points in a SORA determination (*see People v Gibson*, 149 AD3d 1567, 1568 [4th Dept 2017]; *People v Brown*, 148 AD3d 1705, 1707 [4th Dept 2017]; *see also People v Campbell*, 98 AD3d 5, 12-13 [2d Dept 2012], *lv denied* 20 NY3d 853 [2012]). Consequently, we conclude that the court erred in considering defendant's juvenile delinquency adjudication in assessing 10 points under risk factor 8.

Defendant also contends that the court erred when it, in the alternative, adjudicated him a level three risk through application of an automatic override based on "a clinical assessment that the offender has a psychological, physical, or organic abnormality that decreases his ability to control impulsive sexual behavior" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]; *see generally People v Cohen*, 232 AD3d 1207, 1207-1208 [4th Dept 2024]). We agree. It is well settled that "[t]he People bear the burden of proving the applicability of a particular override by clear and convincing evidence" (*People v Schiavoni*, 107 AD3d 773, 773 [2d Dept 2013], *lv denied* 21 NY3d 864 [2013]; *see* Correction Law § 168-n [3]; *People v Cobb*, 141 AD3d 1174, 1175 [4th Dept 2016]). Here, we conclude that there was no evidence in the record to support the court's conclusion that the aforementioned automatic override was applicable here. While the record supports the conclusion that defendant suffered from mental illness and that he exhibited impulsive behavior, there was no clinical assessment in the record establishing that his mental illness decreased his ability to control his behavior. Of note, neither the People nor the Board of Examiners of Sex Offenders requested that the court apply the automatic override here and, further, defendant never had the opportunity to oppose use of the override before the court decided to apply it.

Consequently, we conclude that the court erred in its alternative determination that defendant was a level three risk based on the automatic override.

Without the improperly assessed points under risk factor 8 and the automatic override, defendant is a presumptive level two risk. Under the circumstances of this case, we remit the matter to County Court for further proceedings to determine whether an upward or downward departure is warranted (*see Brown*, 148 AD3d at 1707; *see generally People v Weber*, 40 NY3d 206, 211-212 [2023]). Present—Lindley, J.P., Curran, Ogden, Nowak and Hannah, JJ.

107 The People of the State of New York, Respondent, v Lawren Goins, Appellant. [248 NYS3d 402]—Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered October 11, 2022. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree and attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]). Contrary to defendant's contention in his main brief, we conclude that defendant's waiver of the right to appeal was valid (*see People v Gaines*, 239 AD3d 1350, 1350 [4th Dept 2025]). Defendant's valid waiver of the right to appeal "precludes our review of his challenge to the severity of the sentence" (*id.* at 1351).

Contrary to defendant's further contention in the main brief, County Court did not fail to make an independent youthful offender determination (*cf. People v Hobbs*, 158 AD3d 1308, 1309 [4th Dept 2018]; *see generally* CPL 720.20 [1]), and the court was "not required to state, on the record, its reasons for denying defendant youthful offender status" (*People v Minemier*, 29 NY3d 414, 416 [2017]).

We have considered defendant's contentions in his pro se supplemental brief and conclude that they are without merit. Present—Lindley, J.P., Curran, Ogden, Nowak and Hannah, JJ.

108 The People of the State of New York, Respondent, v Scott A. Meyer, Appellant. [248 NYS3d 408]—

Crimes—Sentence—Penalty Assessment—Unduly Harsh and Severe Sentence—Third-Degree Burglary and Petit Larceny

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered August 31, 2023. The judgment convicted defendant upon his plea of guilty of burglary in the third degree and petit larceny.

It is hereby ordered that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for burglary in the third degree under count 1 of the indictment to an indeterminate term of 2 to 4 years, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25), defendant contends that he was denied effective assistance of counsel. To the extent that defendant's contention survives the guilty plea (*see People v Williams*, 105 AD3d 1428, 1428-1429 [4th Dept 2013], *lv denied* 21 NY3d 1021 [2013]), we conclude that it lacks merit. The record establishes that defendant received a favorable plea bargain and that defendant was afforded meaningful representation (*see People v Moore*, 229 AD3d 1279, 1279-1280 [4th Dept 2024]). We agree with defendant, however, that the sentence is unduly harsh and severe. Defendant's conviction arises from an incident in which he stole two cans of hard iced tea from a pharmacy; defendant had previously been served with a trespass notice relating to that pharmacy and was thus prohibited from entering it. We note that defendant has no history of violence and is an addict with mental health issues who steals to get money for drugs and alcohol. Under the circumstances of this case, we modify the judgment as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for burglary in the third degree under count 1 of the indictment to an indeterminate term of 2 to 4 years. Present—Lindley, J.P., Curran, Ogden, Nowak and Hannah, JJ.

109 The People of the State of New York, Respondent, v Kevin J. Weber, Appellant. [249 NYS3d 336]—

Crimes—Plea of Guilty—Voluntariness—Potential Conflict of Interest of Judge—Prior Prosecution on Unrelated Charge

Crimes—Right to Counsel—Effective Representation—Potential Conflict of Interest of Judge—Prior Prosecution on Unrelated Charge

Appeal from a judgment of the Genesee County Court (Melissa Lightcap Cianfrini, J.), rendered October 3, 2023. The judgment convicted defendant upon a plea of guilty of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that his plea was involuntarily entered because, inter alia, the judge who presided over the plea proceeding in County Court had previously prosecuted him on an unrelated crime and defendant did not fully appreciate the potential conflict of interest when he entered the plea. Defendant also contends that his plea was involuntary because he did not understand that a single violation of interim probation for failing a drug test could result in him being sentenced to state prison on the felony to which he had pleaded guilty.

As a preliminary matter, we note that, although defendant waived his right to appeal and the court's colloquy was consistent with the appropriate model colloquy (*see generally People v Thomas*, 34 NY3d 545, 567 [2019], *cert denied* 589 US 1302 [2020]), defendant's challenges to the voluntariness of the plea survive even a valid waiver of the right to appeal (*see People v McMurtry*, 224 AD3d 1310, 1310 [4th Dept 2024], *lv denied* 41 NY3d 984 [2024]; *People v Gimenez*, 59 AD3d 1088, 1088-1089 [4th Dept 2009], *lv denied* 12 NY3d 816 [2009]). Nevertheless, by failing to move to withdraw his plea or to vacate the judgment of conviction, defendant failed to preserve his contentions for our review (*see People v Santos*, 230 AD3d 1586, 1586 [4th Dept 2024], *lv denied* 43 NY3d 932 [2025]; *People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020], *lv denied* 36 NY3d 1100 [2021]). The narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]) does not apply here.

We note that the judge informed defendant that she had prosecuted him on an unrelated charge years earlier and gave defendant an opportunity to move for her recusal. Defendant acknowledged that the judge had previously prosecuted him and stated that he nonetheless wanted to accept the People's plea offer, pursuant to which he would have been allowed to vacate his plea to the felony had he successfully completed interim probation. Defendant declined the court's offer for an opportunity to discuss the matter with his attorney. Under the circumstances, we decline to exercise our power to address defendant's contentions as a matter of discretion in the interest of justice (*see CPL 470.15 [3] [c]*).

Defendant further contends that he was denied effective assistance of counsel because his attorney failed to object to the alleged conflict of interest arising from the judge's involvement in the case, failed to move to withdraw the plea on the basis of

that alleged conflict of interest, and failed to explain to defendant that a single violation of interim probation could have such significant carceral consequences. To the extent that defendant's claims of ineffective assistance survive his plea and valid waiver of the right to appeal (*see People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]), we conclude, after reviewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Gardner*, 237 AD3d 1545, 1547 [4th Dept 2025]).

We note that defense counsel negotiated a favorable plea agreement pursuant to which defendant, who had four prior felony convictions on his record and was captured on video brutally assaulting the victim in this case, would have been permitted to withdraw his plea to the felony and instead plead guilty to a misdemeanor with no more than a year in jail had he successfully completed interim probation (*see Gardner*, 237 AD3d at 1547). The fact that defendant subsequently violated the terms of the interim probation by using cocaine does not “cast[] doubt on the apparent effectiveness of defense counsel” (*id.* [internal quotation marks omitted]). Present—Lindley, J.P., Curran, Ogden, Nowak and Hannah, JJ.

110 In the Matter of Thomas J. Coates, Sr., Appellant, v Brianna L. Hodge, Respondent. [247 NYS3d 902]—

Parent, Child and Family—Custody—Initial Custody Determination—Effect of Relocation of Parent

Appeal from an order of the Family Court, Ontario County (Brian D. Dennis, J.), entered August 5, 2024, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded respondent sole legal custody and primary physical placement of the subject children.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, petitioner father appeals from an order awarding sole legal custody and primary physical placement of the children to respondent mother. We affirm.

Contrary to the father's assertion, this case involves an initial custody determination and thus it cannot properly be characterized as a relocation case to which the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied (*see Matter of Moore v Kazacos*, 89 AD3d 1546, 1546 [4th Dept 2011], *lv denied* 18 NY3d 806

[2012]; *Matter of Baker v Spurgeon*, 85 AD3d 1494, 1496 [3d Dept 2011], *lv dismissed* 17 NY3d 897 [2011]; *Matter of Schneider v Lascher*, 72 AD3d 1417, 1417 [3d Dept 2010], *lv denied* 15 NY3d 708 [2010]). The effect of the mother's relocation is therefore "but one factor among many" for Family Court to consider in making its custody determination (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272 [4th Dept 2012], *appeal dismissed* 19 NY3d 887 [2012], *appeal dismissed* 20 NY3d 1052 [2013]). The relevant issue is whether it is in the best interests of the children to reside primarily with the mother or the father (*see id.*; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]).

Contrary to the father's contention on appeal, the court's determination awarding sole legal custody and primary physical placement of the children to the mother is supported by a sound and substantial basis in the record and should not be disturbed (*see Matter of Hochreiter v Williams*, 201 AD3d 1303, 1304 [4th Dept 2022]; *Matter of Hermann v Williams*, 179 AD3d 1545, 1546 [4th Dept 2020]; *see also Matter of Castle v Barnes*, 221 AD3d 1562, 1563 [4th Dept 2023], *lv denied* 41 NY3d 901 [2024]). Present—Lindley, J.P., Curran, Ogden, Nowak and Hannah, JJ.

111 *Matter of Thomas J. Barnes*, a Suspended Attorney, Resignor. [247 NYS3d 864]—*Matter of Thomas J. Barnes*, a Suspended Attorney, Resignor.—Order entered accepting resignation and striking name from the roll of attorneys pursuant to 22 NYCRR 1240.10. Present—Curran, J.P., Bannister, Montour, Greenwood and Hannah, JJ. (Filed Jan. 20, 2026.)

112 *Matter of Daniel A. DeRose*, an Attorney, Resignor. [248 NYS3d 388]—*Matter of Daniel A. DeRose*, an Attorney, Resignor.—Order entered accepting resignation and striking name from the roll of attorneys pursuant to 22 NYCRR 1240.10. Present—Curran, J.P., Bannister, Montour, Greenwood and Hannah, JJ. (Filed Jan. 20, 2026.)

113 *Matter of Steven Boyd Alderman*, a Disbarred Attorney, for Reinstatement to the Practice of Law in the State of New York. [247 NYS3d 864]—*Matter of Steven Boyd Alderman*, a Disbarred Attorney, for Reinstatement to the Practice of Law in the State of New York.—Order entered denying application for reinstatement to the practice of law. Present—Lindley, J.P., Ogden, Nowak, DelConte and Keane, JJ. (Filed Dec. 24, 2025.)

114 In the *Matter of City of Buffalo*, Respondent, v Darryl J. Carr, Appellant. [247 NYS3d 905]—In the *Matter of City of*

Buffalo, Respondent, v Darryl J. Carr, Appellant—Motion for leave to appeal to the Court of Appeals denied. Present—Whalen, P.J., Lindley, Montour and Ogden, JJ.

115 The People of the State of New York, Respondent, v Samuel Diaz, Appellant. [248 NYS3d 403]—The People of the State of New York, Respondent, v Samuel Diaz, Appellant.—Motion for leave to appeal to the Court of Appeals denied. Present—Whalen, P.J., Bannister, Smith, Nowak and DelConte, JJ.

116 In the Matter of Joseph Roesch, Appellant, v Office of the Executive Director et al., Respondents. [247 NYS3d 906]—In the Matter of Joseph Roesch, Appellant, v Office of the Executive Director et al., Respondents.—Motion for reargument denied. Present—Whalen, P.J., Lindley, Montour and Nowak, JJ.

117 The People of the State of New York, Respondent, v Demetris Coleman, Appellant. [247 NYS3d 912]—The People of the State of New York, Respondent, v Demetris Coleman, Appellant.—Motion for reargument denied and for a stay of judgment dismissed. Present—Curran, J.P., Bannister, Ogden, DelConte and Hannah, JJ.

118 In the Matter of Jon Z. and Another, for the Appointment of a Guardian of the Property and/or Person of Margaret Z., an Alleged Incapacitated Person. John Z., Appellant; Theresa M. Girouard, Esq., Appointed Guardian for Margaret Z., an Alleged Incapacitated Person, Respondent. [247 NYS3d 912]—In the Matter of Jon Z. and Another, for the Appointment of a Guardian of the Property and/or Person of Margaret Z., an Alleged Incapacitated Person. John Z., Appellant; Theresa M. Girouard, Esq., Appointed Guardian for Margaret Z., an Alleged Incapacitated Person, Respondent.—Motion for reargument denied. Present—Bannister, J.P., Montour, Smith, Greenwood and Hannah, JJ.

119 In the Matter of Joshua Bouck, Respondent, v New York State Department of Motor Vehicles, Appellant. [247 NYS3d 906]—In the Matter of Joshua Bouck, Respondent, v New York State Department of Motor Vehicles, Appellant.—Motion for leave to appeal to the Court of Appeals denied. Present—Whalen, P.J., Smith, Greenwood, DelConte and Hannah, JJ.

