

**No. 21**  
May 27, 2026

# NEW YORK OFFICIAL REPORTS



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Law Reporting Bureau

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# NEW YORK OFFICIAL REPORTS



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# COURT OF APPEALS NEW FILINGS

## **Preliminary Appeal Statements processed by the Court of Appeals Clerk's Office 4/24/26-4/30/26**

Each week, the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rules of the Court of Appeals (22 NYCRR) § 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rules of the Court of Appeals (22 NYCRR) § 500.23 and direct any questions to the Clerk's Office.

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For April 24, 2026 through April 30, 2026, the following preliminary appeal statements were filed:

### **PEOPLE v ERBER (MICHAEL) (243 AD3d 804):**

APL-2026-00038

2nd Dept. App. Div. order of 11/19/25; affirmance; leave to appeal granted by Halligan, J., 4/9/26; **Crimes—Appeal—Preservation of Issue for Review—Whether a defendant is required to preserve a challenge to the Attorney General's prosecutorial authority under Executive Law § 63 (3); Crimes—Larceny—Whether the grand jury evidence was legally insufficient to establish grand larceny in the second degree, grand larceny in the third degree, and scheme to defraud in the first degree and whether insufficiency was cured by legally sufficient evidence at trial; Crimes—Right to Counsel—Effective Representation—Whether defendant was deprived of the effective assistance of counsel based on counsel's failure to object that the trial evidence was legally insufficient; Crimes—Evidence—Whether the court erred in admitting the prosecution to introduce evidence that defendant may have made false allegations against one of the complainants;** Supreme Court, Kings County, convicted defendant of grand larceny in the second degree, grand larceny in the third degree (four counts), and scheme to defraud in the first degree, upon a jury verdict, and imposed sentence; App. Div. affirmed.

### **MATTER OF J.L. (245 AD3d 466):**

APL-2026-00034

1st Dept. App. Div. order of 1/13/26; affirmance; sua sponte examination of whether any jurisdictional basis exists for an appeal as of right; **Guardian and Ward—**

**Whether the petition for the appointment of a guardian was properly granted;** Supreme Court, New York County, granted petition for the appointment of a guardian of the person and property of J.L., also known as J.A., an alleged incapacitated person; App. Div. affirmed.

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Disbarment.—Respondent attorney failed to communicate to a client, in writing, the scope of his representation and the basis or rate of the fees and expenses for which she would be responsible; engaged in conduct prejudicial to the administration of justice by failing to provide the client a written letter of engagement or retainer agreement; charged and collected excessive fees in representing the client; represented the client when there was a significant risk that his professional judgment on behalf of the client would be adversely affected by respondent's own interests; and engaged in conduct that adversely reflected on his fitness as a lawyer (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.5 [a], [b]; 1.7, 8.4 [d], [h]). Notwithstanding the mitigation advanced, respondent was involved in a course of self-dealing, actively took financial advantage of a vulnerable individual, and ignored his duties required by the Rules of Professional Conduct and his duty as a fiduciary to safeguard his client's limited assets. Under the totality of the circumstances, respondent was disbarred.— *Matter of Galarza*, 247 AD3d 88.

Public Censure.—Respondent attorney failed to provide prompt and diligent representation, neglected three client matters, and failed to adequately communicate with clients, opposing parties, and the Court regarding the status of and substantive developments in those matters (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.3 [a], [b]; 1.4 [a] [3], [4]). A public censure—requested by consent of the parties pursuant to 22 NYCRR 1240.8 (a) (5)—was warranted in light of respondent's admitted misconduct, as well as the aggravating factor of her prior disciplinary history consisting of a letter of advisement and an admonition in connection with the handling of a personal injury matter. In mitigation, respondent cooperated with the Attorney Grievance Committee's investigation; her misconduct was not motivated by a desire for personal profit, nor did it involve dishonesty towards the clients, adversaries, or the courts; respondent had been practicing personal injury law for 40 years and had an overall positive reputation in the legal community; and she included eight letters (from former judges and clients) attesting to her good character.— *Matter of Asher*, 247 AD3d 102.

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Summary Judgment.— *Salas v Joy Constr. Corp.*, 88 Misc 3d 1264(A), 2025 NY Slip Op 52226(U).

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Industrial Code Violation—Tripping Hazard.— *Cuddihy v Bronx Pro Group LLC*, 88 Misc 3d 1263(A), 2025 NY Slip Op 52221(U).

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Slip and Fall on Ramp—Elevation Differential.— *Rodriguez v Lendlease (US) Constr., Inc.*, 88 Misc 3d 1264(A), 2025 NY Slip Op 52225(U).

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VOLUME 247  
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2026



[241 NYS3d 528]

In the Matter of EDDIE A. PANTILIAT, an Attorney, Respondent.

Second Department, August 27, 2025

**PROCEDURAL SUMMARY**

RESPONDENT was admitted to the bar on October 18, 2017, at a term of the Appellate Division of the Supreme Court in the Third Judicial Department. By order to show cause dated June 27, 2024, the Appellate Division, Second Department, directed respondent to show cause why an order should not be made and entered pursuant to 22 NYCRR 1240.13 imposing discipline upon him for the misconduct underlying the discipline imposed by a judgment and order of the Supreme Court of the State of Arizona dated September 13, 2023.

**HEADNOTE**

**Attorney and Client — Disciplinary Proceedings — Censure**

Pursuant to the reciprocal disciplinary provision of 22 NYCRR 1240.13, respondent was censured based upon a public reprimand and one year of probation imposed upon him by the Supreme Court of the State of Arizona for his refusal to withdraw from representation despite a conflict of interest that led to his disqualification.

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**RESEARCH REFERENCES**

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 29–30, 38, 40, 44, 55–56, 70.

CARMODY-WAIT 2d Officers of Court §§ 3:244, 3:247–3:248, 3:260, 3:279, 3:282, 3:323, 3:325, 3:329.

22 NYCRR 1240.13.

NY JUR 2d Attorneys at Law §§ 362–364, 369, 454–457, 478, 505, 510–512, 518–519, 524.

**ANNOTATION REFERENCES**

What constitutes representation of conflicting interests subjecting attorney to disciplinary action. 17 ALR3d 835.

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

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#### APPEARANCES OF COUNSEL

*Catherine A. Sheridan*, Hauppauge (*Rose L. Dias* of counsel), for Grievance Committee for the Tenth Judicial District.

*Harwood Law PLLC*, New York City (*Anthony J. Harwood* of counsel), for respondent.

#### OPINION OF THE COURT

Per Curiam.

By judgment and order dated September 13, 2023, the Supreme Court of the State of Arizona publicly reprimanded the respondent for his violation of rules 1.16 (a), 4.3 and 8.4 (d) of the Arizona Rules of Professional Conduct (hereinafter the RPC), which, inter alia, require a lawyer to withdraw from representation of a client if the representation will result in a violation of the RPC and prohibit a lawyer from giving legal advice to an unrepresented person if the lawyer knows the interests of such a person are in conflict with the interests of the lawyer’s client.

#### Arizona Disciplinary Proceeding

By an agreement for discipline by consent, the respondent admitted that in January 2019 he represented Andrew Bloom’s real estate firm, BVO Luxury Groups (hereinafter BVO), and Andrew R. Bloom, P.C. (hereinafter together the Bloom entities), in an action commenced in the Superior Court of Arizona against former sales agents of BVO, Courtney Van Cott and Jennifer Daly. The complaint in that action alleged, inter alia, that Van Cott and Daly stole BVO clients and appropriated trade secrets, depriving BVO and Bloom of profits of approximately \$220,000. Van Cott and Daly filed proper answers and represented themselves in communications with the respondent. On May 27, 2020, Janis Gail Pelletier filed a notice of limited appearance on behalf of Van Cott and Daly and limited her appearance to all depositions and settlement conferences. Pelletier appeared with Van Cott and Daly for their settlement conference and depositions and took Bloom’s deposition.

At the parties’ settlement conference, Daly offered \$5,000 to the Bloom entities to settle the matter, which was rejected, ending the settlement conference. Van Cott and Daly thereaf-

ter continued communicating directly with the respondent, and the respondent ceased communication with Pelletier as the limited scope representation had expired.

On July 7, 2020, the respondent communicated with Daly, without Pelletier, and discussed his plans for the case. The respondent offered to settle with Daly for a payment of \$5,000 from Daly to the Bloom entities if Daly cooperated as a favorable witness against Van Cott. In exchange, the respondent offered a dismissal with prejudice of the complaint insofar as asserted against Daly. The respondent informed Daly that he wanted an affidavit from Daly tailored to support the Bloom entities' version of the facts underlying the action, which would be used in a motion for summary judgment. Daly informed the respondent that Van Cott did not solicit any of the alleged BVO clients at issue, those clients had little to no contact with BVO, and Daly wanted to be removed from the action without making an adversary of Van Cott. The respondent informed Daly that he wanted the affidavit to state that the clients at issue were covered by an independent contractor agreement (hereinafter the ICA) and that commissions on the sales and purchases of those clients' homes were due to BVO. The respondent advised Daly that there was nothing criminal that Daly would be testifying to.

On July 8, 2020, and July 9, 2020, the respondent communicated further with Daly, and he subsequently sent her a proposed affidavit. Daly did not sign the proposed affidavit as she believed it contradicted her sworn deposition testimony and, by signing it, she would be committing perjury.

In July 2020, the Bloom entities moved for summary judgment on all claims alleged in the complaint, and in August 2020, Pelletier filed an amended notice of appearance to include representation of Daly and Van Cott on the motion for summary judgment, as well as a cross-motion for summary judgment dismissing the complaint. In December 2020, the Superior Court ruled that the ICA was valid, and the parties' motions for summary judgment were denied.

As part of the briefing for the motions for summary judgment, Pelletier requested sanctions based on the respondent's alleged effort to extort Daly's testimony. On May 25, 2021, the Superior Court held an evidentiary hearing on the issue of sanctions. After the hearing, the court concluded that the respondent had a professional obligation to include Pelletier in his communications with Daly and that he had an obligation to

not prepare a document that was knowingly inaccurate for the purpose of obtaining an improper advantage over Van Cott.

The Superior Court further concluded that the respondent and the Bloom entities caused a disruption in the court proceedings and assessed attorneys' fees against the respondent and the Bloom entities. The court further permitted Van Cott and Daly to present evidence at trial regarding the facts and circumstances surrounding the proposed affidavit, thereby creating a conflict between the Bloom entities and the respondent.