120 The People of the State of New York, Respondent, v Jason A. Chabot, Appellant. [247 NYS3d 906]—The People of the State of New York, Respondent, v Jason A. Chabot, Appellant.—Motion for reargument denied. Present—Lindley, J.P., Curran, Ogden, Nowak and Hannah, JJ.

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agreement, including a paragraph which acknowledged that defendants had the option to distribute funds to the authorized class members. Even though this was also subject to the other terms of the agreement, as well as the preliminary and final approval orders, there were no provisions or language contained therein which prohibited this arrangement. By depositing a portion of the “Gross Settlement Sum” with the claims administrator to distribute to class counsel and the named plaintiffs, while also providing pre-written settlement checks to the authorized class members, defendants had given meaning to the terms of the agreement that authorized both the claims administrator and defendants to “distribute funds.” *O'Brien v Sagbolt LLC*, 246 AD3d 111.

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9. Interim Suspension.—Respondent was immediately suspended from the practice of law on an interim basis until further order of the Court based upon his failure to comply with the lawful investigative demands of the Attorney Grievance Committee, as well as the delinquency in his attorney registration (22 NYCRR 1240.9 [a] [3]; Judiciary Law § 468-a). *Matter of Biniakewitz*, 246 AD3d 126.

10. Public Censure.—Pursuant to the reciprocal disciplinary provision of 22 NYCRR 1240.13, respondent was publicly censured based upon similar discipline imposed by the Supreme Court of New Jersey stemming from respondent's representation of a client in a personal injury lawsuit against the State of New Jersey. Respondent failed to inform his client that he had filed a claim against that State; respond to a letter from the client requesting an update; seek to withdraw as counsel despite advising the client that he was not certain that the client had much of a case any longer; fulfill the State's request for medical records; depose the client's treating physician; and either follow up with the client regarding the State's summary judgment motion or file opposition. Public censure was the appropriate discipline as it was commensurate with the Appellate Division, First Department's precedent, balanced the seriousness of the misconduct against respondent's unblemished disciplinary record, and reflected respondent's failure to inform the Court or Attorney Grievance Committee about his New Jersey discipline. *Matter of Dratch*, 246 AD3d 122.

11. Public Censure.—Respondent attorney was guilty of professional misconduct arising from his second misdemeanor conviction of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). Notwithstanding that respondent accepted full responsibility for his actions, submitted character testimony showing that he was well regarded at work, was believed to have integrity, appeared to have supportive people in his life, and expressed genuine remorse, he did not continue to seek objective third-party support once his mandated remedial activities had been completed. Under the totality of the circumstances, respondent was publicly censured for the unlawful conduct which resulted in his conviction. *Matter of Kaminski*, 246 AD3d 62.

12. Public Censure.—Respondent attorney was guilty of professional misconduct based upon his convictions of aggravated driving while intoxicated and driving while intoxicated, both unclassified misdemeanors (Vehicle and Traffic Law § 1192 [2-a] [a]; [3]). Under the totality of the circumstances, including that respondent completed the terms of his sentencing, engaged in therapy, had remained sober, and secured rewarding nonlegal employment, and the absence of aggravating circumstances, respondent was publicly censured for his unlawful conduct. *Matter of Halton*, 246 AD3d 32.

13. Resignation.—Inasmuch as resignor's proffered resignation complied with the requirements of 22 NYCRR 1240.10 in that her affidavit attested that the resignation was submitted voluntarily, without coercion or duress, and with full awareness of the consequences, and she acknowledged that the Court's approval of the application would result in the entry of an order disbaring respondent, and that she could not successfully defend herself against pending charges of professional misconduct or additional charges of professional misconduct if they were predicated upon the matters under investigation, resignor's resignation was accepted and she was immediately disbarred. *Matter of Brody*, 246 AD3d 73.

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14. Suspension.—Respondent attorney committed professional misconduct by engaging in a pattern and practice of misappropriating client funds entrusted to him as a fiduciary, incident to his practice of law; commingling his personal funds with client funds in his escrow account; and failing to maintain the required book-keeping records for his escrow account (Rules of Prof Conduct [22 NYCRR 1200.0] rule 1.15 [a], [d]). In mitigation, respondent offered his remorse and lack of venality, evidence of his positive character, his pro bono work, and the remedial measures he had undertaken. In aggravation, respondent was previously publicly censured for, among other things, failing to satisfy a judgment for approximately three years and failing to retain funds for a lien after acknowledging the lien, and had also received a prior admonition and letter of advisement. Under the totality of the circumstances, respondent was suspended from the practice of law for a period of one year. *Matter of Plasse*, 246 AD3d 25.

15. Suspension.—Respondent attorney was suspended from the practice of law for a period of one year based upon findings that he neglected a legal matter entrusted to him, failed to keep his client reasonably informed about the status of the matter, failed to promptly comply with his client's reasonable requests for information, engaged in conduct prejudicial to the administration of justice and engaged in conduct adversely reflecting on his fitness as a lawyer (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.3 [b]; 1.4 [a] [3], [4]; 8.4 [d], [h]). The one-year suspension—requested by consent of the parties pursuant to 22 NYCRR 1240.8 (a) (5)—was warranted in view of respondent's admitted misconduct as well as the mitigating factors presented, including respondent's cooperation with the Attorney Grievance Committee, acknowledgment of his mistakes, and remorse, as well as the nature of respondent's practice which involved representing vulnerable individuals, and, as an aggravating factor, respondent's prior disciplinary history, which consisted of five admonitions, two letters of advisement, and two letters of caution, many of which were for similar conduct. *Matter of Mulhearn*, 246 AD3d 78.

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4. Failure to Procure Insurance—Required in Rental Agreement. *Markowitz v 420 Kent Ave., LLC*, 246 AD3d 716.
5. Loan Acquisition—Oral Agreement. *CS Leveraged Loan Funding 2021 LLC v Bank of Am., N.A.*, 246 AD3d 431.

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6. Equitable Estoppel—Notice of Claim Requirements. *Nicholas Indus. & Constr. Servs., Inc. v NASDI, LLC*, 246 AD3d 469.
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8. Willful Default—Refusal to Release Deposit under Assignment Agreement. *Thor 138 N. 6th St. LLC v Goldberg Weprin Finkel Goldstein LLP*, 246 AD3d 641.

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1. Piercing Corporate Veil.—Supreme Court correctly found that plaintiffs sufficiently met their burden for piercing the corporate veil so as to hold defendant parent company liable for defendant retailer's breach of an agreement under which defendant retailer, in exchange for assuming plaintiffs' adjacent retail space lease, was required to pay plaintiffs a specified monthly sum until it vacated possession of the premises. The evidence established that while each of defendant parent company's subsidiaries may have had its own profit and loss statements, the revenues from each of the subsidiaries were swept into a single account in the parent company's name at the end of each retail day. Thereby, defendants used a centralized cash management system, indicative of domination and control by the parent company, which rendered defendant retailer judgment-proof and unable to pay out on any of its obligations. In addition, the individual who signed the agreement was both the president of the parent company and also the president and only officer of defendant retailer, and the agreement was signed at substantially the same time as the lease assignment, which was signed and guaranteed by the parent company founder. All important papers, including payroll and service of process, were also directed to the parent company corporate offices for review and centralization of records. Defendant parent company then used its domination of defendant retailer to commit a wrong by stopping payments to plaintiffs under the agreement, causing defendant retailer to become judgment-proof, and then by dissolving the retailer after the action had been commenced, making plaintiffs' judgment nothing more than a pyrrhic victory. *Rich v J.A. Madison, LLC*, 246 AD3d 1.

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2. Documentary Evidence—Refuted Allegation of De Facto Merger. *Haji-Georgi v Wishner*, 246 AD3d 790.
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1. Absence of Notice of Appeal. *People v Rodney*, 246 AD3d 1382.
2. Constitutional Challenge to Weapon Possession Conviction. *People v Holley*, 246 AD3d 583.
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5. Invalid Waiver. *People v Doctor*, 246 AD3d 411.
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7. Invalid Waiver. *People v Marin*, 246 AD3d 669.
8. Invalid Waiver. *People v Tolentino*, 246 AD3d 1366.
9. Invalid Waiver—Suggestion That Right to Appeal Conditioned upon Going to Trial. *People v Cruz*, 246 AD3d 639.
10. Invalid Waiver of Right to Appeal—Discussed after Guilty Plea and Failed to Confirm Understanding. *People v Bassono*, 246 AD3d 936.
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13. Preservation of Issue for Review. *People v Battle*, 246 AD3d 825.
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19. Preservation of Issue for Review—Plea of Guilty. *People v Desino*, 246 AD3d 1406.
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21. Preservation of Issue for Review—Validity of Guilty Plea—Statements Made for Presentence Report. *People v T.D.*, 246 AD3d 588.
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- 23. Preservation of Issue for Review—Waiver of Right to Appeal. *People v Rayo-Lugo*, 246 AD3d 768.
- 24. Valid Waiver. *People v Brown*, 246 AD3d 666.
- 25. Valid Waiver. *People v DeWolf*, 246 AD3d 1476.
- 26. Valid Waiver. *People v Dotel*, 246 AD3d 476.
- 27. Valid Waiver. *People v Felix*, 246 AD3d 1369.
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- 30. Valid Waiver. *People v Jones*, 246 AD3d 517.
- 31. Valid Waiver. *People v Laws*, 246 AD3d 1367.
- 32. Valid Waiver. *People v Ortiz*, 246 AD3d 442.
- 33. Valid Waiver—Foreclosure of Review of Constitutional Challenges. *People v Hernandez*, 246 AD3d 578.
- 34. Valid Waiver—Monosyllabic Responses during Plea Colloquy. *People v Jones-Watkins*, 246 AD3d 1447.
- 35. Valid Waiver of Right to Appeal. *People v Annunziata*, 246 AD3d 755.
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- 37. Valid Waiver of Right to Appeal. *People v Caple*, 246 AD3d 826.
- 38. Valid Waiver of Right to Appeal. *People v Codett*, 246 AD3d 756.
- 39. Valid Waiver of Right to Appeal. *People v Diaz-Zuniga*, 246 AD3d 757.
- 40. Valid Waiver of Right to Appeal. *People v Harrington*, 246 AD3d 1113.
- 41. Valid Waiver of Right to Appeal. *People v Jackson*, 246 AD3d 765.
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- 43. Valid Waiver of Right to Appeal. *People v Portalatin*, 246 AD3d 833.
- 44. Valid Waiver of Right to Appeal. *People v Ransom*, 246 AD3d 768.
- 45. Valid Waiver of Right to Appeal. *People v Vergara*, 246 AD3d 836.
- 46. Valid Waiver of Right to Appeal. *People v Victor*, 246 AD3d 836.
- 47. Valid Waiver of Right to Appeal—Adequate Explanation. *People v Mejia*, 246 AD3d 828.
- 48. Valid Waiver of Right to Appeal—Adequate Explanation. *People v Perez*, 246 AD3d 830.
- 49. Valid Waiver of Right to Appeal—Aware of Waiver Prior to Guilty Plea. *People v Mejia*, 246 AD3d 828.
- 50. Valid Waiver of Right to Appeal—Defendant Informed That Some Issues Survive Waiver. *People v Wilson*, 246 AD3d 838.
- 51. Waiver—Challenge to Severity of Sentence Precluded. *People v Tatro*, 246 AD3d 1159.
- 52. Waiver—Constitutional Challenge to Firearm Licensing Scheme. *People v Johnson*, 246 AD3d 474.
- 53. Waiver—Demand of People as Condition to Plea Bargain. *People v Wright*, 246 AD3d 1383.
- 54. Waiver—Demand of Trial Court as Condition to Plea Bargain. *People v Williams*, 246 AD3d 1370.
- 55. Waiver—Validity. *People v Anthony*, 246 AD3d 1152.
- 56. Waiver—Validity—Court's Oral Colloquy Cured Overly Broad Language in Written Waiver. *People v Sweeney*, 246 AD3d 1163.

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- 57. Validity. *People v Sweeney*, 246 AD3d 1163.

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- 58. First-Degree Assault—Second-Degree Criminal Possession of Weapon—Weight of Evidence. *People v Williams*, 246 AD3d 1419.

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59. Serious Physical Injury—Protracted Impairment of Health Element. *People v Green*, 246 AD3d 636.

60. Sufficiency and Weight of Evidence—Intent. *People v Silva*, 246 AD3d 672.

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61. Intoxication. *People v Govan*, 246 AD3d 1442.

62. Suppression of Statements Made at Emergency Wing of Hospital Prior to Administration of *Miranda* Warnings. *People v Lerario*, 246 AD3d 1281.

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63. Sale of Cocaine—Ongoing Supplier Relationship—Sufficiency and Weight of Evidence. *People v Stanley*, 246 AD3d 1218.

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64. Weight of Evidence. *People v Bessette*, 246 AD3d 1310.

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65. Automatic Discovery—Possession by and Due Diligence of People. *People v Brinson*, 246 AD3d 1435.

66. Diligence—Reasonable Efforts to Ascertain Victim's Medical Records, Defendant's Video Calls and Jail Letters—Certificate of Compliance Not Illusory. *People v Harris*, 246 AD3d 1300.

67. Patrol Officer's Body-Worn Camera Footage Disclosed after Filing Certificate of Compliance—Due Diligence. *People v Stanley*, 246 AD3d 1218.

68. Remedies or Sanctions for Non-Compliance—Belated Disclosure of Criminal History of Accomplice. *People v Khauka*, 246 AD3d 1462.

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70. Defendant Involved Her Children in Events Surrounding Narcotics Transaction—Sufficiency and Weight of Evidence. *People v Stanley*, 246 AD3d 1218.