Pelletier informed the respondent that he had a conflict of interest in representing the Bloom entities as the respondent would be a necessary witness at trial and that under ethical rules he should withdraw his representation. The respondent refused to do so, and Pelletier moved to disqualify him. In February 2022, the Superior Court ruled that there was a significant risk that the respondent's representation of the Bloom entities would be materially limited by the respondent's own personal interests, since the respondent was under investigation by the State Bar of Arizona for his actions and his personal interests and professional standing were at stake as a result of the investigation. The court disqualified the respondent.

As agreed to in the agreement for discipline by consent, the following aggravating factors were considered: the respondent's prior disciplinary history, a pattern of misconduct, multiple rule violations, and the respondent's substantial experience in the practice of law. The following mitigation was considered: the respondent's cooperation with the proceedings, his evidence of good character, and the imposition of penalties and sanctions.

By judgment and order of the Supreme Court of the State of Arizona dated September 13, 2023, the respondent was publicly reprimanded and placed on probation for one year with the condition that he complete six hours of continuing legal education.

#### New York Proceeding

By order to show cause dated June 27, 2024, the respondent was directed to show cause why he should not be reciprocally disciplined pursuant to 22 NYCRR 1240.13 based on the misconduct underlying the discipline imposed by the judgment and order of the Supreme Court of the State of Arizona dated September 13, 2023. By affirmation dated September 23, 2024,

the respondent does not raise any of the enumerated defenses in 22 NYCRR 1240.13 (b) and requests the imposition of public censure as reciprocal discipline. In mitigation, the respondent states that he made a free and full disclosure to the Arizona disciplinary board and cooperated fully. He further states that his misconduct was negligent, not knowing and intentional, and he is sincerely remorseful for violating the RPC. He recognizes that he failed to report his Arizona discipline to this Court, but states that it was an oversight that he regrets, and that he was unaware of the obligation to report such. The respondent submits that a public censure would be the equivalent of the Arizona sanction and is consistent with sanctions that New York courts have imposed for similar misconduct.

In response, the Grievance Committee submits an affirmation indicating that the respondent did not raise any defenses as enumerated in 22 NYCRR 1240.13 (b) and that the mitigation he sets forth is a matter for this Court's consideration.

The respondent failed to notify this Court of his Arizona discipline as required by 22 NYCRR 1240.13 (d), and the Grievance Committee learned of the discipline when the State Bar of Arizona reported such.

#### Findings and Conclusion

Based on the admitted misconduct underlying the discipline imposed by the judgment and order of the Supreme Court of the State of Arizona dated September 13, 2023, we find that the imposition of discipline is warranted. Regarding the sanction, this Court has found that

“[i]n reciprocal proceedings, we generally accord significant weight to the sanction imposed by the jurisdiction where the misconduct occurred because the foreign jurisdiction has the greatest interest in fashioning sanctions for misconduct perpetrated therein. Therefore, when the sanction prescribed by the foreign jurisdiction is not inconsistent with the sanction for similar misconduct in this jurisdiction, the Court should impose the same sanction” (*Matter of Sirkin*, 77 AD3d 320, 323 [1st Dept 2010] [citations omitted]; see *Matter of Esposito*, 126 AD3d 93, 109 [2d Dept 2015]).

Therefore, we conclude that the respondent should be publicly censured.

LASALLE, P.J., DILLON, DUFFY, BARROS and GOLIA, JJ., concur.

Ordered that, pursuant to 22 NYCRR 1240.13, the respondent, Eddie A. Pantiliat, is publicly censured for his professional misconduct.

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[245 NYS3d 392]

In the Matter of JULIO CEASAR GALARZA, an Attorney, Respondent. GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT, Petitioner.

Second Department, November 19, 2025

**PROCEDURAL SUMMARY**

DISCIPLINARY PROCEEDING instituted by the Grievance Committee for the Tenth Judicial District. Respondent was admitted to the bar on March 15, 1995, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

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

Respondent attorney failed to communicate to a client, in writing, the scope of his representation and the basis or rate of the fees and expenses for which she would be responsible; engaged in conduct prejudicial to the administration of justice by failing to provide the client a written letter of engagement or retainer agreement; charged and collected excessive fees in representing the client; represented the client when there was a significant risk that his professional judgment on behalf of the client would be adversely affected by respondent's own interests; and engaged in conduct that adversely reflected on his fitness as a lawyer (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.5 [a], [b]; 1.7, 8.4 [d], [h]). Notwithstanding the mitigation advanced, respondent was involved in a course of self-dealing, actively took financial advantage of a vulnerable individual, and ignored his duties required by the Rules of Professional Conduct and his duty as a fiduciary to safeguard his client's limited assets. Under the totality of the circumstances, respondent was disbarred.

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**RESEARCH REFERENCES**

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 57–58, 60–61, 65, 237, 239.

CARMODY-WAIT 2d Officers of Court §§ 3:280, 3:288–3:289.  
22 NYCRR 1200.0, rules 1.5 (a), (b); 1.7, 8.4 (d), (h).

NY JUR 2d Attorneys at Law §§ 77, 80, 446, 448, 453, 511.

**ANNOTATION REFERENCE**

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

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#### APPEARANCES OF COUNSEL

*Catherine A. Sheridan*, Hauppauge (*Rachel Merker* of counsel), for petitioner.

*Slavin & Slavin* (*Barton L. Slavin* and *Scalise & Hamilton, P.C.*, Scarsdale [*Deborah A. Scalise* of counsel]), for respondent.

#### OPINION OF THE COURT

Per Curiam.

The Grievance Committee for the Tenth Judicial District commenced a formal disciplinary proceeding against the respondent by serving and filing a notice of petition and a verified petition, both dated December 16, 2022. The respondent served and filed a verified answer dated February 22, 2023, and an amended verified answer dated April 19, 2023. By decision and order on application dated September 26, 2023, this Court, pursuant to 22 NYCRR 1240.8 (b) (1), referred the matter to the Honorable Arthur J. Cooperman, as Special Referee, to hear and report. In a report dated May 2, 2024, the Special Referee sustained all five charges in the petition. By notice of motion dated July 12, 2024, the Grievance Committee moves to confirm the report of the Special Referee sustaining all five charges of professional misconduct, to strike paragraph 66 of the respondent's amended answer on the ground that the affirmative defenses therein do not comply with CPLR 3014 and 3018, and to impose such discipline upon the respondent as the Court deems just and proper. The respondent submits an affirmation in opposition asserting that only charge one should be sustained and the remaining four charges should be dismissed, and that branch of the Grievance Committee's motion which is to strike paragraph 66 of the respondent's amended answer on the ground that the affirmative defenses therein do not comply with CPLR 3014 and 3018 should be denied as academic. The respondent requests a sanction no greater than a public censure or an admonition for his misconduct related to charge one.

#### The Petition

The petition alleges five charges of misconduct surrounding the respondent's representation of JH.

Charges one and two allege that pursuant to a letter of engagement/retainer agreement (hereinafter the retainer

agreement) dated February 15, 2019, JH retained the respondent to represent her in defense of an action in Supreme Court, Nassau County. The action was for specific performance of a contract for the sale of real property in East Meadow owned by JH (hereinafter the property). For this representation, the respondent charged a flat fee of \$7,500. The retainer agreement did not specify hourly rates for legal or nonlegal services.

In or about May 2019, the respondent negotiated a new contract of sale for the property. A closing on the property occurred on May 15, 2019, the underlying action was settled, and the respondent was paid \$7,500 in accordance with the retainer agreement. The net proceeds from the sale, totaling \$194,186.57, were deposited into an attorney trust account maintained by Elliot Small in an account ending in 3717 at TD Bank, entitled “Elliot S. Small Attorney at Law IOLA Trust Account” (hereinafter Small’s escrow account).

Starting in or about July 2019, the respondent represented JH in a matter before the Suffolk County Traffic and Parking Violations Agency (hereinafter the traffic court matter). Starting in or about November 2019, the respondent represented JH in a criminal matter in District Court, Nassau County (hereinafter the criminal court matter). Starting in or about July 2020, the respondent represented JH in a matter before the Mental Health Court Part, Supreme Court, Queens County (hereinafter the Mental Health Court matter). Starting in or about December 2020, the respondent represented JH in a personal injury claim before the New York State Court of Claims (hereinafter the Court of Claims matter). The respondent failed to provide JH with a written letter of engagement or written retainer agreement for his representation in any of the above-referenced matters.

From June 27, 2019, through July 31, 2019, and in connection with the above-referenced matters, the respondent charged JH \$300 per hour for legal services, and \$175 per hour for his secretary’s services. On October 16, 2019, the respondent increased his hourly rate for legal services from \$300 to \$400. The respondent applied the \$400 hourly rate retroactively to work he previously had completed, thereby requesting an additional \$1,330 for work he completed from June 27, 2019, through July 31, 2019.

The respondent failed to communicate to JH, in writing, the scope of his representation and the basis or rate of the fees and expenses for which she would be responsible in the traffic court

matter, the criminal court matter, the Mental Health Court matter, and the Court of Claims matter.

The respondent's legal fees for his representation of JH in these matters exceeded \$3,000, as follows:

- (a) at least \$3,920 for the traffic court matter;
  - (b) at least \$9,400 for the criminal court matter;
  - (c) at least \$17,352.50 for the Mental Health Court matter;
- and
- (d) at least \$21,140 for the Court of Claims matter.

Based on the foregoing, charge one alleges that the respondent failed to communicate to JH, in writing, the scope of his representation and the basis or rate of the fees and expenses for which JH would be responsible, in violation of rule 1.5 (b) of the Rules of Professional Conduct (22 NYCRR 1200.0). Charge two alleges that the respondent engaged in conduct prejudicial to the administration of justice by failing to provide JH a written letter of engagement or retainer agreement concerning legal representation, in violation of rule 8.4 (d) of the Rules of Professional Conduct.

Charge three incorporates the factual allegations of charges one and two and further alleges that the respondent charged JH a legal fee of \$400 per hour for numerous nonlegal activities, such as supervising JH's move from one storage unit to another, reviewing JH's mail, and at least 19 charges for picking up JH's mail at the post office. Furthermore, the respondent charged JH a fee of \$175 per hour for secretarial services, including opening and reviewing JH's mail, for which the respondent charged JH at least 19 times.

On July 31, 2019, the respondent submitted to Small an affirmation in support of the respondent's application for payment of legal fees in the amount of \$3,990 for 13.3 hours of work associated with his representation of JH. Small paid the respondent the full amount that same day.

On October 16, 2019, the respondent submitted to Small an affirmation in support of the respondent's application for payment of legal fees in the amount of \$7,200 for 18 hours of work associated with his representation of JH. In his affirmation, the respondent noted an additional balance due of \$1,330 because he had "erroneously billed" JH the \$300 hourly rate in the July 31, 2019 affirmation, rather than the \$400 hourly rate. On October 17, 2019, Small paid the full amount to the respondent.

On December 4, 2019, and January 24, 2020, the respondent submitted to Small an affirmation in support of the respondent's application for payment for 44 hours for legal work and 12 hours of secretarial work associated with his representation of JH. The respondent also claimed payment for \$275.77 in postage and moving charges, and \$246.92 for various bills. The total claim for payment for these two affirmations totaled \$20,814.56, which Small paid in full the same day that they were submitted by the respondent.

Based upon the foregoing, charge three alleges that the respondent charged and collected excessive fees in representing a client, in violation of rule 1.5 (a) of the Rules of Professional Conduct.

Charge four incorporates allegations of charge one through three and further alleges that on March 13, 2019, JH executed, as principal, three different powers of attorney, two entitled "statutory short form" and one entitled "statutory gift rider." In each power of attorney, JH, as principal, designated the respondent as her agent.

On April 25, 2020, the respondent, acting as "agent and attorney in fact" for JH, executed a trust agreement entitled the "[JH] Revocable Living Trust" (hereinafter the trust). The trust designated JH as the grantor and the respondent as the trustee. The respondent signed the trust agreement as trustee. The trust designated that "if no children of the Grantor survive the Grantor, then in that event the Trustee shall pay over, transfer and distribute the balance of the Trust and any undistributed income to [the respondent]." The trust further designated that "[i]n the event of the death, resignation or inability of the Trustee to act as Trustee, for any reason, then the Grantor appoints Jason Galarza to serve as Trustee." Jason Galarza is the respondent's son and had no prior affiliation with JH. JH never saw and was never read the trust agreement before it was executed.

On April 30, 2020, the respondent opened a trust account at JP Morgan Chase entitled the "[JH] Revocable Living Trust," with account number ending in 2480 (hereinafter the trust account). On or about May 1, 2020, the respondent requested that Small turn over any leftover proceeds held in Small's escrow account for JH. On May 4, 2020, the respondent deposited check No. 2679 for \$110,809.18, drawn on Small's escrow account, into the trust account.

On June 2, 2020, the respondent wired \$8,000 from the trust account to make a payment on his personal Lowe's credit card

account. On June 12, 2020, the respondent wired \$1,500 from the trust account to make a payment to his personal Home Depot credit card account. On June 25, 2020, the respondent deposited check No. 2686 for \$17,667.85, drawn on Small's escrow account, into the trust account.

Between August 13, 2020, and December 15, 2020, the respondent made three payments to himself from the trust account totaling \$45,330.25.

Based on the foregoing, charge four alleges that the respondent represented a client when there was a significant risk that his professional judgment on behalf of the client would be adversely affected by the respondent's own financial, business, property, or other personal interests, in violation of rule 1.7 of the Rules of Professional Conduct.

Charge five alleges that as a result of the facts and misconduct alleged in charges one through four, the respondent engaged in conduct that adversely reflects on his fitness as a lawyer, in violation to rule 8.4 (h) of the Rules of Professional Conduct.

#### The Hearing Record

A hearing was held on January 17, 2024, continuing on January 18, 2024, and January 19, 2024. The Grievance Committee entered six exhibits into evidence to prove its case in chief. To testify as character witnesses on his behalf, the respondent called his wife, Maria Galarza. The respondent also called Joseph A. Augenanger, the Honorable Andrea Phoenix, John Sharp, Christina Chazotte, Jordan Trager, and Joseph L. Admo. The respondent also testified on his own behalf and submitted six exhibits into evidence.

The respondent testified that he is a general practitioner who handles a variety of cases including civil litigation, real estate, bankruptcy, criminal, and traffic matters. The respondent began his own practice in or about 1998 or 1999, and he has one employee who works as a secretary. The respondent stated that he previously had received grievance complaints, all of which had been dismissed except for one which resulted in a letter of caution in 2003.

The respondent recounted that he met JH in or around January 2019, when she came to the respondent's office seeking help for an issue she was having with the property. The purchaser was suing JH for breach of contract because she was attempting to cancel the sale. JH retained the respondent who

agreed to a flat-fee retainer of \$7,500 to represent JH in the breach of contract litigation regarding the property. At his examination under oath, the respondent testified that JH “had no money to retain” him during their first meeting but that she contacted his office again. The parties had another meeting and agreed on the \$7,500 flat fee, which would be paid later, presumably from the proceeds of the sale of the property.

Once retained, the respondent submitted an answer in the action for JH, conducted discovery, and appeared for a preliminary conference. During the litigation, the respondent discovered that the house on the property had been condemned by the Town of Hempstead. The respondent did not know how much time they had before the house was demolished. The respondent stated that he learned that if the Town demolished the house, the cost of the demolition would be added to the tax bill. Because JH already was delinquent in her taxes, the value of the property would be further reduced. The respondent visited the property with JH and took numerous photographs. The respondent stated that JH did not want the respondent to speak with her neighbors or anyone else without her present. The respondent stated that the house was boarded up and that he had to make arrangements with the Department of Buildings of the Town of Hempstead and receive special permission to enter the house. The respondent said the house had been declared unsafe and that JH had been living in her car in the driveway on the property. The respondent said that Nassau County had stopped JH from living in her car, but he was unaware of where JH was living when she came to him for representation.

The respondent settled the litigation surrounding the sale of the property and participated in a closing on May 15, 2019. According to the closing statement, the purchase price for the property was \$240,000, an increase from the original price of \$185,000, to which JH had agreed prior to the breach of contract action. The respondent stated that the new price of \$240,000 was based upon his negotiations with the purchaser. From the proceeds of the sale, in addition to other disbursements related to taxes and closing fees, Small, who shared an office space with the respondent and whom the respondent engaged to act as the seller’s attorney, was paid \$3,500, as well as \$500 for “preparation and execution of power of attorney.” According to Small’s bill, he was paid \$3,500 for his legal services related to negotiation and drafting of the contract of sale

and related closing services. Additionally, Small charged \$500 for “[i]legal services related to preparation and execution of durable power of attorney *related to the closing of subject premises*” (emphasis added). According to the closing statement, the respondent was paid \$7,500 for “Power of Attorney Preparation and Execution.” The respondent signed all of the closing documents as agent for JH. Ultimately, a total of \$194,132.10 was deposited into Small’s escrow account from the remaining proceeds of the sale.

The respondent stated that Small served as the escrow agent for the purchase proceeds, holding the money in his escrow account. The respondent testified that JH had asked the respondent to act as power of attorney because there was no one else she could trust and she wanted the respondent to handle her affairs. The respondent explained that three power of attorney documents were executed on March 13, 2019, and that Small prepared the documents. The respondent maintained that he had “nothing to do with the power of attorney.” This testimony contradicts the power of attorney documents in the record, which explicitly state, “This document was prepared by: Julio C. Galarza, Esq., 5020 Sunrise Highway, Massepequa Park, New York 11762.” In further contravention, the billing records state that Small was paid only \$500 for preparing the power of attorney documents, while the respondent was paid \$7,500. The witness signatures on the power of attorney documents are from Brooks Taylor and the respondent’s secretary, Joann Mineo. The record demonstrates that Taylor’s office address is the same office address as the respondent’s and that Taylor also was paid for working on the traffic court matter.

After the sale of the property, the respondent continued to perform unrelated legal work for JH at her request. No new retainer was ever signed.

From June 2019 to June 2020, the respondent billed JH for his work at a rate of \$400 per hour, submitting affirmations of legal services directly to Small for payment. Although the respondent claimed that JH knew these payments were occurring, there was no testimony that JH had any say over whether Small paid the respondent the money he requested. The respondent stated that he submitted his bills directly to Small because the respondent had power of attorney.

The respondent also attended doctors’ and counseling appointments with JH. The respondent stated that he accompanied JH “because she was concerned that she would go

to a doctor visit and then be held against her will.” The respondent billed JH for attending these appointments. For example, a billing entry from August 19, 2019, shows that the respondent billed JH for 4.3 hours, at \$400 per hour, totaling \$1,720, to accompany her to an appointment at Nassau University Medical Center, where JH met with a psychiatrist and discussed the specific conditions from which she suffered.

In December 2019, JH was incarcerated in Nassau County Jail and then transferred to Creedmoor Psychiatric Center (hereinafter Creedmoor) approximately one week later. In a letter to Nassau County Department of Social Services, Adult Protective Services, dated December 9, 2019, the respondent wrote, *inter alia*, “I am writing to refer [JH] to your agency for services that I believe are necessary to protect her welfare. . . . [R]ecent developments have caused me to question her current ability to adequately care for herself and conduct herself in a rational manner.”

At the end of December 2019, the respondent visited Creedmoor and spoke to a doctor who said that JH would be kept at Creedmoor for 60 days. JH was assigned an attorney from Mental Hygiene Legal Service (hereinafter MHLS) to represent her while at Creedmoor. From February 2020 until late March 2020, the respondent did not have contact with JH. The respondent testified that during this time, he thought that something had happened to JH or she had died.