71. Enlargement of Alleged Time Frame to Conform to Period Delineated at Trial. *People v Nieves*, 246 AD3d 571.

72. Weight of Evidence—Motor Vehicle Collision. *People v Felix*, 246 AD3d 1372.

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73. Excited Utterances—Statement Made by Shooting Victim Shortly after Being Shot. *People v Barry*, 246 AD3d 523.

74. Manslaughter—Child Victim's Hearsay Statements to School Social Worker Not Admitted for Their Truth—Right of Confrontation Not Implicated. *People v Harris*, 246 AD3d 1293.

75. Photographic Evidence—Depraved Indifference Murder—Intubated Victim—Accurate Photos Not Introduced Solely to Inflame Jury's Emotions and Multiple Cautionary Instructions Given. *People v Cox*, 246 AD3d 1308.

76. Photographs Depicting Social Media Messages Sent to Victim—Authentication. *People v Jones*, 246 AD3d 1375.

77. Police Body Camera Footage Containing Hearsay Statements. *People v Darbasie*, 246 AD3d 524.

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78. Judge Questioning Witnesses—Function and Appearance as Advocate. *People v Morales*, 246 AD3d 941.

79. Prosecutor's Statements. *People v Williams*, 246 AD3d 769.

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80. Incapacitation. *People v Petty*, 246 AD3d 831.

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- 81.** Confirmatory Identification by Victim. *People v Armstrong*, 246 AD3d 1434.
- 82.** Lineup. *People v Garcia*, 246 AD3d 521.
- 83.** Photographic Array—Undue Suggestiveness. *People v Govan*, 246 AD3d 1442.

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- 84.** Validity of Waiver—Oral Agreement at Virtual Appearance—Court Initialed Waiver on Defendant's Behalf. *People v Black*, 246 AD3d 441.

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- 85.** Sufficiency of Evidence—Social Media Posts. *People v Darbasie*, 246 AD3d 524.

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- 86.** Response to Inquiry—Social Media Posts of Defendant. *People v Darbasie*, 246 AD3d 524.

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- 87.** Weight of Evidence. *People v Swanton*, 246 AD3d 1441.

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- 88.** Typographical Error in Petition. *Matter of J.W.*, 246 AD3d 551.

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- 89.** Criminally Negligent Homicide. *People v Harris*, 246 AD3d 1293.
- 90.** Manslaughter. *People v Wright*, 246 AD3d 1429.

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- 91.** Child Victim Abused by Mother's Boyfriend—Sufficiency and Weight of Evidence. *People v Harris*, 246 AD3d 1293.

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- 92.** Attempt—Weight of Evidence—Victim Shot in Face during Domestic Incident. *People v Lerario*, 246 AD3d 1281.
- 93.** Depraved Indifference Murder—Multiple Organ Failure Due to Hypothermia. *People v Cox*, 246 AD3d 1308.

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- 94.** Did Not Credit for Jail Time Served. *People v Sosa*, 246 AD3d 943.
- 95.** Exceeded Maximum Period Permissible. *People v Vergara*, 246 AD3d 836.
- 96.** Failure to Credit for Jail Time Served—Exceeded Maximum Time Limit. *People v Dickey*, 246 AD3d 757.

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- 97.** Enforcement of Agreement—Enhanced Sentence—Failure to Appear for Pre-sentence Investigation and for Original Sentencing Date. *People v Woody*, 246 AD3d 1160.
- 98.** Enforcement of Agreement—Surcharge and Fees. *People v Rodriguez*, 246 AD3d 638.
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- 101.** Condition to Return to Court. *People v Rodriguez*, 246 AD3d 412.
- 102.** Forfeiture of Right to Raise Issues on Appeal. *People v Rayo-Lugo*, 246 AD3d 768.

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103. Forfeiture of Right to Raise Issues on Appeal—Discovery-Related Contention. *People v Ellison*, 246 AD3d 1408.

104. Sufficiency of Allocution. *People v Clark*, 246 AD3d 1150.

105. Sufficiency of Allocution. *People v Woody*, 246 AD3d 1160.

106. Sufficiency of Allocution—Monosyllabic Responses. *People v Jones-Watkins*, 246 AD3d 1447.

107. Voluntariness—Coercion by Defense Counsel. *People v Govan*, 246 AD3d 1442.

108. Voluntariness—Potential Conflict of Interest of Judge—Prior Prosecution on Unrelated Charge. *People v Weber*, 246 AD3d 1508.

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109. Attempt—Indictment Not Jurisdictionally Defective. *People v Woody*, 246 AD3d 1160.

110. Constitutional Challenge to Firearm Licensing Scheme. *People v Jackson*, 246 AD3d 827.

111. Constitutional Challenge to Firearm Licensing Scheme. *People v Johnson*, 246 AD3d 474.

112. Constitutional Challenge to Firearm Licensing Scheme. *People v Smalls*, 246 AD3d 526.

113. Constitutional Challenge to Firearm Licensing Scheme—Standing. *People v Ortiz*, 246 AD3d 522.

114. Constitutional Challenge to Firearms Licensing Scheme. *People v Ramos*, 246 AD3d 519.

115. Constitutional Challenge to Gun Licensing Scheme. *People v Peguero*, 246 AD3d 668.

116. Second-Degree Criminal Possession of Weapon—Sufficiency of Evidence—Place of Business of Defendant—Possession of Appropriate Firearm Licence. *People v Wyatt*, 246 AD3d 1448.

117. Second-Degree Criminal Possession of Weapon—Weight of Evidence. *People v Walsh*, 246 AD3d 1395.

118. Sufficiency of Indictment—Operability—Citation to Name of Statute. *People v Porter*, 246 AD3d 477.

119. Weight of Evidence. *People v Brinson*, 246 AD3d 1435.

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120. Sufficiency and Weight of Evidence. *People v Harris*, 246 AD3d 1300.

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121. Morphed Image of Identifiable Minor. *People v Lewis*, 246 AD3d 621.

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122. Balance between Probative Value and Prejudice. *People v Shen Yang*, 246 AD3d 839.

123. Past Sex Crime. *People v Nieves*, 246 AD3d 571.

124. Testimony of Uncharged Sexual Abuse—Inextricably Interwoven and Necessary Background Information. *People v Jackson*, 246 AD3d 761.

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125. Sufficiency and Weight of Evidence. *People v DeLaRosa*, 246 AD3d 576.

126. Sufficiency and Weight of Evidence—Physically Helpless—Sleep. *People v Qatabi*, 246 AD3d 581.

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127. Assignment of New Counsel—Failure to Correct Mistake Regarding Sex Offender Risk Assessment. *People v Hall*, 246 AD3d 840.

128. Effective Representation. *People v Harris*, 246 AD3d 1300.

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129. Effective Representation—Absence during Proffer Session. *People v Anonymous*, 246 AD3d 573.

130. Effective Representation—Appropriate Opening and Closing Remarks, Thorough Direct and Cross-Examination during Trial and Cogent Defense Theory. *People v Besette*, 246 AD3d 1310.

131. Effective Representation—Challenge to Expert Testimony—Child Sexual Abuse Accommodation Syndrome—Cross-Examination of Police Investigators. *People v Jones*, 246 AD3d 1375.

132. Effective Representation—Court's Failure to Conduct Hearing on Motion to Vacate. *People v Thompson*, 246 AD3d 833.

133. Effective Representation—Declining to Request Lesser Included Charge. *People v Thompson*, 246 AD3d 833.

134. Effective Representation—Failure to Call Expert Witness—Intoxication Defense—Domestic Violence Incident. *People v Lerario*, 246 AD3d 1281.

135. Effective Representation—Failure to Request Limiting Instruction. *People v Williams*, 246 AD3d 1419.

136. Effective Representation—Failure to Request Specific Response to Jury Note. *People v Qatabi*, 246 AD3d 581.

137. Effective Representation—Plea of Guilty. *People v Williams*, 246 AD3d 1370.

138. Effective Representation—Potential Conflict of Interest of Judge—Prior Prosecution on Unrelated Charge. *People v Weber*, 246 AD3d 1508.

139. Effective Representation—Unlawful Police Encounter. *People v Wyatt*, 246 AD3d 1448.

140. Substitution. *People v Stanford*, 246 AD3d 1393.

141. Valid Waiver—Searching Inquiry. *People v Petty*, 246 AD3d 831.

142. Withdrawal of Counsel—Failure of Brief to Adequately Analyze Potential Appellate Issues. *People v Davis*, 246 AD3d 937.

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143. Ability to Proceed on Another Charge. *People v Hunt*, 246 AD3d 1391.

144. Certificate of Compliance—Exercise of Due Diligence. *People v Jackson*, 246 AD3d 761.

145. Failure of Trial Court to Explicitly Rule on Alleged Periods of Delay. *People v Hunt*, 246 AD3d 1391.

146. Motion to Dismiss Indictment on Statutory Grounds—Initial Burden. *People v Felix*, 246 AD3d 1372.

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147. Sidebar Conference. *People v Harris*, 246 AD3d 1293.

148. Waiver—Voor Dire Sidebars. *People v Qatabi*, 246 AD3d 581.

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149. Sufficiency and Weight of Evidence—Identification. *People v Khauka*, 246 AD3d 1462.

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150. Concurrent and Consecutive Terms—Failure to Establish Convictions Separate and Distinct. *People v Whittingham*, 246 AD3d 837.

151. Concurrent and Consecutive Terms—Predicate Felony. *People v Swanton*, 246 AD3d 1441.

152. Concurrent and Consecutive Terms—Simple Weapon Possession—Possession of Weapon before Forming Specific Intent. *People v Williams*, 246 AD3d 1419.

153. Domestic Violence Survivors Justice Act—Failure to Show Victim of Domestic Violence at Time of Offense. *People v Molyneaux*, 246 AD3d 940.

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- 154. Harsh or Excessive Sentence—Mental Illness. *People v T.D.*, 246 AD3d 588.
- 155. Mandatory Surcharge and Fees. *People v Herring*, 246 AD3d 761.
- 156. Merging of Postrelease Supervision Terms. *People v Jones*, 246 AD3d 517.
- 157. Penalty Assessment—Unduly Harsh and Severe Sentence—Third-Degree Burglary and Petit Larceny. *People v Meyer*, 246 AD3d 1507.
- 158. Persistent Violent Felony Offender. *People v Harris*, 246 AD3d 1300.
- 159. Presentence Investigation and Report. *People v Rodriguez*, 246 AD3d 412.
- 160. Probation—Conditions. *People v Brown*, 246 AD3d 666.
- 161. Probation—Conditions. *People v Hernandez*, 246 AD3d 578.
- 162. Probation—Conditions. *People v Holley*, 246 AD3d 583.
- 163. Probation—Conditions. *People v McArn*, 246 AD3d 574.
- 164. Probation—Conditions. *People v Pacha*, 246 AD3d 575.
- 165. Probation—Conditions. *People v Vega*, 246 AD3d 579.
- 166. Probation—Consent to Search. *People v Gardner*, 246 AD3d 667.
- 167. Probation—Curfew—Crime Took Place at Night. *People v Ortiz*, 246 AD3d 442.
- 168. Probation—Mandatory Surcharge and Court Fees. *People v Brown*, 246 AD3d 577.
- 169. Probation—Revocation. *People v Castiglione*, 246 AD3d 1401.
- 170. Probation—Surcharge and Fees. *People v Mazyck*, 246 AD3d 520.
- 171. Probation—Violation of Conditions of Interim Probation—Burden of Proof. *People v Baker*, 246 AD3d 1474.
- 172. Resentencing under Domestic Violence Survivors Justice Act. *People v Welch*, 246 AD3d 1411.
- 173. Surcharge and Fees. *People v Bassono*, 246 AD3d 936.
- 174. Surcharge and Fees. *People v Benjamin*, 246 AD3d 621.
- 175. Youthful Offender. *People v M.O.*, 246 AD3d 476.
- 176. Youthful Offender—Armed Felony Offense. *People v Pringle*, 246 AD3d 1409.
- 177. Youthful Offender—Failure to Make Determination Despite Eligibility. *People v Smith*, 246 AD3d 942.
- 178. Youthful Offender—Mandatory Surcharges and Fees. *People v J.W.*, 246 AD3d 475.
- 179. Youthful Offender—Violent Gang-Related Offenses. *People v Green*, 246 AD3d 636.

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- 180. Civil Commitment or Supervision—Dangerous Sex Offender Requiring Confinement—Weight of Evidence. *Matter of John H. v State of New York*, 246 AD3d 1452.
- 181. Sex Offender Registration Act—Automatic Override—Clinical Assessment Establishing Mental Illness Decreased Ability to Control Behavior. *People v Singleton*, 246 AD3d 1505.
- 182. Sex Offender Registration Act—Behavior while Incarcerated Insufficient for Downward Departure. *People v Eastwood*, 246 AD3d 770.
- 183. Sex Offender Registration Act—Challenge to Assessment of Points for Drug or Alcohol Abuse and Number and Nature of Prior Crimes Risk Factors. *People v Butler*, 246 AD3d 1153.
- 184. Sex Offender Registration Act—Defendant Pleaded Guilty to Federal Charge of Enticement of Minors to Engage in Sexual Activity—Upward Departure from Presumptive Risk Level One Justified—Aggravating Factors. *People v McGeoch*, 246 AD3d 1156.

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185. Sex Offender Registration Act—Downward Departure. *People v Gardner*, 246 AD3d 771.

186. Sex Offender Registration Act—Downward Departure. *People v Mishk*, 246 AD3d 944.

187. Sex Offender Registration Act—Downward Departure Declined. *People v Camacho*, 246 AD3d 442.

188. Sex Offender Registration Act—Guilty Plea to Federal Crimes of Travel with Intent to Engage in Illicit Sexual Conduct and Transfer of Obscene Material to Minors—Upward Departure to Risk Level Two. *People v Sandikci*, 246 AD3d 1210.