In May 2020, while JH was at Creedmoor, the respondent formed a trust to manage the remainder of her money held in Small’s escrow account. The respondent testified that JH “didn’t say specifically that she wanted me to have a trust. What she said was, she wanted me to take care of everything. And rather than requesting every time something had to be paid, you know, an e-mail and a bill to [Small], I got the money and created a trust.” The respondent stated that JH consented to the creation of the trust. The respondent testified that Small prepared the trust documents and that the respondent’s 23-year-old son was named as the successor trustee. The respondent claimed that he did not know who else to appoint and acknowledged that, in hindsight, his son was not the best choice. The respondent signed the trust agreement on behalf of JH “as agent and attorney in fact” and on his own behalf as the trustee. Mineo notarized the trust documents. The respondent did not discuss the creation of the trust with JH’s MHLS attorney. The trust also included a provision that if JH should

pass away, the balance of the trust would be distributed to the respondent. The respondent testified that Small told the respondent that any remaining balance of the trust should be left to JH's family or a charity and Small mentioned the issue of a judicial accounting. The respondent provided the following explanation:

“So there was no one that she wanted to leave the money to, but she did indicate she wanted me to have the money. But even with that, I didn't anticipate that was—I didn't think that there would ever be money at the end of the rainbow. The other thing, too, is, if I had to do a judicial accounting, I learned that would be expensive. So my thinking was, it would be left to me, quote unquote, but it would be donated to some sort of dog charity on some level or church, for her behalf. So it was never, even though it says it would be left to me. I just didn't want to have to do a final judicial accounting and charge the money or legal fees to do that.”

When asked why he created a trust and did not put the money in his escrow account, the respondent stated that he did not want to put the money into his escrow account and wanted to create a separate account. JH was not provided a copy of the trust agreement, and the respondent did not recall reading the trust agreement to JH over the telephone while she was at Creedmoor. On May 6, 2020, Small was paid \$4,250 for preparing the trust documents. As of April 17, 2020, when the trust documents were drafted, the value of the trust was \$113,126.33. This amount was reduced from nearly \$195,000 following the closing on the property in May 2019.

At some point, JH asked the respondent to represent her instead of MHLS so that she could be released from Creedmoor. On August 11, 2020, the respondent attended a hearing on behalf of JH to secure her release. JH was released one or two days after the hearing, at which time the respondent picked up JH from Creedmoor, helped her get her car, and returned her mailbox key. The respondent testified that he told JH, “Now you can get your own mail, you can take care of your stuff, I'll still pay the bills, you just need to give them to me.”

Upon JH's release from Creedmoor, the respondent gave JH the mail he had collected and the bills for which he had already been paid from the trust. According to a trust statement, in June 2020, the respondent paid himself legal fees by paying

his Lowe's credit card bill in the amount of \$8,000, and his Home Depot credit card bill in the amount of \$1,500, directly from the trust account. On August 13, 2020, two days after the hearing at Creedmoor, the respondent paid himself \$20,130.25. The respondent stated that JH did not complain about the bills and just asked the respondent to do more work. The respondent stated that he did not send a bill to JH every 60 days while she was in Creedmoor because he already was picking up her mail, he had power of attorney, and he believed it did not make sense to mail her a bill. The respondent acknowledged that from December 2019 to August 2020, while JH was at Creedmoor, he was working pursuant to the power of attorney and was paying himself accordingly.

The respondent stated that he had advanced money to himself once or twice because he was doing a lot of work for JH. On October 15, 2020, the respondent wrote a check to himself from the trust account for \$18,000 in attorney's fees. The respondent explained, "[s]o like the work was done, I'd look at the—my time sheets, guesstimate hours, write a check, and then I would do a bill a week later or a couple of days later." When asked about his billing records for January 2020 through December 2020, the respondent explained that a lot of work he did for JH was not reflected in his billing records and that he performed such work as a professional courtesy. On December 15, 2020, the respondent issued a check to himself from the trust account for \$7,200 in attorney's fees.

On or about April 5, 2021, the respondent's relationship with JH soured, and the respondent returned to JH the remaining money in the trust account and resigned from the trust. The respondent claimed that there was approximately \$49,000 remaining in the trust account, but the actual amount was \$38,423.48. The respondent provided a letter to the Grievance Committee, stating that he had uncollected bills in the amount of \$7,279.43.

The respondent testified in mitigation, discussing his health concerns and personal issues which he attributed to his stress during the time of his representation of JH. The respondent suggested that the stress affected his judgment.

#### The Special Referee's Report

In a report dated April 8, 2024, the Special Referee sustained all five charges of professional misconduct.

The Grievance Committee now moves to confirm the report of the Special Referee sustaining all five charges of profes-

sional misconduct, to strike paragraph 66 of the respondent's amended answer on the ground that the affirmative defenses therein do not comply with CPLR 3014 and 3018, and to impose such discipline upon the respondent as the Court deems just and proper. The Grievance Committee submits, *inter alia*, that the respondent has not reimbursed any of the funds to JH, that the respondent put his own financial interests above those of a vulnerable client, and that the respondent merely apologized for his misconduct without showing remorse for the clear conflict of interest. The Grievance Committee further submits that the respondent's statements in paragraph 66 of his amended answer are self-serving arguments, not in the proper form, and are not affirmative defenses as they are labeled. In his report, the Special Referee noted that the statements in paragraph 66 of the respondent's amended answer were more appropriately considered as mitigating factors.

In response, the respondent, through counsel, submits a memorandum of law in opposition, in which he asserts that only charge one of the petition should be sustained and that the remaining four charges should be dismissed, and that branch of the Grievance Committee's motion which is to strike paragraph 66 of the respondent's amended answer on the ground that the affirmative defenses therein do not comply with CPLR 3014 and 3018 should be denied as academic. The respondent contends that charges two through five fail to state a cause of action, are not supported by the evidence, and that the respondent's conduct was the result of a reasonable and well-intentioned mistake. The respondent further contends that given the mitigation presented, including that he did not act with venal intent, that he was experiencing health concerns and personal issues, that he cooperated with the Grievance Committee's investigation, that he performed *pro bono* work and community activities, and that JH purportedly benefitted from his services, the Court should impose a sanction no greater than an admonition or a public censure for the misconduct related to charge one. As to that branch of the Grievance Committee's motion which is to strike paragraph 66 of the respondent's amended answer on the ground that the affirmative defenses therein do not comply with CPLR 3014 and 3018, the respondent contends that the Special Referee considered these statements as mitigating factors and that the statements provide a legally cognizable justification or excuse for his actions, and are therefore proper statements.

Findings and Conclusion

In view of the evidence adduced at the hearing and the admissions, we find that the Special Referee properly sustained all five charges. The Grievance Committee's motion to confirm the Special Referee's report and to strike paragraph 66 of the respondent's amended answer on the ground that the affirmative defenses therein do not comply with CPLR 3014 and 3018 is granted.

In determining an appropriate measure of discipline, the respondent asks this Court for leniency, requesting a sanction no greater than an admonition or a public censure based upon the mitigation submitted. However, it is clear that the respondent does not appreciate the severity of his misconduct. Notwithstanding the mitigation advanced, we find that the respondent's actions necessitate the severest of sanctions. This matter involved a course of self-dealing by the respondent, who actively took financial advantage of a vulnerable individual. The respondent actively ignored his duties required by the Rules of Professional Conduct and his duty as a fiduciary to safeguard his client's limited assets.

Under the totality of the circumstances, we find that the respondent's conduct warrants disbarment from the practice of law, effective immediately (*see Matter of D'Angelo*, 158 AD3d 107 [2d Dept 2017]).

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

Ordered that the Grievance Committee's motion to confirm the Special Referee's report and to strike paragraph 66 of the respondent's amended answer on the ground that the affirmative defenses therein do not comply with CPLR 3014 and 3018 is granted; and it is further,

Ordered that pursuant to Judiciary Law § 90, effective immediately, the respondent, Julio Ceasar Galarza, is disbarred, and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

Ordered that the respondent, Julio Ceasar Galarza, shall 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, Julio Ceasar Galarza, shall desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appear-

ing 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, Julio Ceasar Galarza, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency, and he shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 1240.15 (f).

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[246 NYS3d 49]

In the Matter of ROBERTA DORF ASHER, an Attorney, Respondent. ATTORNEY GRIEVANCE COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, December 2, 2025

### PROCEDURAL SUMMARY

JOINT MOTION pursuant to 22 NYCRR 1240.8 (a) (5) by the Attorney Grievance Committee for the First Judicial Department and respondent for discipline on consent. Respondent was admitted to the bar on August 3, 1983, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

### HEADNOTE

#### Attorney and Client — Disciplinary Proceedings — Public Censure

Respondent attorney failed to provide prompt and diligent representation, neglected three client matters, and failed to adequately communicate with clients, opposing parties, and the Court regarding the status of and substantive developments in those matters (Rules of Prof Conduct [22 NYCRR 1200.0] rules 1.3 [a], [b]; 1.4 [a] [3], [4]). A public censure—requested by consent of the parties pursuant to 22 NYCRR 1240.8 (a) (5)—was warranted in light of respondent's admitted misconduct, as well as the aggravating factor of her prior disciplinary history consisting of a letter of advisement and an admonition in connection with the handling of a personal injury matter. In mitigation, respondent cooperated with the Attorney Grievance Committee's investigation; her misconduct was not motivated by a desire for personal profit, nor did it involve dishonesty towards the clients, adversaries, or the courts; respondent had been practicing personal injury law for 40 years and had an overall positive reputation in the legal community; and she included eight letters (from former judges and clients) attesting to her good character.

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### RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 29–30, 40, 44–45, 58, 66, 67–69, 100.

CARMODY-WAIT 2d Officers of Court §§ 3:244, 3:247–3:248, 3:277, 3:325, 3:329–3:330, 3:333.

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

NY JUR 2d Attorneys at Law §§ 362–364, 402, 405, 505, 511, 518–519, 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 personal injury or property damage actions as ground for disciplinary action—modern cases. 68 ALR4th 694.

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censure" & consent

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**APPEARANCES OF COUNSEL**

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

*J. Richard Supple, Jr.*, for respondent.

**OPINION OF THE COURT**

Per Curiam.

Respondent Roberta D. Asher was admitted to the practice of law in the State of New York by the Second Judicial Department on August 3, 1983, under the name Roberta Dorf Asher. Respondent maintains a registered address in the First Judicial Department.

In April 2025, the Attorney Grievance Committee (the AGC) served respondent with a notice and petition of charges (seven charges) alleging professional misconduct stemming from her mishandling of three separate client matters. From approximately 1993 and at all times relevant here, respondent practiced law at Asher & Associates, PC of which she is the sole proprietor and ultimate supervisor of all pending cases.