189. Sex Offender Registration Act—Mitigating Factors Insufficient for Downward Departure. *People v Boone*, 246 AD3d 1116.

190. Sex Offender Registration Act—Modification. *People v Jackson*, 246 AD3d 444.

191. Sex Offender Registration Act—Modification of Risk Level. *People v Johnson*, 246 AD3d 518.

192. Sex Offender Registration Act—Receipt and Possession of Child Pornography—Denial of Downward Departure from Risk Level Two Not Abuse of Discretion Given Abhorrent and Graphic Nature of Images. *People v Butler*, 246 AD3d 1153.

193. Sex Offender Registration Act—Risk Assessment. *People v Gardner*, 246 AD3d 771.

194. Sex Offender Registration Act—Risk Factor Assessment—Juvenile Delinquency Adjudication. *People v Singleton*, 246 AD3d 1505.

195. Sex Offender Registration Act—Upward Departure. *People v Davies*, 246 AD3d 1480.

196. Sex Offender Registration Act — Sexually Violent Offender — As-Applied Due Process Challenge to Foreign Registration Clause.—The foreign registration clause of Correction Law § 168-a (3) (b), insofar as applied to defendant designating him a sexually violent offender as a result of criminal conduct that occurred outside of New York, and would not otherwise have resulted in such designation if the same conduct occurred within the state, violated state and federal constitutional guarantees of substantive due process. The foreign registration clause defines a “sexually violent offense” as a “conviction of a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred” (Correction Law § 168-a [3] [b]). Defendant’s out-of-state conviction did not include all of the essential elements of any of the enumerated sexually violent offenses set forth in Correction Law § 168-a (3) (a). Designating a defendant as sexually violent merely because he or she had an out-of-state sex conviction requiring out-of-state registration, regardless of whether that underlying offense is violent, bears no rational relationship to the legitimate governmental interest of informing the public of threats posed by sex offenders. In addition, the requirements of federal law are fulfilled by requiring out-of-state sex offenders to register as sex offenders when they move into New York according to their appropriate risk level. The requirement that an out-of-state sex offender’s status automatically transmutes into that of a sexually violent offender simply by virtue of moving to New York is not rationally related to any federal requirement. *People v Edwards*, 246 AD3d 37.

UNLAWFUL SEARCH AND SEIZURE.

197. Double Parking—Approach and Subsequent Search of Vehicle. *People v Jones*, 246 AD3d 517.

198. Impoundment of Vehicle and Subsequent Inventory Search—Failure to Establish Public Safety or Community Caretaking Interests. *People v McClarin*, 246 AD3d 1114.

199. Matched Description from Anonymous Tip—Unusual Behavior. *People v Porter*, 246 AD3d 477.

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200. Physical Evidence Recovered from Vehicle—Fruits of Unlawful Impoundment. *People v McClarin*, 246 AD3d 1114.

201. Reasonable Suspicion—Anonymous Tip. *People v Robinson*, 246 AD3d 1388.

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1. Forfeiture of Truck for Violation of Food Vending Codes — Excessive Fines.—In a proceeding under Administrative Code of City of NY §§ 17-321 (c) and 17-322 to forfeit defendant's truck for violation of food vending codes, plaintiff City of New York was not entitled to summary judgment because defendant raised material issues of fact as to whether the forfeiture was subject to and violated the Excessive Fines Clauses of the New York and United States Constitutions. The Excessive Fines Clauses prohibit a punitive forfeiture that is grossly disproportional to the gravity of a defendant's offense. The Health Department never sought to test any of the items being sold to determine if their contents posed a danger to the public, there was no evidence the Health Department ever received any complaints about defendant selling spoiled or tainted food, there was no evidence that the Health Department had decided that public safety required forfeiture of the vehicle, and there was no evidence that there were any "victims" of the sale of items from the vehicle or that the proceeds of the forfeiture would be distributed to them. Accordingly, defendant raised issues of fact as to whether the forfeiture was, at least in part, punitive. Further, defendant asserted that the vehicle was worth approximately \$40,000, in contrast to the fines which totaled \$2,600, and that plaintiff's possession of his vehicle had caused him extreme financial hardship. There was no evidence that the sale of the items at issue did cause or could have caused any harm. Therefore, defendant also raised issues of fact as to whether, if the excessive fines analysis did apply, the forfeiture would be grossly disproportionate to the offense. *City of New York v Jones*, 246 AD3d 16.

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1. Safety and Construction Defects. *Board of Mgrs. of 45 E. 22nd St. Condominium v 45 E. 22nd St. Prop. LLC*, 246 AD3d 655.

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2. Terms for Immediate Release. *People ex rel. Boksenbaum v Maginley-Liddie*, 246 AD3d 781.
3. Terms for Immediate Release from Incarceration. *People ex rel. Arpino v Franchi*, 246 AD3d 687.
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1. Emergency or Disaster Treatment Protection Act—Injuries from Intubation and Sedation as Result of COVID-19—Pressure Ulcer. *Madourie v Montefiore Med. Ctr.*, 246 AD3d 467.

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2. Emergency or Disaster Treatment Protection Act—Pandemic-Related Departure from Standard of Care—Pressure Ulcers. *Silva-Rios v New York Presbyt. Columbia Med. Ctr.*, 246 AD3d 416.
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8. Maintenance—Imputation of Income. *Shah v Shah*, 246 AD3d 983.
9. Maintenance—Termination of Husband's Obligation upon Wife's Cohabitation with Boyfriend—Ambiguous Conditions of Habitually Living with and Holding out as Spouse. *Llera v Llera*, 246 AD3d 1355.

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5. Personal Injury—Mislevelled Elevator. *Fino v Macy's Retail Holdings, Inc.*, 246 AD3d 1467.

6. Sidewalk Defect—Clause in Lease Covered Sidewalk. *Simeone v City of New York*, 246 AD3d 417.

7. Worksite Injury. *Siguencia v Hudson Cos. Inc.*, 246 AD3d 445.

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ADOLESCENT OFFENDERS.

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2. Removal to Family Court — Extraordinary Circumstances.—In a prosecution arising from allegations that defendant participated in a burglary when he was 17 years old, the People failed to demonstrate extraordinary circumstances existed as required to retain the matter in County Court (Youth Part) under CPL 722.23 (1) (d). The Legislature intended for adolescent offenders to be prosecuted in criminal court only in the most exceptional cases. As alleged in the criminal complaint, defendant and his codefendant stood accused of entering the dwelling of a relative and stealing unsecured firearms, which they then sold. The relative was not home at the time and they did not forcibly enter the home. Rather, the codefendant—who was a willing and able participant—utilized the garage door code he had been entrusted with and they entered the home together, without causing damage to or destruction of property. Defendant also did not go on to use the firearms in the commission of some other crime nor were the firearms used by another in the commission of a crime. Instead, the firearms were sold, and then located by law enforcement not long after the sales. These facts did not present one of the extremely rare and exceptional cases as was contemplated by the Legislature in enacting the governing legislation. *People v Aaron VV.*, 246 AD3d 131.

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3. Placement in Residential Facility—Detention Time Credit. *Matter of Zyair M.*, 246 AD3d 1385.

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5. Sale, Disposition or Transfer of Auto Dealerships Barred as Well as Associated Real Estate during Pendency of Declaratory Judgment Action. *Darwish Auto Group, LLC v TD Bank, N.A.*, 246 AD3d 1332.

6. Undertaking. *Zwickel v Underhill Land LLC*, 246 AD3d 1351.

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3. Additional Insured Party—Unsigned Agreement. *A1 Specialized, Inc. v James Riv. Ins. Co.*, 246 AD3d 420.

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4. Coverage under Policy—Certificate of Insurance. *Itzhak v Briarwood Ins. Servs. Inc.*, 246 AD3d 466.

5. General Liability—Damage to Insured's Property. *Itzhak v Briarwood Ins. Servs. Inc.*, 246 AD3d 466.

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2. Vacatur—Failure to Tender Timely Payment under Stipulation of Settlement. *Sekosan v A Bronx Woman's Med. Pavillion P.C.*, 246 AD3d 547.

3. Vacatur—Interest of Justice. *GIT Capital, LLC v Alexis*, 246 AD3d 708.

4. Vacatur—Reasonable Excuse. *JPMorgan Chase Bank, N.A. v Toju Realty Corp.*, 246 AD3d 881.

5. Vacatur—Rebuttal of Showing of Proper Service. *Unitrin Safeguard Ins. Co. v Della-Noce*, 246 AD3d 448.

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8. Prior Action Dismissed on Merits. *Shaia v Saw Mill Capital, LLC*, 246 AD3d 1126.

9. Sane Set of Facts or Transactions—Prior Action Concerned Real Property Not at Issue. *Guzzetta v Messina*, 246 AD3d 879.

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12. Motion for Summary Judgment in Lieu of Complaint—Existence of Guaranty, Underlying Debt, and Guarantor's Failure to Perform. *Rego Park Lender LLC v Golyan*, 246 AD3d 674.

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13. Foreclosure and Sale—Stipulation Consenting to Summary Judgment. *Global Bank v 43 Mott Realty Owner, LLC*, 246 AD3d 658.

14. Lack of Personal Jurisdiction—No Time Limit on Motion. *Khusenov v Tur-sunova*, 246 AD3d 435.

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HOURS AND WAGES.

1. Executives' Right to Pursue Employer's Civil Liability under Labor Law Article 6.—The No Wage Theft Loophole Act (L 2021, ch 397) made it clear that there is no exception to an employer's civil liability under Labor Law §§ 193 and 198 for the unauthorized withholding of wages, benefits or wage supplements. Accordingly, in plaintiff executive's action against his former employer seeking attorneys' fees, costs, and liquidated damages for unpaid severance pay, Supreme Court erred in dismissing the cause of action under sections 193 and 198 based on Labor Law § 198-c (3)'s exclusion of certain executives from seeking criminal penalties against employers who fail to pay earned benefits or wage supplements. Supreme Court's decision was contrary to the Legislature's expressed intent to amend these rights-affirming statutes to impose civil liability for wage theft completely and without exception. Additionally, it directly conflicted with Labor Law § 198 (3)'s command that "[a]ll employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages." Sections 193 and 198 do not expressly exclude executives from the definition of employees. *Patel v Maybank Kim Eng Sec. USA Inc.*, 246 AD3d 104.

2. Failure to Provide Wage Notices—Compensation for Working Split Shifts and Spread of Hours—Sufficiency of Pleading. *Gregg v Community Care Companions, Inc.*, 246 AD3d 1495.

3. Failure to Provide Wage Notices—Standing to Sue. *Gregg v Community Care Companions, Inc.*, 246 AD3d 1495.

4. Liability of Corporate Officers for Violations—Control over Day-to-Day Operations. *Gregg v Community Care Companions, Inc.*, 246 AD3d 1495.

5. No Wage Theft Loophole Act—Retroactive Application. *Fisher v Hudson Hall LLC*, 246 AD3d 434.

6. Severance Pay—Private Right of Action. *Alvarado v Local 1549—N.Y.C. Clerical Admin. Empls.*, 246 AD3d 555.

7. Unpaid Overtime—Sufficiency of Pleading. *Fisher v Hudson Hall LLC*, 246 AD3d 434.

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8. Construction Project—Elevation-Related Hazard—Collapse of Floating Ceiling. *Fernandez v Sub 412 Assoc., LLC*, 246 AD3d 614.

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9. Contractual Right to Control Work—General Responsibility for Site Safety. *Coronel v Marcal Contr. Co., LLC*, 246 AD3d 403.

10. Control of Means and Method of Work. *Viana v All Is. Recycle & Rubbish Removal*, 246 AD3d 846.

11. Dangerous Condition—Constructive Notice. *Viana v All Is. Recycle & Rubbish Removal*, 246 AD3d 846.

12. Demolition Laborer—Elevation-Related Hazard—Pipe Falling from Ceiling. *Butler v Marco Realty Assoc., L.P.*, 246 AD3d 610.

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14. Elevation-Related Hazard—Fall from Dumpster while Securing Tarp to Sides. *Carreno v Chelsea Leaf S. Hous. Dev. Fund Corp.*, 246 AD3d 558.

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- 39. Joint Custody. *Matter of Rodney W. v Uchechi C.*, 246 AD3d 681.
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- 41. Judicial Notice of Prior Proceedings. *Matter of Olmsted v Olmsted*, 246 AD3d 1466.
- 42. Modification. *Matter of Luisanny A. v Jonathan C.*, 246 AD3d 651.
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64. Imputed Income—Derived from Tax Return. *Matter of Stanley v Lomax*, 246 AD3d 932.

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69. Abandonment—One-Time Contact with Child through Third Party. *Matter of Raven Bless C. (Tirek C.)*, 246 AD3d 722.

70. Best Interests Analysis—Freeing Child for Adoption by Foster Parents. *Matter of Carlos J.G.W. (Carlos G.)*, 246 AD3d 745.

71. Desire to Keep Children Together. *Matter of N.N. (Delroy N.)*, 246 AD3d 619.

72. Nonmarital Parent's Consent for Adoption of Child in Foster Care — Retroactivity of Statutory Amendment.—The amendment of Domestic Relations Law § 111 to require consent for adoption by any nonmarital parent who has executed an unrevoked acknowledgment of parentage or filed an unrevoked notice of intent to claim parentage of a child in foster care should be given retroactive effect. Accordingly, in a proceeding seeking to terminate respondent nonmarital father's parental rights in which the fact-finding and disposition were still being litigated at the time the amendment went into effect, respondent's failure to provide financial support after the child entered foster care could not constitute grounds for finding that he was only entitled to notice of the proceeding and precluded from being heard on the permanent neglect petition as it pertained to him. The amendment did away with the necessity for some parents with children in foster care to establish that in addition to having visited or regularly communicated with the child that they made payments to the foster care agency caring for the child. The legislature acknowledged that this requirement resulted in noncompliant or unknowing parents permanently losing their parental rights by being relegated to receiving only notice of the termination proceedings. The express purpose of the amendment was to correct how the law applied to nonmarital parents and was "effective immediately," indicating a sense of urgency that should be effectuated through retroactive application. *Matter of C.C. (D.C.)*, 246 AD3d 84.

73. Permanent Neglect—Adoption by Foster Parents. *Matter of N.N. (Delroy N.)*, 246 AD3d 619.

74. Permanent Neglect—Appealability of Order Entered on Consent. *Matter of Ragnar B.-N. (Gary B.-N.)*, 246 AD3d 1438.

75. Permanent Neglect—Continued Use of Illicit Drugs—Failure to Plan for Future of Children. *Matter of Aiden E. (Tiffany D.)*, 246 AD3d 1262.

76. Permanent Neglect—Default Judgment—Reasonable Excuse. *Matter of K.C. (K.M.)*, 246 AD3d 430.

77. Permanent Neglect—Diligent Efforts by Agency. *Matter of K.C. (K.M.)*, 246 AD3d 430.

78. Permanent Neglect—Diligent Efforts of Agency. *Matter of Amiyah C. (Marcus C.)*, 246 AD3d 1481.

79. Permanent Neglect—Diligent Efforts of Agency. *Matter of F.S.W. v A.F.M.*, 246 AD3d 550.

80. Permanent Neglect—Diligent Efforts of Agency. *Matter of Noah P. (Anthony F.)*, 246 AD3d 1398.

81. Permanent Neglect—Diligent Efforts of Agency to Encourage and Strengthen Parental Relationship—Mother Failed to Substantially Plan for Child's Future. *Matter of Alisha SS. (Zuhra SS.)*, 246 AD3d 1265.

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84. Permanent Neglect—Failure to Plan for Child's Return. *Matter of Carlos J.G.W. (Carlos G.)*, 246 AD3d 745.

85. Permanent Neglect—Failure to Plan for Future of Child. *Matter of Amiyah C. (Marcus C.)*, 246 AD3d 1481.

86. Permanent Neglect—Failure to Plan for Future of Child. *Matter of Noah P. (Anthony F.)*, 246 AD3d 1398.

87. Permanent Neglect—Failure to Plan for Return of Child. *Matter of Storm A.H. (Jahmel W.)*, 246 AD3d 803.

88. Permanent Neglect—Parent's Failure to Complete Programs or Visit Child Consistently. *Matter of F.S.W. v A.F.M.*, 246 AD3d 550.

89. Permanent Neglect—Suspended Judgment. *Matter of Dax S. (Sunshine P.)*, 246 AD3d 1386.

90. Permanent Neglect—Suspended Judgment. *Matter of Noah P. (Anthony F.)*, 246 AD3d 1398.

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92. Modification—Additional and More Definite Parenting Time Schedule for Mother. *Matter of Natalie F. v Nicholas G.*, 246 AD3d 1275.

93. Modification Due to Change of Circumstances—Move out of State. *Matter of D.B. v S.P.*, 246 AD3d 556.

94. Oldest Child Estranged from Mother Due to Acrimonious Relationship Seeking Visitation with Sibling—Mother's Appeal Dismissed as Untimely. *Matter of Janey B. v Jill C.*, 246 AD3d 1261.

95. Supervised Parental Access. *Matter of Viola J. v Baron A.*, 246 AD3d 804.

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2. Wrongful Death—Failure to Obtain Letters of Administration from Decedent's Estate. *Larson v Shore View Rehabilitation & Nursing Ctr.*, 246 AD3d 888.

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4. Disclosure Exemptions—Family Court—Records Related to Pregnancy. *Matter of Borrero v New York City Dept. of Social Servs. Freedom of Info. Law Off.*, 246 AD3d 402.

5. Extensions of Anticipated Date of Production—Exceeded Statutorily Permitted 20 Business Days. *Matter of Wagner v New York City Dept. of Health & Mental Hygiene*, 246 AD3d 748.

6. Failure to Inform of Further Administrative Review—Excused Obligation to Exhaust Administrative Remedies. *Matter of Wagner v New York City Dept. of Health & Mental Hygiene*, 246 AD3d 748.

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SEALING OF RECORDS UPON TERMINATION OF CRIMINAL ACTION IN FAVOR OF ACCUSED.

8. Videotaped Interview by Independent Victims' Assistance Agency.—Respondent father was not entitled to an order precluding petitioner Administration for Children's Services from introducing videotaped interviews of his two daughters conducted at a child advocacy center (CAC) by an independent victims' assistance agency employee as evidence in a Family Court Act article 10 proceeding alleging that he sexually abused both daughters, which was commenced after criminal sex abuse charges were dismissed due to lack of witness cooperation. CPL 160.50 (1) (c) specifies that, where a criminal action or proceeding terminates in favor of the accused, "all official records and papers . . . relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed." Neither petitioner nor the victims' assistance agency are included in this list of entities in section 160.50 (1) (c), and petitioner has a different mission and a different burden of proof. Nor were the videos "official records and papers" related to respondent's arrest or prosecution, notwithstanding that the interviews were observed by a multidisciplinary task force involving multiple law enforcement and non-law enforcement actors. As permitted by Social Services Law § 423-a (2) (f), the forensic interviews were made in the CAC's regular course of business as an initial information-gathering process, not inherently tied to any arrest or prosecution that might follow. Moreover, while the videotaped interviews are confidential under section 423-a (5) (a), they "shall" be disclosed for the purpose of investigation, prosecution and/or adjudication in any relevant court proceeding. *Leah W. v Keith W.*, 246 AD3d 68.

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2. General Release—Obtained under Circumstances That Indicated Unfairness. *Dairy King, Inc. v Boar's Head Provisions Co., Inc.*, 246 AD3d 870.

3. Indication of Unfairness—Threat to Deny Approval of Sale of Distribution Route. *Sal Savasta, Inc. v Boar's Head Provisions Co., Inc.*, 246 AD3d 968.

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1. Statute of Frauds—Agreement to Stage House Predominantly Service-Oriented. *Montgomery v Emanon S. Corp.*, 246 AD3d 1064.

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See, also, CIVIL SERVICE; COLLEGES AND UNIVERSITIES, and other specific titles

STUDENTS.

1. Injury to Student—Constructive Notice of Abusive Propensities of Teacher. *BCVAWCH-Doe v Roman Catholic Archdiocese of N.Y.*, 246 AD3d 696.

2. Injury to Student—Sexual Abuse by Teacher—Actual and Constructive Notice of Teacher's Abusive Tendencies. *S.A.W. v Archdiocese of N.Y.*, 246 AD3d 451.

TEACHERS.

3. Placement of Unvaccinated Teachers on Leave with Pay. *Matter of Schneider v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 246 AD3d 811.

4. Placement of Unvaccinated Teachers on Leave with Pay. *Matter of Serragonzalez v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 246 AD3d 813.

SEPARATION.

See HUSBAND AND WIFE AND OTHER DOMESTIC RELATIONSHIPS

SLANDER.

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REGISTER OF CHILD ABUSE AND MALTREATMENT.

1. Petitioner Mother Brought Infant Child to Meet Abusive Father. *Matter of Brittany W. v Miles-Gustave*, 246 AD3d 491.

SPORTING EVENTS.

See THEATRES AND SHOWS

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CLAIM AGAINST STATE.

1. Permission to File Late Claim—Appearance of Meritorious Claim. *Mattison v State of New York*, 246 AD3d 1425.

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See CONTRACTS; FRAUDS, STATUTE OF

STATUTE OF LIMITATIONS.

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1. Scope of Authority under Town Law Chapter 153—Board Considered Overall Impact of Entire Project. *Matter of Orange & Rockland Utils., Inc. v Town Bd. of the Town of Clarkstown*, 246 AD3d 1095.

RETROACTIVE APPLICATION OF STATUTE.

2. Foreclosure Abuse Prevention Act—Contracts and Due Process Clauses. *DLJ Mtge. Capital, Inc. v Adler*, 246 AD3d 461.
3. Foreclosure Abuse Prevention Act—No Violation of Takings Clauses of Federal and State Constitutions—Vested Interest in Property Subject to Compensation Not Secured Until Final Judgment of Foreclosure and Sale. *Federal Natl. Mtge. Assn. v Marshall*, 246 AD3d 1234.
4. Foreclosure Abuse Protection Act. *Deutsche Bank Natl. Trust Co. v Roberts*, 246 AD3d 657.
5. Justice for Injured Workers Act—Legislature's Intended Amendment to Have Remedial Effect. *Pacheco v P.V.E. Co., LLC*, 246 AD3d 1107.

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1. Fraudulent Misrepresentation—Mutual or Unilateral Mistake. *Guzzetta v Messina*, 246 AD3d 881.

STIPULATION OF SETTLEMENT.

2. Debtor's Placement of Funds in Escrow—Subject to Claims Brought by Creditors. *Matter of Avigdor v Avigdor*, 246 AD3d 912.

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See WITNESSES

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COUNSEL FEES.

1. Lease Provided for Fees Arising from Action to Enforce Terms. *64 W. 10th St. LLC v L-Ray LLC*, 246 AD3d 401.

SURETYSHIP AND GUARANTEE—Cont'd

SCOPE OF GUARANTEE.

2. Default on Obligations under Lease—Continued Tenancy after Prior Lease's Expiration. *64 W. 10th St. LLC v L-Ray LLC*, 246 AD3d 401.

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1. Employment of Income Capitalization Method for 10 Parking Lot Parcels That were Generating Income under Surface Parking Lease in Determining Damages. *Matter of City of Albany Indus. Dev. Agency (PSC, LLC)*, 246 AD3d 1238.
2. Methodology. *Matter of Cuba Lake Comm. for Fair Assessments v Town of Cuba*, 246 AD3d 1497.

EXEMPTIONS.

3. Real Property—Industrial and Commercial Abatement Program. *Matter of Park Row 23 Owners LLC v Jiha*, 246 AD3d 438.

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INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

1. Extreme and Outrageous Conduct—Directing Co-Worker to Sit on Lap. *Carvello v Warner Music Group Corp.*, 246 AD3d 482.

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TRADEMARKS, TRADE NAMES AND UNFAIR COMPETITION.

UNFAIR COMPETITION.

1. Bad Faith Misappropriation of Commercial Advantage—Exploited Proprietary Information and Trade Secrets. *Premium Prods., Inc. v O'Malley*, 246 AD3d 948.

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ADJOURNMENT.

1. Diligence in Procuring Witness Testimony. *AMK Capital Corp. v Plotch*, 246 AD3d 424.

ARGUMENT AND CONDUCT OF COUNSEL.

2. Deprivation of Fair Trial—Comments during Summation and Cross-Examination Question. *Quentin v Knox*, 246 AD3d 956.

DIRECTED VERDICT.

3. Authority to Sign Confidentiality Agreement. *Georgia Malone & Co., Inc. v E&M Assoc.*, 246 AD3d 505.

EVIDENCE.

4. Prejudice of Substantial Right—Video Surveillance Footage Created for Hearing. *Bank of Am., N.A. v Greenfield*, 246 AD3d 783.

HARMLESS AND PREJUDICIAL ERROR.

5. Preclusion from Inquiring into Prior Charges of Misconduct. *D'Antonio v Brady*, 246 AD3d 1027.

INSTRUCTIONS.

6. Failure to Give Element of Breach of Contract for Each Party. *Georgia Malone & Co., Inc. v E&M Assoc.*, 246 AD3d 505.

TRIAL—Cont'd

7. Response to Jury Note — Whether Alleged Accident Occurred.—In a personal injury action where there are questions of fact about whether the alleged injury-producing event actually occurred as claimed by the plaintiff, it is not error for the court to respond to a jury note by instructing that the jury could consider whether the alleged accident occurred. Where trial evidence raises the issue of whether negligence and proximate cause are inextricably intertwined, versus whether the negligent event may not have occurred as claimed, the jury verdict sheet should not be drafted or construed as to take away from the jury the determination of the latter issue. However, there are cases where the happening of an accident may itself be contested. Here, where plaintiff alleged that his van took “a massive hit” when it “heavily” impacted a concrete barrier “a couple of times” while traveling approximately 50 miles per hour because defendants’ negligent installation of the van’s pitman arm caused the loss of steering, but failed to call police to the heavily trafficked scene or to produce any other witnesses or tow truck invoices at trial and offered photographs that did not depict the far greater damage as would have been expected, Supreme Court did not err in instructing the jury that it could consider whether plaintiff’s accident had occurred. *Krohn v Schultz Ford Lincoln, Inc.*, 246 AD3d 90.

NOTE OF ISSUE AND STATEMENT OF READINESS.

8. Denial of Motion to Vacate Note of Issue—Court Invited Defendants’ Future Application for Social Security Disability Records Closer to Trial—Identification of Possible Alternative Means to Acquire Relevant Records. *Mermell v Ashokan Ctr., Inc.*, 246 AD3d 1359.

9. Vacatur—Post-Note of Issue Discovery. *Santacruz v 58 Gerry St LLC*, 246 AD3d 600.

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10. Failure to Call Witness. *AMK Capital Corp. v Plotch*, 246 AD3d 424.

RIGHT TO JURY TRIAL.

11. Contractual Jury Waiver Clause—Challenge to Underlying Agreement—Equitable Defense and Counterclaim. *Penske v National Holding Corp.*, 246 AD3d 569.

VERDICT.