In 2003, M.M. retained respondent's firm to represent him in a lawsuit filed in Supreme Court, Bronx County alleging unlawful arrest. After commencing the case, respondent did not file a request for judicial intervention for approximately seven years. During the pendency of the case, there were years-long periods when respondent and her firm had no contact with M.M. The lack of contact was at times due to M.M.'s lack of stable living arrangements and/or incarceration(s), and also due to the firm's lack of affirmative steps to locate him. Eight years after being retained, respondent produced M.M. for a deposition. The defendants did not appear for depositions for three additional years, until November 2014 when their first

witness testified. During this three-year period, the firm moved to strike the defendants' answers in March 2014 at which point it came to light that the defendants' second witness was on medical leave and could not appear. The firm did not make additional motions to strike, although they could have. In June 2019, and again in January 2020, respondent moved for contempt against the second witness. Both motions were denied as by then the witness had retired from the defendant agency and was allegedly no longer under its control. The matter remains ongoing with the note of issue only having been filed in February 2025.

A.B. retained respondent in December 2021 to prosecute her personal injury action which the firm filed in Supreme Court, Bronx County. In September 2022, A.B.'s daughter J.B. informed the firm that her mother had died three months prior, and that J.B. was interested in proceeding with her late mother's case. J.B. sent the firm A.B.'s death certificate in November 2022. Between that time and April 2023, respondent did not advise the court or opposing counsel of her client's death, which would have resulted in an automatic stay of proceedings pending substitution of an administrator as plaintiff. The defendants thus continued to engage in discovery and motion practice. In April 2023, the firm finally notified the court that A.B. had died. The matter was marked stayed in June 2023 and remains so marked to date without a final disposition.

At some point after A.B.'s death, respondent determined that the firm would not continue to act in the matter on behalf of A.B.'s estate. She did not communicate that decision to J.B. until May of 2023. In August 2025, the firm advised opposing counsel and the court that insofar as it did not represent A.B.'s estate, inquiries regarding appointment of an administrator should be made directly to J.B.

In May 2018, R.S. retained respondent's firm to represent him as a plaintiff in a personal injury case. In March 2021, R.S. died from causes unrelated to his injuries and/or accident. Following his death, R.S.'s spouse D.P. took her late husband's death certificate and their marriage certificate to the firm with the idea of continuing the case in the name of his estate. For two years, neither respondent nor anyone else from the firm contacted D.P. in connection with the status of R.S.'s case, despite D.P.'s inquiries, and respondent failed to petition for letters of administration.

In 2022, the defendant's counsel sent respondent two letters requesting the status of the Surrogate's Court proceedings. Respondent did not respond. Respondent instructed a firm associate to work with D.P. to have her appointed as administrator of her husband's estate, but the associate did not accomplish same before leaving the firm. Upon the associate's departure, a paralegal was hired to work on that task (and perform similar work in other matters), but she did not accomplish same either. In February 2024, approximately three years after her client's death, respondent and/or the firm filed an administration petition. In August 2024, the Kings County Surrogate's Court's Clerk issued a request for amended petition, citing the need for various corrections. After the AGC filed the petition of charges, respondent and/or the firm filed an amended petition with the court on May 28, 2025, four years after R.S.'s death.

Respondent admits that her actions violated all seven charges alleged in the petition of charges. As to charge 1, respondent's failure to provide prompt and diligent representation to M.M., causing M.M.'s matter to be delayed and remain pending for 22 years, without any current prospect of a resolution in the near future, violated Rules of Professional Conduct (22 NYCRR 1200.0) rule 1.3 (a) and (b). As to charge 2, she failed to keep M.M. informed about the status of his matter for prolonged periods, and failed to comply with the client's reasonable requests for information in violation of rule 1.4 (a) (3) and (4).

As to charge 3, by failing to keep J.B. informed about the status of her late mother's legal matter, which J.B. was positioned to inherit, for approximately seven months respondent violated rule 1.4 (a) (3) and (4). As to charge 4, by failing to timely inform the court and the opposing parties about the death of her client A.B., and by continuing to prosecute the case after her client's death, respondent caused waste of the parties' and the court's time and resources in violation of rule 1.3 (a).

As to charge 5, respondent failed to file a Surrogate's Court petition for limited letters of administration after her client R.S.'s death for approximately four years and failed to respond to Surrogate's Court's requests to amend the petition in a timely manner, causing inordinate delay to the continued prosecution of her client's case which violated rule 1.3 (a) and (b). As to charge 6, respondent failed to communicate timely with her late client's spouse, D.P., who was in a position to inherit

her husband's personal injury case, regarding the status of the filing the petition for approximately four years, despite D.P.'s repeated attempts to reach respondent or her firm, in violation of rule 1.4 (a) (3) and (4).

As to charge 7, respondent failed to adequately supervise her associate and paralegal to ensure timely and adequate filing of D.P.'s Surrogate's Court petition, causing delays of four years and a failure to amend and finalize the petition in a timely matter in violation of rules 5.1 (c), (d) (2) (ii) and 5.3 (a) and (b) (2) (ii).

The parties have stipulated to the following aggravation: In January 2019, respondent received a letter of advisement for failure to advise and warn a client of the possibility that respondent would not file a lawsuit on his behalf unless he had a significant injury, resulting in the client's prolonged inability to work. In February 2021, respondent received an admonition (private discipline) for failure to act with reasonable diligence and promptness, failure to keep a client reasonably informed, and failure to respond to reasonable requests for information, in connection with respondent's handling of a personal injury matter, in violation of rules 1.3 (a) and 1.4 (a) (3) and (4).

The parties stipulate to the following mitigation: respondent cooperated with the AGC's investigation; her misconduct was not motivated by a desire for personal profit, nor did it involve dishonesty towards the clients, adversaries, or the courts; respondent has been practicing personal injury law on behalf of thousands of clients for the past 40 years and has an overall positive reputation in the legal community; and she includes eight letters (from former judges and clients) attesting to her good character.

Additionally, the parties maintain that respondent aims to reform her practice in the following ways in order to avoid repetition of misconduct herein in the future: Respondent will ensure that she and other firm attorneys are prompted periodically by computer-generated calendaring notices to contact clients so there are no pronounced lapses in communications; and will utilize video conferencing platforms more frequently to enhance the quality of communications with clients. The firm also has provided mobile phones to certain client-facing paraprofessionals and provided clients with their numbers so clients have more options for initiating inquiries directly.

The parties jointly move pursuant to Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.8 (a) (5) for discipline

by consent and ask this Court to impose a public censure. They agree that in essence, respondent's misconduct consisted of neglecting three clients' matters and failing to adequately communicate with clients, opposing parties, and the court regarding the status of and substantive developments in the cases in question. They submit that the imposition of a public censure comports with this Court's precedent, under similar circumstances of lack of diligent and prompt representation, neglect, and failure to communicate, in the absence of dishonesty and venality. They cite as support *Matter of Brodsky* (153 AD3d 52, 56 [1st Dept 2017]), where the Court opined that "[t]ypically, public censure is imposed where the misconduct is based on negligence or mistake, rather than venal intent" (internal quotation marks omitted); *Matter of Salomon* (78 AD3d 115 [1st Dept 2010]) where censure was imposed for, inter alia, neglect of multiple matters; prior admonition discounted as aggravation because it was issued after misconduct at issue occurred; *Matter of Lenoir* (287 AD2d 243 [1st Dept 2001]) where censure was imposed for, inter alia, neglect of a client matter; two prior admonitions for neglect of three matters; and *Matter of Marrin* (207 AD2d 239 [1st Dept 1995]) where there was censure for neglect of a client matter; three prior admonitions for neglect. Additional case law in this Department also supports the parties' censure request (see *Matter of Thomas*, 159 AD3d 35 [1st Dept 2018] [censure for neglect of a matrimonial matter, three prior admonitions]; *Matter of Gould*, 253 AD2d 233 [1st Dept 1999] [censure for neglect of three matters, prior admonition for neglect]; *Matter of Erda*, 209 AD2d 147 [1st Dept 1995] [censure for, inter alia, neglect of three matters and misrepresenting the status of those matters, two prior admonitions for neglect, significant mitigation]).

In light of respondent's admitted misconduct, the aggravating and mitigating factors presented, and the relevant case law, public censure is an appropriate sanction.

Accordingly, the parties' joint motion for discipline by consent should be granted, the AGC's petition of charges be denied as moot, and respondent publicly censured.

KERN, J.P., KENNEDY, KAPNICK, O'NEILL LEVY and HAGLER, JJ., concur.

Wherefore, it is ordered that the parties' joint motion pursuant to 22 NYCRR 1240.8 (a) (5) for discipline by consent is granted, and

It is further ordered that respondent, Roberta Dorf Asher, is hereby publicly censured for her misconduct, and

It is further ordered that the separately filed petition of charges by the Attorney

Grievance Committee for the First Judicial Department is denied as moot.

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[246 NYS3d 54]

In the Matter of ROBERT JAY HANTMAN, an Attorney, Respondent. ATTORNEY GRIEVANCE COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, December 2, 2025

### PROCEDURAL SUMMARY

JOINT MOTION pursuant to 22 NYCRR 1240.8 (a) (5) by the Attorney Grievance Committee for the First Judicial Department and respondent for discipline on consent. Respondent was admitted to the bar on March 30, 1982, at a term of the Appellate Division of the Supreme Court in the Third Judicial Department.

### HEADNOTE

#### Attorney and Client — Disciplinary Proceedings — Public Censure

Respondent attorney, who pleaded guilty to criminal possession of stolen property in the fifth degree in violation of Penal Law § 165.40 for his failure to timely file his 2019 New York State income tax return and pay the tax due, was publicly censured. Prior to pleading guilty, respondent paid the entirety of his remaining New York tax liabilities. The public censure—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 factors in mitigation, including that respondent lacked a prior disciplinary history; cooperated with both the district attorney's office and the Attorney Grievance Committee (AGC) during their respective investigations; accepted full responsibility for his misconduct; sincerely expressed remorse; was well-regarded in the legal community and had a positive reputation for honesty and integrity; his misconduct was unrelated to the practice of law; he performed significant hours of pro bono activities; there was little likelihood that his misconduct would recur; and the AGC received a number of letters attesting to respondent's reputation for good character.

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### RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 29–30, 40, 82, 86, 89, 96, 100.  
 CARMODY-WAIT 2d Officers of Court §§ 3:244, 3:247–3:249, 3:273, 3:325, 3:328–3:329.  
 MCKINNEY'S, Penal Law § 165.40.  
 22 NYCRR 1240.8 (a) (5).  
 NY JUR 2d Attorneys at Law §§ 362–365, 400–401, 493, 505, 511, 518, 523–524; NY JUR 2d Criminal Law: Substantive Principles and Offenses § 1068.

### ANNOTATION REFERENCE

See ALR Index under Censure; Discipline and Disciplinary Actions; Income Taxes; Possession; Taxes.

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**APPEARANCES OF COUNSEL**

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

*Michael R. Perle* for respondent.

**OPINION OF THE COURT**

Per Curiam.

Respondent Robert Hantman was admitted to the practice of law in the State of New York by the Third Judicial Department on May 30, 1982. At all times relevant to this proceeding, he maintained a law office within the First Judicial Department.

On April 29, 2022, respondent was charged with criminal tax fraud in the third degree, a class D felony; repeated failure to file personal income and earnings taxes, a class E felony; criminal possession of stolen property in the fifth degree, a class A misdemeanor; and criminal tax fraud in the fifth degree, a class A misdemeanor. Pursuant to a negotiated pre-arrest agreement, respondent pleaded guilty to criminal possession of stolen property in the fifth degree, in violation of Penal Law § 165.40, for his failure to timely file his 2019 New York State income tax return and pay the tax due. Prior to pleading guilty, respondent paid \$168,842.17, the entirety of his remaining New York tax liabilities for 2016 through 2019. After pleading guilty, the remaining charges were dismissed, and respondent was sentenced to a \$250 surcharge and a one-year conditional discharge.

On January 9, 2025, the Attorney Grievance Committee (AGC) served respondent with a petition of charges alleging that respondent violated rule 8.4 (b) and (h) of the New York Rules of Professional Conduct (22 NYCRR 1200.0). These charges stem from respondent’s conviction and underlying conduct. On February 12, 2025, respondent submitted an answer admitting certain facts and denying all of the charges.

The parties now jointly move under Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.8 (a) (5) for discipline by consent and ask this Court to publicly censure respondent.

The motion is supported by a joint affirmation containing a stipulation of facts, factors in mitigation, conditional admissions, and agreed-upon discipline, as well as respondent's affidavit acknowledging his admission to the stipulated facts, his consent to the agreed-upon discipline, which he has freely and voluntarily given, and his full awareness of the consequences of such consent.

The parties stipulate to the following facts: respondent did not timely file his 2016, 2017, 2018 and 2019 New York State income tax returns, instead filing each in 2020, while having an outstanding tax liability of more than \$10,000 in each year; respondent did not timely file his 2016, 2017, 2018 and 2019 federal income tax returns, instead filing each in 2020, while having an outstanding tax liability of more than \$10,000 in each year; for the tax years from 2016 through 2019, respondent did remit withholding taxes due on his W-2 income, but respondent did not remit amounts owed due to his partnership income (i.e., amounts related to Internal Revenue Service form 1065 schedule K-1); respondent failed to timely pay in full the income taxes he owed for the tax years 2016 through 2019; respondent's criminal charges were resolved as noted above; prior to pleading guilty, respondent remitted a check to the Department of Taxation and Finance for \$168,842.17, which covered the entirety of his tax liabilities for the years 2016 through 2019, including tax interest and penalties; and respondent timely notified the Clerk of the Court of his conviction.

Respondent conditionally admits that his actions, as set forth above, violated the four charges alleged in the petition for violation of rule 8.4 (b) (charge one) and (h) (charges two through four).

The parties cite no factors in aggravation and stipulate to the following factors, among others, in mitigation: respondent was admitted in 1982 and has no prior disciplinary history; he cooperated with both the New York County District Attorney's Office and the AGC during their respective investigations; he has accepted full responsibility for his misconduct and has never attempted to blame anyone else; he has sincerely expressed remorse and contrition; respondent is well-regarded in the legal community and has a positive reputation for honesty and integrity; his misconduct was unrelated to the practice of law; there are no allegations of professional misconduct related to his service of a client; respondent's conduct did not involve any deceptive misconduct; he has

performed significant hours of pro bono activities; and there is little likelihood that respondent's misconduct will recur. The AGC received a number of letters attesting to respondent's reputation for good character as well.

Under these circumstances, the parties agree that the discipline to be imposed should be a public censure (*see Matter of Eppner*, 62 AD3d 151 [1st Dept 2009]; *Matter of Everett*, 243 AD2d 75 [1st Dept 1998]).

The parties' joint motion for discipline by consent to impose a public censure should be granted. This Court has consistently imposed public censure in comparable tax-related disciplinary matters where the respondent's conduct was non-venal, the misconduct aberrational, and the mitigating factors compelling, as here (*see e.g. Matter of Clark*, 60 AD3d 159 [1st Dept 2009]; *cf. Matter of Bernfeld*, 117 AD3d 26 [1st Dept 2014] [suspension for failure to remit taxes warranted where conduct included aggravating factor of substantial discretionary spending during the delinquency period]).

Accordingly, the parties' joint motion should be granted and respondent publicly censured.

WEBBER, J.P., SHULMAN, RODRIGUEZ III, PITT-BURKE and HIGGITT, J.J., concur.

Wherefore, it is ordered that the parties' joint motion for discipline by consent pursuant to 22 NYCRR 1240.8 (a) (5) is granted, and respondent, Robert Jay Hantman, is publicly censured.

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- 88** 423 Madison Ave. LLC v 423 Madison Ave. Inc., 2026 NY Slip Op 50614(U). Landlord and Tenant—Summary Proceedings—Commercial Tenant’s Nonpayment of Rent—Prior Course of Conduct. (App Term, 1st Dept, Apr. 30, 2026)
- 89** 530 Manhattan Ave. Hous. Dev. Fund Corp. v Situ, 2026 NY Slip Op 50615(U). Condominiums and Cooperatives—Proprietary Lease—Landlord’s Failure to Serve Notice of Default Prior to Serving Notice of Termination. (App Term, 1st Dept, Apr. 30, 2026)
- 90** 80 Varick St. Group, L.P. v Lutz, 2026 NY Slip Op 50643(U). Landlord and Tenant—Rent Regulation—Holdover Proceeding Predicated on Tenant’s Failure to Execute Renewal Lease—Willfulness of Default. (App Term, 1st Dept, May 7, 2026)



[— NYS3d —]

CHANEL FRESELLA, an Infant, by Her Father and Natural Guardian, BERNARD COUCH, et al., Plaintiffs, v BARCLAYS CENTER et al., Defendants, and AEG MANAGEMENT BROOKLYN, LLC, et al., Defendants/Third-Party Plaintiffs, and LIVE NATION WORLDWIDE, INC., et al., Defendants/Third-Party Defendants.

Supreme Court, Kings County, October 7, 2025

#### HEADNOTES

**Negligence — Foreseeability — Crowd Surge Triggered by Loud Noise at Concert Venue**

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#### RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Entertainment and Sports Law §§ 55–56; AM JUR 2d Negligence §§ 1, 70–72, 118–124, 138, 140, 143, 156, 393, 448–449, 452, 455–456, 461, 568, 584; AM JUR 2d Premises Liability §§ 533, 535.

DOBBS LAW OF TORTS (2d ed) §§ 120, 124–125, 159, 202, 205–207, 256, 416.

NY JUR 2d Negligence §§ 1, 12, 16–18, 21, 59, 62, 65, 67, 71, 77, 79–81, 85–86, 100–101; NY JUR 2d Premises Liability §§ 2, 24, 26–28, 170.

NEW YORK LAW OF TORTS §§ 6:3, 6:6, 8:8–8:9, 8:13–8:15, 12:3, 12:12, 12:50–12:52.50.

#### ANNOTATION REFERENCE

Liability of proprietor for injury to customer or patron caused by pushing, crowding, etc., of other patrons. 20 ALR2d 8.

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#### APPEARANCES OF COUNSEL

*Rivkin Radler LLP*, Uniondale (*James Raymond Finn* and *Sahil Sharma* of counsel), for Barclays Center and others, defendants/third-party plaintiffs.

*Siben & Siben LLP*, Bay Shore (*John A. Meringolo* and *Richard K. Perskin* of counsel), for Sabrina Bencivenga and another, plaintiffs.

*Hannum Feretic Prendergast & Merlino LLC*, Mineola (*Beth L. Rogoff-Gribbins* of counsel), for Live Nation Worldwide, Inc. and another, defendants/third-party defendants.

*Della Mura & Ciacci LLP*, Bronx (*Paul Gentile* of counsel), for Chanel Fresella, plaintiff.

*Reena Rani*, New York City, for Catrina Washington and another, plaintiffs.

*Steven Adam Rubin & Associates, PLLC*, New York City (*Steven A. Rubin* of counsel), for Roberto Ubinas-Lugo, plaintiff.

#### OPINION OF THE COURT

FRANCOIS A. RIVERA, J.

Notice of motion filed on September 30, 2024, under motion sequence number 8, by defendants Brooklyn Events Center, LLC doing business as Barclays Center and incorrectly sued herein as Brooklyn Sports & Entertainment, Brooklyn Arena LLC, AEG Management Brooklyn LLC, and Onexim Sports and Entertainment Holdings USA, Inc. (hereinafter Barclay or Barclay defendants) for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and dismissing the complaint and all cross-claims asserted against them. The motion is opposed.

Notice of cross-motion filed on March 19, 2025, under motion sequence number 9, by plaintiffs Sabrina Bencivenga and Michael Mulligan for an order pursuant to the common-law doctrine of spoliation of evidence and CPLR article 31, granting sanctions against moving defendants Brooklyn Events Center, LLC doing business as Barclays Center and incorrectly sued herein as Brooklyn Sports & Entertainment, Brooklyn Arena LLC, AEG Management Brooklyn LLC and Onexim Sports and Entertainment Holdings USA, Inc. The motion is opposed.

Notice of cross-motion filed on March 19, 2025, under motion sequence number 10, by plaintiffs Sabrina Bencivenga and Michael Mulligan for an order pursuant to CPLR 305 (c), 2001, and 3025 (b) amending and correcting the name of a defendant in the caption from Live Nation Entertainment, Inc. to Live Nation Worldwide, Inc. The motion is opposed.

Notice of motion filed on May 8, 2025, under motion sequence number 11, by defendants/third-party defendants Live Nation Worldwide, Inc. and Live Nation Concerts, Inc. (collectively Live Nation) for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and

dismissing the complaint of the plaintiffs, the cross-claims of codefendants, and the claims of third-party plaintiffs as against them, and entering judgment in their favor. The motion is opposed.