12. Setting Verdict Aside—Culpable Conduct Not Same as Proximate Cause. *Chiloyan v Chiloyan*, 246 AD3d 864.

13. Setting Verdict Aside — Negligence and Proximate Cause Not Inextricably Intertwined.—In an action in which plaintiff alleged that his van impacted a concrete barrier on an expressway because defendants’ negligent installation of the van’s pitman arm caused the loss of steering, the issues of negligence and proximate cause were not inextricably intertwined as a result of there being a rational view of the evidence that plaintiff’s accident did not occur as claimed. Accordingly, Supreme Court erred by, in effect, granting those branches of plaintiff’s motion which were pursuant to CPLR 4404 (a) to set aside so much of the jury verdict as, upon finding that defendants were negligent, found that such negligence was not a substantial factor in causing injury to plaintiff and for judgment as a matter of law on the issue of liability. There was a valid line of reasoning and permissible inferences upon which the jury could have parsed the alleged negligent repair from the alleged proximate cause and determine that while defendants were negligent, they were not a proximate cause of plaintiff’s claimed accident. Plaintiff failed to produce his passenger or any other witness to testify about the alleged collision or its aftermath. Plaintiff did not call the police to the heavily trafficked scene, and therefore, there was no police report corroborating the accident after-the-fact. He did not produce any tow invoices. The photographs of plaintiff’s van revealed damages, which a rational jury could have concluded were not consistent with the nature of the described vehicular impact. *Krohn v Schultz Ford Lincoln, Inc.*, 246 AD3d 90.

14. Sufficiency of Evidence—Medical Malpractice. *D’Antonio v Brady*, 246 AD3d 1027.

TRIAL—Cont'd

15. Weight of Evidence—Credited One Witness in Conflicting Testimony. *Quentin v Knox*, 246 AD3d 956.

TRUSTS.

AMENDMENT.

1. Consent—Percentage of Distribution of Trust Remainder. *Matter of Castaldo v Mondello*, 246 AD3d 724.

CONSTRUCTIVE TRUST.

2. Construction of Home and Business in Reliance on Oral Promise to Convey Title of Real Property. *Putnam v Putnam*, 246 AD3d 1503.

CREATION.

3. Express Trust—Failure to Distribute Proceeds from Property. *Klein v Klein*, 246 AD3d 712.

VALIDITY.

4. Undue Influence of Trustee—Not Present When Grantor Signed Limited Power of Appointment. *Matter of Castaldo v Mondello*, 246 AD3d 724.

UNEMPLOYMENT INSURANCE.

BENEFITS.

1. Ophthalmic Technician Not Totally Unemployed—Provision of Home-Care Services to Father under Medicaid/Medicare Program during Relevant Time Period. *Matter of Dai Kwang Lim (Supreme Home Care Agency of NY Inc.—Commissioner of Labor)*, 246 AD3d 1177.

2. Recovery of Overpayments—Claimant Made Willful Misrepresentation in Order to Obtain Benefits. *Matter of Dai Kwang Lim (Supreme Home Care Agency of NY Inc.—Commissioner of Labor)*, 246 AD3d 1177.

CONTRIBUTIONS.

3. Existence of Employment Relationship—Substantial Evidence—Employer Exercised Overall Control over Important Aspects of Services Performed by Teaching Professional. *Matter of Paron (Bilingual Birdies LLC—Commissioner of Labor)*, 246 AD3d 1168.

UNFAIR COMPETITION.

See MONOPOLIES; TRADEMARKS, TRADE NAMES AND UNFAIR COMPETITION, and other specific titles

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USURIOUS AGREEMENT.

1. Receivable Purchase Agreements. *Kapitus Servicing, Inc. v Suburban Waste Servs., Inc.*, 246 AD3d 661.

USURIOUS TRANSACTION.

2. Merchant Cash Advances—Characterization as Loan. *People v Richmond Capital Group LLC*, 246 AD3d 585.

VENDOR AND PURCHASER.

See, also, BROKERS; CONTRACTS; FRAUDS, STATUTE OF; SALES; SPECIFIC PERFORMANCE, and other specific titles

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See CIVIL SERVICE; INCAPACITATED AND MENTALLY DISABLED PERSONS; INSURANCE; TAXATION

VILLAGES.

See MUNICIPAL CORPORATIONS

WELFARE.

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WILLS.

CONSTRUCTION.

1. Counsel Fees. *Matter of Pearce*, 246 AD3d 919.
2. Extrinsic Evidence—Ambiguous Meaning of Primary Residence. *Matter of Pearce*, 246 AD3d 919.

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See, also, CONTEMPT; CRIMES; DISCLOSURE; EVIDENCE; TRIAL; WILLS, and other specific titles

CROSS-EXAMINATION.

1. Client—Leading Questions. *Matter of Sheltering Arms Children's Servs. v Yi-weiz.*, 246 AD3d 677.

EXPERT WITNESS.

2. Conclusory Affidavit of Merit. *Williams v State of New York*, 246 AD3d 1005.
3. Medical Malpractice—Qualifications. *Markman v New York-Presbyterian Healthcare Sys., Inc.*, 246 AD3d 566.

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AWARD.

1. Claimant Entitled to 20% Schedule Loss of Use for Bilateral Carpal Tunnel Syndrome—Conflicting Orthopedist Opinions. *Matter of Labocetta v Consolidated Edison Co. of N.Y., Inc.*, 246 AD3d 1207.
2. Entitlement to 20% Schedule Loss of Use Rather than Permanent Partial Disability Benefits for Right Knee Injury Appropriate—Substantial Evidence. *Matter of Ayars v Navillus Tile Co.*, 246 AD3d 1205.

CAUSAL RELATION.

3. Claimant Sustained Ongoing Causally-Related Marked Partial Disability to Lower Back. *Matter of Hummer v Riccelli Enters., Inc.*, 246 AD3d 1212.

DISQUALIFICATION FOR FALSE REPRESENTATION.

4. Failure to Inform Treating Orthopedic Surgeon or Carrier's Medical Examiner Regarding Work Performed Following Retirement—Work Status Material in Assessing Degree of Disability. *Matter of Belcher v Dominican Vil. Inc.*, 246 AD3d 1251.
5. Imposition of Discretionary Penalty Permanently Precluding Claimant from Receiving Future Wage Replacement Benefits Disproportionate to Offense. *Matter of Belcher v Dominican Vil. Inc.*, 246 AD3d 1251.

EXCLUSIVENESS OF REMEDY.

6. Negligent Infliction of Emotional Distress. *Carvello v Warner Music Group Corp.*, 246 AD3d 483.
7. Special Employment Relationship—Retained for Payroll and Workers' Compensation. *Samuel v Petainer*, 246 AD3d 973.

EXTENT OF DISABILITY.

8. Work-Related Injuries Amenable to Nonschedule Classification—Substantial Evidence Supported Board Determination That Claimant's Injuries were Better Classified as Marked Permanent Partial Disability. *Matter of Foster v New York State Off. of Children & Family Servs.*, 246 AD3d 1199.

INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

9. Contraction of COVID-19 in Workplace. *Matter of Hogan v ABF Frgt. Sys., Inc.*, 246 AD3d 1201.

WORKERS' COMPENSATION—Cont'd

LIMITATION OF RIGHT TO COMPENSATION.

10. Timeliness of Claim—Board Received Sufficient Notice. *Matter of Foster v Monadnock Constr. Inc.*, 246 AD3d 1170.

OCCUPATIONAL DISEASE.

11. Causal Relation—Denial of Carrier's Request for Adjournment of Deposition of Claimant's Treating Physician—No-Adjournment Rule for Expedited Hearings. *Matter of Moe v America Ootoya Chelsea*, 246 AD3d 1165.

12. Causal Relation—Notice of Controversy Not Timely Filed—No Showing of Good Cause for Delay. *Matter of Moe v America Ootoya Chelsea*, 246 AD3d 1165.

REOPENING CASE.

13. Modification of Prior Schedule Loss of Use for Claimant's Left Leg—Decreased Range of Motion Proof of Material Change in Condition—Denial of Request to Reopen Abuse of Discretion. *Matter of Siddon v Advance Energy Tech.*, 246 AD3d 1245.

14. Untimely Request to Reclassify Claimant to Permanent Total Disability or Total Industrial Disability Due to Extreme Hardship. *Matter of Jackson v New York Foundling Hosp.*, 246 AD3d 1197.

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15. Grave Injury—Injuries Did Not Fit within Meaning of Grave Injury. *Samuel v Petainer*, 246 AD3d 973.

VOLUNTARY WITHDRAWAL FROM LABOR MARKET.

16. Ongoing Attachment to Labor Market Not Required for Permanent Partial Disability Indemnity Benefits. *Matter of Blake v Niagara Wheatfield Cent. Sch. Dist.*, 246 AD3d 1247.

WORKERS' COMPENSATION BOARD.

17. Denial of Application for Reconsideration and/or Full Board Review—Inconsistent Accounts of When and How Claimant was Injured and Failure to Tell Medical Providers Who Linked Back Problems to Prior Work Injury of Previous Treatment for Low Back Pain. *Matter of Sheodial v Universal Constr. Resources Inc.*, 246 AD3d 1214.

ZONING.

See MUNICIPAL CORPORATIONS

**APPELLATE DIVISION REPORTS
CUMULATIVE ERRATA TABLE**

1. 141 App Div 232 (Lowenstein v Hargraves Mills)	At 141 App Div 233, line 16, change “contact” to “contract.”
2. 59 AD2d 286 (Curle v Ward)	At 59 AD2d 288, in the final paragraph, line 7, change <i>Sheldon</i> to <i>Shelton</i> .
3. 78 AD2d 950	Change date at top of page within parentheses from November 26, 1979 to November 26, 1980.
4. 139 AD2d 428 (People v Stokes)	Five lines from the bottom of page 428, change the citation to <i>People v Cartagena</i> from 76 AD2d to 78 AD2d.
5. 156 AD2d 137 (West 157th St. Assoc. v Sassoonian)	Change plaintiff’s name in title from West 15th St. Assoc. to West 157th St. Assoc.
6. 179 AD2d 118 (Matter of Schulz v Warren County Bd. of Supervisors)	At 179 AD2d 121, footnote 2, line 1, change General Municipal Law § 50, to General Municipal Law § 51.
7. 205 AD2d 976 (Owen v Appelbaum)	At 205 AD2d 977, line 2 from the bottom of the page, change “contact” to “contract.”
8. 211 AD2d 692 (Bogdan v Peekskill Community Hosp.)	At 211 AD2d 977, last line on the page, change “contact” to “contract.”
9. 227 AD2d 863 (Matter of Dudley v Travis)	Change defendant’s name in title from Travis Brown to Brion D. Travis.
10. 247 AD2d 273 (McQuaig v Olympia & York 125 Broad St. Co.)	Change plaintiff’s name in title from Opympia to Olympia.

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11. **255 AD2d 438** (Wieck v Halpern) At 438, line 25, change “410” to “514.”
12. **272 AD2d 322** (Matter of Beisgen v Town of Orangetown) Add a “v” to title after “Petitioner.”.
13. **276 AD2d 143** (DeLuca v DeLuca) Change defendant’s name in title from Maria DeLuca to Marie DeLuca.
14. **288 AD2d 932** (People ex rel. Victory v Travis) At 288 AD2d 933, on line 25, change Presented to presented.
15. **290 AD2d 410** (DeLuca v DeLuca) Change defendant’s name in title from Maria DeLuca to Marie DeLuca.
16. **300 AD2d 1118** (People v Soluri) The case of People v Soluri is incorrectly printed at page 1118. The opinion is correctly printed and cited at 300 AD2d 988.
17. **303 AD2d 1026** (People v Harris) At 303 AD2d 1027, lines 10 and 11, delete (see People v Vasquez, 89 NY2d 521, 533).
18. **304 AD2d 508** (Almestica v Colon) At 304 AD2d 509, line 10, change *supra* at 843 to *supra* at 803.
19. **304 AD2d 982** (People v Elhadi) At 304 AD2d 983, line 34, change 79 NY2d 673, 783 to 79 NY2d 673, 683.
20. **304 AD2d 1027** (Matter of Vaksman) At 304 AD2d 1028, on lines 9 and 10, change *lv dismissed* 95 AD2d 896 [1983] to *lv dismissed* 95 NY2d 896 [2000].
21. **304 AD2d 1069** (Fahey v Canino) At 304 AD2d 1071, line 29, change *supra* at 775 to *supra* at 774.
22. **305 AD2d 591** (Butera v Floral Park-Bellerose Union Free School District) Change defendant’s name in title from Floral Park-Bellrose to Floral Park-Bellerose.
23. **306 AD2d 156** (Matter of McCarthy v Board of Trustees of N.Y. City Police Fund, Art. II) At 306 AD2d 157, line 17, change 81 AD2d 543 to 81 AD2d 553.

24. 1 AD3d 432 (Matter of Devon B.)	At 1 AD3d 433, line 1, change correspondent to corespondent.
25. 1 AD3d 474 (Estate of Hamilton v Nassau Suffolk Home Health Care)	At 1 AD3d 474, line 3 from bottom of page, change CPLR [3] to CPLR [e].
26. 2 AD3d 16 (People v Darrett)	At 2 AD3d 21, line 4, change 192 AD2d 1010 to 191 AD2d 1010.
27. 2 AD3d 508 (Moloney v Wal-Mart Stores, Inc.)	At 2 AD3d 510, line 5, change 2 AD3d 48 to 1 AD3d 48.
28. 2 AD3d 1135 (Matter of Site Acquisitions, Inc. v Town of New Scotland)	At 2 AD3d 1136, line 44, change 2 AD3d 89 to 1 AD3d 89; at 2 AD3d 1137, line 10, change <i>supra</i> at 717 to <i>supra</i> at 94.
29. 3 AD3d 143 (Matter of R.M. Kliment & Frances Hasband, Architects [McKinsey & Co.])	At 3 AD3d 143, in headnote, change subhead to Architect's Malpractice.
30. 4 AD3d 629 (Matter of Rosalind EE. v William EE.)	Change title to Matter of Rosalind EE. v William EE.
31. 5 AD3d 229 (Tradewinds Fin. Corp. v Refco Sec., Inc.)	Change defendant's name in title from Repco to Refco.
32. 5 AD3d 247 (Matter of Sills v Kerik)	At 5 AD3d 247, 3 lines from bottom of page, change 560-561 to 585-586.
33. 6 AD3d 220 (Henriques v Kindercare Learning Ctr., Inc.)	Change title to D.H. v Kindercare Learning Ctr., Inc.
34. 6 AD3d 437 (Matter of Shondel J. v Mark D.)	Change all references to petitioner's name to Shondel J. and change all references to respondent's name to Mark D.
35. 7 AD3d 441 (People v Griffin)	Change defendant's name in title from Griffen to Griffin.
36. 8 AD3d 359 (Springer v Yonkers Bd. of Educ.)	At 8 AD3d 360, add new last paragraph as follows: The appellant's remaining contentions are without merit. Also, following Judge's line add: [As amended by unpublished order entered Nov. 10, 2004].