#### Procedural History

On October 20, 2017, the plaintiff, Chanel Fresella, an infant under 18 years of age, by her father and natural guardian, Bernard Couch, commenced a lawsuit against defendants Barclays Center, AEG Management Brooklyn, LLC, Brooklyn Events Center, LLC, and Brooklyn Arena Holding Company, LLC by the filing of a summons and complaint in the County of Kings under index number 520316/2017. The foregoing defendants appeared by verified answer.

On February 1, 2019, defendants AEG Management Brooklyn, LLC and Brooklyn Events Center, LLC doing business as Barclays Center filed a third-party summons and complaint against Live Nation Worldwide, Inc. and Live Nation Concerts, Inc.

On February 22, 2019, the plaintiff, Chanel Fresella, an infant under 18 years of age, by her father and natural guardian, Bernard Couch, filed a supplemental summons and amended complaint against and adding Live Nation Worldwide, Inc. and Live Nation Concerts, Inc. to the action. On March 4, 2019, third-party defendants, Live Nation Worldwide, Inc. and Live Nation Concerts, Inc., filed an answer to the amended complaint. On March 11, 2019, defendants AEG Management Brooklyn, LLC and Brooklyn Events Center, LLC doing business as Barclays Center filed an answer to the amended complaint.

Thereafter, and pursuant to order of the Honorable Joseph C. Pastorella, Justice of the Supreme Court, County of Suffolk, dated December 21, 2018, the foregoing action was consolidated with four other actions into the instant action and caption under the instant index number.

The consolidated actions are all cases based upon the claims of other individuals who were hurt due to the same incident. A note of issue was filed on August 1, 2024.

#### Background

On October 20, 2017, Bernard Couch, as the parent and natural guardian of Chanel Fresella, commenced the instant action for damages for personal injury sustained by Chanel Fre-

sella by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). On February 22, 2019, the plaintiff filed an amended verified complaint with the KCCO. Chanel Fresella is no longer an infant.

The amended verified complaint alleges that Chanel Fresella was injured on May 19, 2017, at the Barclays Center, located at 620 Atlantic Avenue, Brooklyn, New York, due to the defendants' negligence, carelessness, and recklessness. Further discovery revealed that the injury occurred following the end of a concert when the crowd surged in response to loud noises, which some members of the crowd reported as gunshots (hereinafter the incident).

Currently, the action concerns the consolidated claims of seven individuals who were also allegedly injured by a surging crowd at Barclays Center on May 19, 2017. The common allegation is that the crowd at Barclays Center spontaneously reacted in panic to a loud noise that was thought to be a gunshot. It was determined after the incident that there were no gunshots fired. The crowd quickly moved toward the exits, and all the plaintiffs herein claim that they were injured by patrons attempting to exit the venue.

#### Law and Application

##### Barclay Defendants' Motion under Motion Sequence Number 8

Barclay has moved under motion sequence number 8 for an order pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against defendants/third-party plaintiffs Brooklyn Events Center, LLC doing business as Barclays Center and incorrectly sued herein as Brooklyn Sports & Entertainment, Brooklyn Arena LLC, AEG Management Brooklyn LLC, and Onexim Sports and Entertainment Holdings USA, Inc.\*

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating "the

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\* Counsel for Live Nation indicates that its affirmation under motion sequence number 8 is submitted in response to defendants/third-party plaintiffs Barclay and that Live Nation does not oppose the Barclay motion that seeks dismissal of the plaintiffs' various complaints and joins in same, seeking the same relief for Live Nation.

absence of any material issues of fact” (*Alvarez*, 68 NY2d at 324; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

“Pursuant to CPLR 3212 (b) a court will grant a motion for summary judgment upon a determination that the movant’s papers justify holding, as a matter of law, ‘that there is no defense to the cause of action or that the cause of action or defense has no merit.’ Further, all the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008], citing *Marine Midland Bank v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

Defendants Brooklyn Events Center, LLC (BEC) and AEG Management Brooklyn, LLC admitted in their answer that BEC is the de facto owner of the premises known as Barclays Center pursuant to a 99-year lease, and that AEG Management Brooklyn, LLC was responsible for management and operation of aspects of the Barclays Center pursuant to its management agreement with BEC.

Barclay’s first contention, as set forth in their memorandum of law in support of the motion, is that the claims asserted against defendants Brooklyn Arena LLC, Onexim Sports and Entertainment Holdings USA, Inc., and Brooklyn Sports & Entertainment must be dismissed since these entities did not own, operate, maintain, manage, or control the Barclays Center and had no duty to do so. This contention was supported by an affidavit of Jeffrey Gewirtz (hereinafter Gewirtz), annexed as exhibit PP, to the motion.

Gewirtz averred that he is the executive Vice President, Business Affairs and Chief Legal Officer for Brooklyn Events Center, LLC and that his allegations of facts were based on information and belief. He then alleged certain facts and opined, among other things, that Onexim did not own, operate, maintain, manage, or control the Barclays Center and had no duty to do so. He further opined that Brooklyn Sports &

Entertainment was not a legal entity, but rather a trade name formerly utilized by Brooklyn Events Center, LLC in the branding of Barclays Center. And, as a fictitious entity, it does not own, operate, maintain, manage, or control Barclays Center, and has no role in any security-related practices at Barclays Center at any time.

However, Gewirtz's affidavit did not state the source of his information or of his belief. He did not aver personal knowledge of the facts he was alleging. If the facts were based on Gewirtz's review of business records, he did not state which business records he relied upon. Nor does he refer to any of the exhibits which were annexed to Barclay's motion. He neither referred to any annexed documents as business records or averred knowledge of the business practices or procedures used in making any such records. "[I]t is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted" (*Citibank, N.A. v Potente*, 210 AD3d 861, 862 [2d Dept 2022], quoting *Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 205 [2d Dept 2019]). "Accordingly, '[e]vidence of the contents of business records is admissible only where the records themselves are introduced'" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 205-206 [2d Dept 2019], quoting 35 Carmody-Wait 2d § 194:94 [2019]). "Without their introduction, a witness's testimony as to the contents of the records is inadmissible hearsay" (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 206 [2d Dept 2019]). In sum, his allegations of fact and opinion were unsupported and conclusory.

Barclay further contends that the remaining claims asserted against Brooklyn Events Center, LLC doing business as Barclays Center (hereinafter BEC or Barclays Center) and incorrectly sued herein as Brooklyn Sports & Entertainment, Brooklyn Arena LLC (hereinafter Brooklyn Arena), and AEG Management Brooklyn LLC (hereinafter AEG) should be dismissed because they provided more than adequate security and the crowd surge which caused the plaintiffs' injuries was unforeseeable. They contend that the security precautions they employed and provided were more than adequate to guard against foreseeable acts of a third party. However, their showing does not demonstrate that the security provided was adequate with respect to each individual circumstance experienced by each injured plaintiff; instead, their presentation was more general.

Barclay further contends that the panic and crowd surge was unforeseeable citing the matter of *Florman v City of New York* (293 AD2d 120 [1st Dept 2002]) in support.

Among other things, Barclay relies on the deposition testimony of NYPD Sergeant Angelo Pirozzi who was assigned to Barclays Center on the day of the incident. Sergeant Pirozzi testified that after the concert ended, he was alerted of the incident when a large crowd started running in his direction saying that there was a shooting. He immediately ran towards the arena to find the shooter and was advised that there was no shooting and that the crowd responded to a loud noise due to an equipment issue related to the stage. Sergeant Pirozzi also testified that the crowd panic was not foreseeable and that the security staff could not have done more to calm the crowd after the incident. However, Sergeant Pirozzi is a fact witness and was not offered as an expert on the issue of foreseeability. His opinion as to foreseeability is therefore not considered by the court. The court cannot and does not find that the crowd surge caused by the loud noise was unforeseeable as a matter of law.

“What is foreseeable or normal may be the subject of varying inferences and is generally for the finder of fact to resolve” (*Beier v Giglio*, 230 AD3d 733, 734 [2d Dept 2024], citing *Raldiris v Enlarged City Sch. Dist. of Middletown*, 179 AD3d 1111, 1114 [2d Dept 2020]). Here, the issue of foreseeability is left for the factfinder to resolve.

Barclay did not make a prima facie showing that Brooklyn Arena LLC, Onexim Sports and Entertainment Holdings USA, Inc., and Brooklyn Sports & Entertainment did not own, operate, maintain, manage, or control Barclays Center. In the light most favorable to the opponent, the evidence presented shows the loud noise, which sounded like gunshots, was reasonably attributable to the breaking down of the stage set while patrons were still in the facility in the process of exiting. The noise was thus reasonably attributable to the conduct of the Barclay defendants’ agents and employees. Barclay’s motion is therefore denied without regard to the sufficiency of the opposition papers (*see Dowling v Valeus*, 119 AD3d 834, 835 [2d Dept 2014], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Moreover, in opposition, John A. Meringolo (hereinafter Meringolo), the attorney for Sabrina Bencivenga and Michael Mulligan, averred that the adequacy of the movants’ security was

irrelevant because it did not account for the movants' inaction and negligent creation of the loud noise during egress which caused the crowd surge.

Meringolo referred to parts of the deposition testimony of some of the plaintiffs and some of the individuals who were deposed on behalf of the movants. Ms. Fresella had testified that at the end of the show the lights came on and she got up out of her seat and proceeded to move toward the stairs. While standing at the top of the steps about to take a first step down, Ms. Fresella heard a loud noise which came from behind her and inside the building. Ms. Fresella indicated that after hearing the loud noise she heard people screaming. A rush of people ran into her from behind. She was knocked forward and into the people in front of her. She fell to the ground and was trampled. She described the event as a stampede.

Michael Sobieraj (hereinafter Sobieraj), a representative of defendants Brooklyn Events Center, LLC, Brooklyn Arena LLC, AEG Management Brooklyn LLC, and Onexim was deposed. Sobieraj averred, among other things, that on the night of the incident, the performance was on a 180 degree stage, with approximately 12,000 people in attendance. In describing some tasks of the stagehands in breaking down the stage, Sobieraj indicated that in breaking down the barricades, they do collapse and make a large sound. Sobieraj described it as a quite loud, metal-on-metal sound, which reverberates into an echo and is heard out in the hallways. The witness indicated that pursuant to contract, load-out commences immediately following the conclusion of the event.