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37. 8 AD3d 658 (Taylor v New York City Tr. Auth.)	At 8 AD3d 658, line 16, change “shifting the burden to the defendant” to “shifting the burden to the plaintiff.”
38. 8 AD3d 791 (Matter of Lorenzo v Neuwirth)	Change defendant’s name in title from Neuwrith to Neuwirth.
39. 8 AD3d 870 (Hallett v City of Ithaca)	At 8 AD3d 871, line 19, change plaintiff sought to defendant sought.
40. 8 AD3d 1133 (People v Samuels)	Change disposition from denied to granted.
41. 10 AD3d 372 (People v Vitiello)	At 10 AD3d 372, in the first paragraph after the word hearing, add (Demakos, J.).
42. 10 AD3d 393 (Santiago v New York City Health & Hosps. Corp.)	At 10 AD3d 393, line 7, and 10 AD3d 394, line 1, change CPLR 3216 to CPLR 3126.
43. 10 AD3d 724 (Matter of McCoy v City of N.Y.)	On pages 10 AD3d 724 and 725, replace all instances of “file a late notice of claim” with “serve a late notice of claim.”
44. 12 AD3d 342 (Daniels v Bovis Lend Lease, Inc.)	At 12 AD3d 343, line 10, after “answering,” add the words “the reasonable excuse offered for the delay,”.
45. 12 AD3d 382 (People v Richard P.)	Change defendant’s name in title to Richard P.
46. 12 AD3d 870 (Matter of New York State Crime Victims Board v Mitchell)	Change first named individual’s name in title to “on Behalf of Anonymous.” At 12 AD3d 870, line 8 of decision delete victim’s name. Line 10 of decision change name to “the victim.”
47. 12 AD3d 1059 (Matter of Wallace B.O.)	At 12 AD3d 1059, line 13 of case No. 27, change 12 AD3d 1058 to 12 AD3d 1057.
48. 13 AD3d 285 (Balbuena v IDR Realty LLC)	At 13 AD3d 286, line 9, change citation from 13 AD3d 349 to 15 AD3d 36.

49. **13 AD3d 963** (Matter of Jacob [Commissioner of Labor])

In the title change claimant’s name from Jacobs to Jacob. At 13 AD3d 964, line 23, delete the words “because he made a willful misrepresentation.” At 13 AD3d 964, delete the last sentence and replace with “Claimant’s remaining contentions, including his assertion that the Board erred in charging him with a recoverable overpayment in benefits, have been examined and found to be lacking in merit.”
50. **15 AD3d 233** (People v Berry)

At 15 AD3d 234, lines 3 & 4, delete “as a second felony offender.”
51. **15 AD3d 473** (Vacca v State Farm Ins. Co.)

At 15 AD3d 475, line 28, change Nassau County to Kings County.
52. **15 AD3d 788** (Matter of Natasha F.)

At 15 AD3d 788, in the appeal statement, change “order of the Family Court of Delaware County (Pines, J.) entered April 22, 2003” to “amended order of the Family Court of Delaware County (Connerton, J.), entered June 17, 2003).”
53. **16 AD3d 859** (Matter of Reardon [Commissioner of Labor])

At 16 AD3d 860, line 25, change February 17, 2003 to February 7, 2003 and March 30, 2003 to March 27, 2003.
54. **17 AD3d 386** (Amona v Orange & Rockland Util., Inc.)

In second to last paragraph add the word “issue” after the word “triable.”
55. **17 AD3d 669** (Matter of Allstate Ins. Co. v Hayes)

At 17 AD3d 670, line 21, change Kings County to Queens County.
56. **17 AD3d 902** (Matter of Oberferst [Commissioner of Labor])

At 902, change appellant’s name in the title from “Stefani J. Oberferst” to “Stefani K.” At xxiii, change “Matter of Oberferst (Commissioner of Labor)” to “Matter of Stefani K. (Commissioner of Labor).”

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57. 18 AD3d 551 (Matter of Shondel J. v Mark D.)	Change all references to petitioner's name to Shondel J. and all references to respondent to Mark D.
58. 18 AD3d 1072 (Matter of Sarah FF.)	At 18 AD3d 1074, in footnote 4, change Social Services Law § 422 (A) to § 422 (4) (A).
59. 19 AD3d 422 (Matter of 151 Route 17M Assoc., LLC. v Zoning Bd. of Appeals of Vil. of Harriman)	At 19 AD3d 423, change § 104-33 to § 140-30; change § 144-30 to § 140-30; change § 144-30 (A) to § 140-30 (A); change § 144-30 (B) to § 140-30 (B).
60. 20 AD3d 550 (Galvin v Francis)	At 20 AD3d 550, delete the words "Merrill Lynch SEP Account No. 433-51M78,". At 20 AD3d 551, after the Judges' line add: [As amended by unpublished order entered Dec. 15, 2005.]
61. 20 AD3d 749 (Altu v Clark)	At 20 AD3d 750, in the third paragraph, change CPLR 3216 to CPLR 3126.
62. 22 AD3d 544 (NC Venture I, L.P. v Complete Analysis, Inc.)	At 22 AD3d 544, delete the third ordering paragraph. In the second ordering paragraph after the words "on the law," add the words "without costs or disbursements," place a period after the word "reinstated" and delete the words "and it is further."
63. 24 AD3d 748 (St. Vincent's Hosp. & Med. Ctr. v Country Wide Ins. Co.)	Change defendant's name in title from County Wide to Country Wide.
64. 25 AD3d 492 (CIBC Mellon Trust Co. v Samuel Montagu & Co. Ltd.)	At 25 AD3d 493, line 7, after the word "prior" add the words "frauds which later resulted in."
65. 26 AD3d 230 (People v Bautista)	In headnote, line 4, change "must" to "may not"; lines 5-6, omit the words "two years, and defendant was eligible for parole within."
66. 26 AD3d 242 (Torrenzano Group, LLC v Burnham)	At 26 AD3d 243, line 15, delete the sentence beginning "Nor does TTG."

67. **28 AD3d 783** (Matter of Brandon W.) At 28 AD3d 783, line 3 of the decision, change Kings County to Orange County.
68. **29 AD3d 682** (Weitzenberg v Nassau County Dept. of Recreation & Parks) Change appellant's last name in title from Weitzberg to Weitzenberg.
69. **33 AD3d 326** (People v Alicea) At 33 AD3d 327, add the following sentence to the first paragraph: Judgment, same court and Justice, rendered July 25, 2003, convicting defendant White, after his plea of guilty, to the crime of conspiracy in the second degree, unanimously affirmed.
- At 33 AD3d 328, before the last paragraph add the following paragraphs: As to the July 25, 2003 judgment, convicting defendant White, after his plea of guilty, to the crime of conspiracy in the second degree, application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no nonfrivolous 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 30 days after service of a copy of this order, with notice of entry. 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.

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70. 33 AD3d 936 (People v Greene)	At 33 AD3d 936, first and third paragraphs, change citation to <i>People v Johnson</i> from 33 AD3d 839 to 33 AD3d 939.
71. 35 AD3d 279 (Barrett v Delma Props, Inc.)	Change title to Patrick D. Barrett, Individually and as a Limited Partner of Delma Associates, LP, Appellant, v Delma Properties, Inc., Respondent.
72. 35 AD3d 769 (People v Torres)	At 35 AD3d 770, line 8, change 15 years to 18 years.
73. 35 AD3d 843 (Sprague v State of New York)	In headnote, after the words “operating vehicle” add the words “that struck vehicle.” In the text at p. 844, in the third paragraph, after the words “operating the vehicle” add the words “that struck the vehicle.”
74. 35 AD3d 1034 (People v Conklin)	In the title change the party designation for the People to Respondent, and change the party designation for Stanley L. Conklin, Jr., to Appellant.
75. 37 AD3d 855 (People v Munford)	Change defendant’s last name in title from Mumford to Munford.
76. 39 AD3d 797 (Costello v Casale)	In third paragraph, change CPLR 5016 (b) to CPLR 5016 (c).
77. 40 AD3d 1364 (People v Williams)	At 40 AD3d 1365, third paragraph, 10th line, change “supressable” to “suppressible.”
78. 41 AD3d 222 (Scott v Beth Israel Med. Ctr., Inc.)	At 41 AD3d 224, last sentence of decision, change “for cause” to “without cause.”
79. 43 AD3d 543 (Weintraub v Stankovic)	In first sentence of second paragraph change June 2007 to June 2005.

Errata

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80. 44 AD3d 329 (People v Haigler)	In first paragraph, line 5, delete “to life.”
81. 44 AD3d 1205 (Matter of Rodriguez v Leclaire)	In title change LeClaire to Leclaire.
82. 45 AD3d 492 (Echevarria v New York City Tr. Auth.)	At 45 AD3d 492, first paragraph, line 1, replace “Gomez” with “Guzman.”
83. 47 AD3d 318 (People v Adamson)	At 47 AD3d 318, headnote 1, on line 4 change Penal Law § 125.27 (1) (v) to Penal Law § 125.27 (1) (a) (v) and on line 8 change § 125.27 [1] [v] to § 125.27 [1] [a] [v]. At 47 AD3d 322, line 28 and at 47 AD3d 323, lines 1 and 26, change the statute to add [a] and (a) as indicated above.
84. 47 AD3d 938 (Matter of Piesco v Hollihan)	At 47 AD3d 938, first paragraph, and at 939, fifth full paragraph (two places), change Town Building Inspector to Village Building Inspector.
85. 48 AD3d 764 (Mirjah v New York City Tr. Auth.)	At page 766, line 10, change “defendant” to “decedent.”
86. 48 AD3d 1207 (Demming v Denk)	At 48 AD3d 1209, lines 13-14, remove “[appeal No. 3],” and on line 14, replace “862” with “856.”
87. 51 AD3d 196 (Gletzer v Harris)	At 51 AD3d 206, line 6 and in ordering paragraph, line 2, replace “affirmed, with costs.” with “modified, so as to deem the 1991 judgment to be renewed as of March 1, 2005, the date the renewal judgment was granted, and as so modified, affirmed, with costs.”
88. 51 AD3d 301 (People v Mattocks)	At 51 AD3d 301, line 5, replace “16” with “8.”
89. 54 AD3d 109 (TOA Constr. Co., Inc. v Tsitsires)	At 54 AD3d 109, line 13, change “affirmed” to “reversed.”

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90. **55 AD3d 1** (Matter of Parkhouse v Stringer)

At 1, line 6 from the bottom, change “modified” to “affirmed.”
At 5, the sentence on lines 1-3 should have a strikeout through the text. Lines 4-5, include a strikeout through the text “move to calendar these two buildings and.” Line 6, include a strikeout through the word “the” before the word “history” and the text “of the development.”

91. **55 AD3d 759** (People v Williams)

At 55 AD3d 759, first paragraph, line 6, change sexual abuse in the third degree to sexual abuse in the first degree.

92. **59 AD3d 942** (People v Bunnell)

At 942, lines 6-7, delete “as a matter of discretion in the interest of justice.”
At 943, delete the sentence on lines 6-9 and replace with: “We reach this issue sua sponte, and we note that preservation is not required inasmuch as the ‘essential nature’ of the right to be sentenced as provided by law’ is implicated (*People v Fuller*, 57 NY2d 152, 156 [1982]). To the extent that *People v Jackson* (23 AD3d 1057 [2005], *lv denied* 6 NY3d 814 [2006]) holds otherwise, it is no longer to be followed.”
Line 15, before the word “We” insert the following sentence: “It cannot be said that the procedure utilized by the court is authorized by *People v Fuller* (57 NY2d 152 [1982]). Indeed, the court attorney did not act merely as a ‘preliminary fact finder’ (*id.* at 158) but, rather, he conducted an adversarial hearing and made credibility determinations, thereby assuming a role specifically limited to the authority of the court (see Penal Law § 60.27 [2]; *Fuller*, 57 NY2d at 158-159).”

Errata

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93. **60 AD3d 1284** (Matter of Laidlaw Energy & Envtl., Inc. v Town of Ellicottville) On page 1284, line 6 from the bottom, change “petitioner” to “respondents.”
94. **61 AD3d 1398** (People v Ziegler) At 61 AD3d 1398, change appellant’s name in the title from “Ziegler” to “Zeigler.”
95. **62 AD3d 100** (People v Mojica) At page 108, lines 11-12 and 18, change Penal Law § 120.30 to Penal Law § 120.03.
96. **63 AD3d 493** (Ayoub v Ayoub) In case title, change respondent and appellant’s name to “Anonymous.”
97. **63 AD3d 1673** (Matter of Meegan v Brown) At page 1673, line 4 from the bottom, change title to In the Matter of Robert P. Meegan, Jr., Individually and as President of Buffalo Police Benevolent Association, et al., Respondents-Appellants, v Byron W. Brown, Mayor of City of Buffalo, et al., Appellants-Respondents. (Proceeding No. 1.) In the Matter of Joseph E. Foley, Individually and as President of Buffalo Professional Firefighters Association, Inc., Local 282, IAFF, AFL-CIO-CLC, et al., Respondents, v Byron W. Brown, Mayor of City of Buffalo, et al., Appellants. (Proceeding No. 2.) Buffalo Teachers Federation, Inc., NYSUT, et al., Respondents, v Buffalo Board of Education for City School District of City of Buffalo et al., Appellants. (Action No. 1.)
98. **64 AD3d 1027** (Matter of Torres v Dubray) Change respondent’s name in the title from Durbray to Dubray.
99. **65 AD3d 1049** (Matter of Nyenekor v Tarig) Change petitioner’s name in the title from Nyenkor to Nyenekor.

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100. 66 AD3d 1064 (Matter of Viig [Hello World Language Ctr., Inc.—Commissioner of Labor])	In the case title, change the spelling from “Languate” to “Language.”
101. 71 AD3d 1511 (Playtime Boutique, Inc. v Fraccola)	At page 1511, line 3 of the title, change respondent’s name from “Fracolla” to “Fraccola.”
102. 77 AD3d 76 (People v Quinto)	On page 76, in the summary, last line, change citations to “CPL 210.20 (1) (f), 30.10 (2) (b) and 30.10 (3) (f).” On page 85, line 9 from the end and on page 86, line 4, change the citations to “CPL 210.20 (1) (f), 30.10 (2) (b) and (3) (f).”
103. 78 AD3d 569 (Matter of Aoki)	At page 569, line 6, delete the word “unanimously.”
104. 83 AD3d 407 (Auqui v Seven Thirty One Limited Partnership)	In case title, change Respondent’s name to “Seven Thirty One Limited Partnership.” On page 408, lines 1-2, delete the word “unanimously.”
105. 83 AD3d 573 (IRB-Brazil Resseguros, S.A. v Inepar Investments, S.A.)	Change respondent’s name from IRB-Brazil to IRB-Brasil in the case title.
106. 82 AD3d 409 (M.N. Dental Diagnostics, P.C. v New York City Tr. Auth.)	On page 410, line 3 in the classification, delete “Crimes—Sentence—Excessive Sentence Reduced.”
107. 82 AD3d 410 (People v Pitts)	On page 410, after the dash on line 2 add the classification “Crimes—Sentence—Excessive Sentence Reduced.”
108. 83 AD3d 1472 (Matter of North Syracuse Cent. School Dist. v New York State Div. of Human Rights)	On page 1472, line 13, change “filed by petitioner” to “filed by the mother of one of petitioner’s students.”

109. **87 AD3d 1042** (People v Vasquez) On page 1044, line 7, add to the end of paragraph, “The defendant’s remaining contention with respect to the admission of the show-up identification testimony pursuant to CPL 60.25 is without merit.”
110. **88 AD3d 1159** (People v Jeffrey VV.) On pages 1159-1160, change the text “sentence was imposed” to “the crime was committed.”
111. **90 AD3d 771** (Matter of Yearwood v Yearwood) On page 774, line 35, delete ending of sentence after the words “for further proceedings” and replace with “to establish an appropriate visitation schedule for the mother.”
112. **92 AD3d 1261** (Hecker v State of New York) On page 1263, line 13, change the word “blindsighting” to “blindsiding.”
113. **94 AD3d 456** (Fiserv Solutions, Inc. v XL Specialty Ins. Co.) On page 461, line 15 from the end, delete the sentence starting, “As we previously held,” and replace it with the following: “Finally, as we previously held, defendant may inquire into the procedures and requirements of an insured lender (*see Fiserv Solutions, Inc. v XL Specialty Ins. Co.*, 84 AD3d 480 [2011]) and the motion Court correctly held that defendant may deny coverage for a loan not made in accordance therewith.”
114. **97 AD3d 1014** (Murchison v State of New York) Change appellant’s name in title from Murchinson to Murchison.
115. **98 AD3d 1312** (Matter of Samaj B. [Towanda H.-B.—Wade B.]) On page 1313, line 23, change “vis-à-vis” to “vis-à-vis.”

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116. 101 AD3d 1623 (Kolbe v Tibbetts)	On page 1623, line 21, change “It is that defendant,” to “It is adjudged and declared that defendant.”
117. 105 AD3d 1387 (People v Conklin)	On page 1389, line 15, change “not did succeed” to “did not succeed.”
118. 110 AD3d 854 (Longman v Longman)	On page 854, second line from the end, change the word “plaintiff” to “defendant.”
119. 118 AD3d 1207 (Matter of Khatib v New York State Bd. of Parole)	On page 1207, lines 7-8, change “criminal possession of a firearm” to “criminal sale of a firearm.”
120. 120 AD3d 1135 (Fidelity Natl. Tit. Ins. Co. v Altshuler Shaham Provident Funds, Ltd.)	On page 1135, line 28, after the words “directed to” add “transfer the file in the Erie County action to the Clerk of Erie County and further directed to.”
121. 120 AD3d 1399 (Reese v Jahan Contr.)	In the case title, change the word “Respondent” to “Plaintiff.”
122. 124 AD3d 467 (People v Boria)	On page 468, line 17, change CPL 720.20 (3) to CPL 720.10 (3).
123. 124 AD3d 1235 (Matter of Thomas)	On page 1239, line 18, change “SCPA 2221” to “SCPA 2211”.
124. 126 AD3d 721 (People v Evans)	In the case title, change “Taqwon Evans” to “T.E.”
125. 126 AD3d 1486 (People v Thompson)	On page 1486, lines 11-12, change “justify County Court’s determination” to “justify the determination.”
126. 127 AD3d 554 (Matter of Steam Pipe Explosion at 41st St. & Lexington Ave.)	On page 554, last line, change “Plaintiff, and” to “Plaintiff, v.” On page 555, line 2, change “Appellant, v” to “Appellant, and.”

127. 128 AD3d 1497 (People v Stephens)	In the case title, change “Harvert Stephens, Appellant” to “Harvert Stephens, Also Known as Havert Stephens, Appellant.”
128. 129 AD3d 830 (Wachovia Mtge. Corp. v Lopa)	In the case title, add a “v” between “Respondent,” and “Frank.”
129. 130 AD3d 1310 (People v Lanier)	On page 1311, line 3, change “first degree” to “second degree.”
130. 132 AD3d - 151 AD3d	Change spelling of “irrevelant” to “irrelevant” throughout.
131. 132 AD3d 541 (Schwartz v Hotel Carlyle Owners Corp.)	On page 542, lines 6-7, replace “accordingly” with “dismissing the complaint.”
132. 133 AD3d 918 (People v Proper)	In the case title, change appellant’s middle initial from “J.” to “C.” On page 918, lines 1-2 from the bottom, change text “robbery in the second degree” to “attempted robbery in the first degree”. On page 919, line 3, change text “robbery in the second degree” to “attempted robbery in the first degree”.
133. 134 AD3d 577 (Allenby, LLC v Credit Suisse, AG)	On page 580, lines 13-14, replace “The Legal Aid Society, New York (of counsel), for” with “Las”.
134. 136 AD3d 1196 (RSVT Holdings, LLC v Main St. Am. Assur. Co.)	In the case title, change “RVST” to “RSVT”.
135. 139 AD3d 772 (Aurora Loan Servs., LLC v Gross)	On page 773, line 8 from the bottom, remove “in order.”
136. 140 AD3d 884 (Matter of Piedimonte v Village of E. Rockaway)	In the case title, change “Appellant” to “Petitioner”.

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137. 143 AD3d 1116 (Wright v Ellsworth Partners, LLC)	On page 1117, line 6, insert the word “allegedly” before the phrase “sustained a traumatic brain injury.”
138. 148 AD3d 523 (Doscher v Mannatt, Phelps & Phillips, LLP)	On page 524, lines 16 and 18, replace “478” with “487.”
139. 148 AD3d 738 (Ramapo Realty, LLC v 1236 Rogers Ave., LLC)	On page 739, lines 24-25, replace “market value” with “sale price.”
140. 149 AD3d 1155 (People v Monteiro)	In the case title, change “Monterio” to “Monteiro.”
141. 151 AD3d 1193 (Matter of Hannah MM. v Elizabeth NN.)	On page 1196, line 34, replace “basis” with “basis; and, as so modified, affirmed.”
142. 151 AD3d 1879 (Erie Insurance Exchange v J.M. Pereira & Sons, Inc.)	In all instances, change “Business Corporation Law” to “BCL.”
143. 152 AD3d 834 (Rackowski v Araya)	On page 836, the footnote, delete lines 1-3 and replace them with the following: “As to plaintiff’s request for counsel fees, however, because he concedes that he sought counsel fees in connection with his motion to dismiss the first action and Supreme Court granted that motion “in full,” any issue in this regard must be addressed to.”
144. 152 AD3d 1122 (Matter of National Energy Marketers Assn. v New York State Pub. Serv. Commn.)	On page 1122, line 14, add, at the end of the paragraph, the following: “To the extent that petitioners herein raise additional arguments, we find such to be without merit.”
145. 154 AD3d 564 (Brooks v April)	On page 568, line 40, please delete “properly” and replace it with “should have.”
146. 157 AD3d 971 (People v Serrano)	On page 973, lines 4-7, delete from “That police officer testified” through “apprehending the defendant.”

147. **157 AD3d 1027** (Rothschild v
Braselmann)

On pages 1029-1030, delete from “Moreover, Correction Law § 24-1 provides that” through “as such, given the dismissal of,” and replace with: “However, plaintiff’s recovery in the Court of Claims for any malpractice or negligence committed by Lieb and Angell is uncertain. Whether the state is “vicariously liable for the medical malpractice of independent contractors” in Court of Claims actions is determined by “a theory of ‘agency or control in fact, or apparent or ostensible agency’ ” (*Garofolo v State of New York*, 135 AD3d 1108, 1109 [2016], quoting *Kavanaugh v Nussbaum*, 71 NY2d 535, 547 [1988]). The state is vicariously liable for the malpractice of an independently contracted doctor “when an inmate has reasonably relied upon the appearance of the doctor’s authority created by the words or conduct of DOCCS. . . . Essential to such a claim is the existence of words or conduct on the part of DOCCS that give rise to the appearance and belief that the doctors were acting on its behalf” (*Garofolo v State of New York*, 135 AD3d at 1109-1110 [citations omitted]; see *Soltis v State of New York*, 172 AD2d 919, 919-920 [1991]).

As such, it is possible, depending on the proof, that the state could successfully avoid liability, and plaintiff’s recovery in the Court of Claims action could then be diminished; therefore, given the dismissal of”

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148. 158 AD3d 731 (Smith v Fuentes)	On page 731, line 30, change “Roman, J.P.” to “Rivera, J.P.”
149. 160 AD3d 580 (Cangro v Maranzos)	Change title to “Marangos.”
150. 161 AD3d 977 (Mascia v Mascia)	On page 977, line 23, change September 24, 1998, to September 24, 1988.
151. 164 AD3d 1190 (FranPerl Equities Corp. v 24 W 23rd St., LLC)	Change title to “124 W 23rd St., LLC.”
152. 171 AD3d 1331 (Anderson v Allstate Ins. Co.)	On page 1332, line 2, change “Albany County” to “Rensselaer County.”
153. 177 AD3d 1380 (Matter of Green v Lafler)	On page 1380, line 15, replace “Cayuga Court” with “Cayuga County.”
154. 179 AD3d 1211 (Matter of Bainton v New York Dept. of Motor Vehs.)	On page 1211, line 16 from the bottom, replace “Columbia County” with “Albany County.”
155. 183 AD3d 1096 (Lisa I. v Manikas)	On page 1096, line 25 from the bottom, replace “15-year-old” with “14-year-old.”
156. 184 AD3d 534 (Sancino v Metropolitan Transp. Auth.)	On page 534, lines 3 and 4 from the bottom, replace “23-1.7 (e) (2)” with “23-1.7 (e) (1).”
157. 189 AD3d 1072 (People v Magliulo)	On page 1073, line 9 following “affirmed” add “, and the matter is remitted to the County Court, Suf- folk County, for further proceed- ings pursuant to CPL 460.50 (5).”
158. 192 AD3d 430 (Papadopoulos v Metropol- itan Transp. Auth.)	On page 430, line 16 from the bot- tom, replace “complaint” with “answer.”

159. **195 AD3d 1366** (Matter of Attorneys in Violation of Judiciary Law § 468-a [Endo])
- At 1366, line 22, change “he” to “she”; lines 26, 32, and 34, change “his” to “her”; at 1367, lines 5, 13, 20, 25, 27, 28, 32, and 39, change “his” to “her”; lines 9, 11, 26, 30, and 31, change “he” to “she”; line 45, change “him” to “her.”
160. **200 AD3d 1315** (People v Sweet)
- On page 1317, lines 11-12 from the bottom, replace “Rivera, who also testified for the People in accordance with his plea deal, stated” with “Rivera, who testified for the People in accordance with a sentencing agreement reached after he was found guilty at his own trial, stated.”
161. **206 AD3d 1044** (People v Drumgold)
- On page 1045, line 23, page 1047, line 40, page 1048, lines 13 and 29, replace “County Court” with “Supreme Court.”
162. **221 AD3d 1412** (People v Neulander)
- On page 1413, line 4, and page 1414, line 13 from the bottom, replace “splatter” with “spatter.”
163. **240 AD3d 1067** (Matter of Spence v Office of the N.Y. State Comptroller)
- On page 1069, lines 8-9 from the bottom, delete “, thus Supreme Court erred in determining that State Finance Law § 200 (3) did not apply.”