In sum, the opposing party produced sufficient and admissible evidentiary proof to establish the existence of material issues of fact as to the adequacy of the security and as to the foreseeability of the crowd surge (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Bencivenga and Mulligan's Cross-Motion for Sanctions under Motion Sequence Number 9

Plaintiffs Sabrina Bencivenga and Michael Mulligan have cross-moved for an order pursuant to the common-law doctrine of spoliation of evidence and CPLR article 31, granting sanctions against moving defendants Brooklyn Events Center, LLC doing business as Barclays Center and incorrectly sued herein as Brooklyn Sports & Entertainment, Brooklyn Arena LLC, AEG Management Brooklyn LLC and Onexim Sports and Entertainment Holdings USA, Inc. for spoliation of video evi-

dence. Plaintiffs Bencivenga and Mulligan seek as a sanction the denial of the Barclay defendants' motion under motion sequence number 8 and an adverse inference at the time of trial.

Here, the court has denied the Barclay defendants' motion for summary judgment under motion sequence number 8 for failure to make a prima facie showing of entitlement and not by applying a sanction for spoliation of evidence. Consequently, the issue remaining is the cross-movants' request for an adverse inference at the time of trial.

The cross-motion for sanctions was joined by plaintiffs Roberto Ubinas-Lugo, Chanel Fresella, Bernard Couch, Catrina Washington, and Shauntay Harris. It was opposed by the Barclay defendants, Live Nation Worldwide, Inc., and Live Nation Concerts, Inc.

By letter dated October 5, 2017, under New York State Courts Electronic Filing (NYSCEF) Doc No. 334, addressed to Rivkin Radler LLP, counsel for Brooklyn Events Center, LLC doing business as Barclays Center and incorrectly sued herein as Brooklyn Sports & Entertainment, Brooklyn Arena LLC, AEG Management Brooklyn LLC and Onexim Sports and Entertainment Holdings USA, Inc., Siben & Siben, counsel for Bencivenga and Mulligan, made a non-spoliation demand to preserve all evidence and instrumentalities related to the plaintiffs' claims, including, but not limited to, audio or video recordings.

The Barclay defendants have opposed the motion contending in their memorandum of law that the preservation letter of October 5, 2017, was dated nearly five months after the alleged incident of May 19, 2017. The Barclay defendants further argued that 24 surveillance videos were exchanged in discovery and plaintiffs were advised that any other video film from Barclays Center had automatically erased 60 days after the date of loss.

“Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126” (*Van DeVeerdonk v North Westchester Restorative Therapy & Nursing Ctr.*, 223 AD3d 702, 703 [2d Dept 2024], citing *Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627, 629 [2d Dept 2009]). “The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence” (*Van DeVeerdonk v North Westchester Restorative Therapy & Nurs-*

*ing Ctr.*, 223 AD3d 702, 703 [2d Dept 2024]; see *Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *Lentz v Nic's Gym, Inc.*, 90 AD3d 618, 618 [2d Dept 2011]).

“A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a ‘culpable state of mind,’ and ‘that the destroyed evidence was relevant to the party’s claim or defense such that the trier of fact could find that the evidence would support that claim or defense’” (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015], citing *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]; see *Franco v Half Moon Riv. Club, LLC*, 214 AD3d 956, 958 [2d Dept 2023]).

“A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence” (*Washington v Church & Nostrand Apparel Corp.*, 238 AD3d 1096, 1098 [2d Dept 2025], quoting *Dagro Assoc. II, LLC v Chevron U.S.A., Inc.*, 206 AD3d 793, 795 [2d Dept 2022], quoting *Hirschberg v Winthrop-University Hosp.*, 175 AD3d 556, 557 [2d Dept 2019]). “However, ‘[i]n the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices’” (*Washington v Church & Nostrand Apparel Corp.*, 238 AD3d 1096, 1098 [2d Dept 2025], quoting *Tanner v Bethpage Union Free Sch. Dist.*, 161 AD3d 1210, 1211 [2d Dept 2018]).

Here, the issue is whether the Barclay defendants were on notice of a credible probability that they would become involved in litigation such that their failure to take active steps to halt the process of automatically recording over 60-day-old surveillance video and to preserve it for litigation constituted spoliation of evidence. The fact that the spoliation letter was issued five months after the injury causing event is not dispositive.

The court finds that the Barclay defendants were aware that people were injured on May 19, 2017, and that there was a high probability that litigation might ensue. With that awareness they admittedly preserved at least 24 videos from the date of the incident before they received the non-spoliation letter. The court further finds that the Barclay defendants had control over the video evidence and possessed an obligation to preserve it before it was overwritten. Allowing the video to be overwritten was negligent and the lost evidence was relevant to the plaintiffs’ claim.

The court further finds that whether a sanction is appropriate, and if so, what that sanction should be, is best left to the trial judge. Accordingly, this issue is respectfully referred to the trial judge to be addressed in a motion in limine.

Bencivenga and Mulligan’s Cross-Motion to Amend the Complaint under Motion Sequence Number 10

Sabrina Bencivenga and Michael Mulligan have cross-moved to amend the summons and complaint by correcting the name of a defendant in the caption from Live Nation Entertainment, Inc. to Live Nation Worldwide, Inc. The motion was opposed. On May 1, 2025, the court issued an interim order which directed the cross-movants to file a proposed amended summons and complaint redlined to clearly set forth the proposed changes sought by the cross-motion. On July 7, 2024, the cross-movants filed a proposed redlined amended complaint under NYSCEF Doc No. 528.

“Applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment would unfairly prejudice or surprise the opposing party, or is palpably insufficient or patently devoid of merit” (*TD Bank, N.A. v Keenan*, 221 AD3d 1040, 1041 [2d Dept 2023]; see CPLR 3025 [b]). “The party opposing the application has the burden of establishing prejudice, which requires a showing that the party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position” (*Great Neck Lib. v Kaeyer, Garment & Davidson Architects, P.C.*, 236 AD3d 873, 875 [2d Dept 2025]).

Live Nation Worldwide, Inc. and Live Nation Concerts, Inc. have opposed the cross-motion claiming that the proposed amendment was patently lacking in merit and palpably improper. The proposed amended pleading solely corrected the name of a defendant from Live Nation Entertainment, Inc. to Live Nation Worldwide, Inc. in the caption and throughout the complaint. It did not allege new or different facts or theories of liabilities. It merely corrected a misnomer. The opposition of Live Nation Worldwide, Inc. and Live Nation Concerts did not dispute that the change did in fact correct a misnomer of the defendant; rather, their opposition was premised on the contention that they should not be defendants at all.

The cross-motion to amend the summons and complaint is granted and all parties who have appeared in the action are deemed served with the amended pleading.

Live Nation's Motion for Summary Judgment and Dismissal under Motion Sequence Number 11

On May 8, 2025, defendants/third-party defendants Live Nation Worldwide, Inc. and Live Nation Concerts, Inc. (hereinafter Live Nation) filed a motion for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and dismissing the complaint of the plaintiffs, the cross-claims of codefendants, and the claims of third-party plaintiffs as against them, and entering judgment in their favor. The motion is opposed.

Pursuant to the Uniform Civil Term Rules of the Supreme Court, Kings County, a motion for summary judgment must be made no later than 60 days after the filing of the note of issue, unless leave of the court is obtained on good cause shown (*see Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579 [2d Dept 2013], citing Kings County Sup Ct Uniform Civ Term Rules, part C, rule 6). In the instant matter, the note of issue was filed on August 1, 2024, and Live Nation's motion was filed on May 8, 2025, over seven months late.

A movant seeking leave to make a late summary judgment motion must demonstrate good cause for the delay (*see* CPLR 3212 [a]; *see Ade v City of New York*, 164 AD3d 1198, 1200-1201 [2d Dept 2018], citing *Courtview Owners Corp. v Courtview Holding B.V.*, 113 AD3d 722, 723 [2d Dept 2014]). "In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment" (*Bargil Assoc., LLC v Crites*, 173 AD3d 958, 958 [2d Dept 2019], quoting *Bivona v Bob's Discount Furniture of NY, LLC*, 90 AD3d 796, 796 [2d Dept 2011]).

Here, the attorney handling the case, a partner with the law firm of Hannum Feretic Prendergast & Merlino LLC, explained why the motion was delayed. The mother of the handling attorney was diagnosed with a terminal illness in 2024 which progressively worsened causing the handling attorney to care for her mother daily from September through her passing in early December 2024. Due to issues related to the mother's medical condition, the handling attorney was unable to attend to the matter and the time to move for summary judgment lapsed.

The handling attorney did not seek any affirmative relief, such as leave to file a late motion or an extension of time within which to file the motion. Nor did the handling attorney explain

why the matter could not have been handled by other counsel in the firm. As pointed out in opposition, the handling attorney's firm has law offices in New York and New Jersey with 16 attorneys in its New York City office alone. Under these circumstances, the excuse proffered does not constitute good cause (see *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

"[A]n untimely motion or cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds" (*Munoz v Salcedo*, 170 AD3d 735, 736 [2d Dept 2019], quoting *Whitehead v City of New York*, 79 AD3d 858, 860 [2d Dept 2010]).

Here, Live Nation seeks an order granting summary judgment in its favor on the issue of liability on the basis that it is free of fault. The court finds that Live Nation's motion is a mirror image of the Barclay defendants' motion under motion sequence number 8 and may therefore be addressed although untimely.

Live Nation seeks dismissal of all claims against it based on the following contentions. First, it had no duty or responsibility regarding security. Second, it did not cause, create, or contribute to the loud noise which caused the crowd surge. Third, it neither owned nor controlled the Barclays Center and only had use of a portion of the Barclays Center pursuant to a limited license agreement between itself and BEC. Live Nation's role was that of an entertainment promoter who brought together the performing artist with the individual parties in control of the venue in which the artist would perform.

The motion is supported by, among other things, an affirmation of its counsel, the deposition transcript of the plaintiffs, the deposition transcript of Barclay's witness, Michael Sobieraj (hereinafter Sobieraj), and the deposition testimony of its own witness, Bill Mockler (hereinafter Mockler).

The deposition testimony of Michael Sobieraj and Bill Mockler established the following facts. Live Nation had no duty or responsibility regarding security at the Barclays Center. Live Nation was not involved in the sound, lighting, or stagecraft for the subject concert, including the breaking down of the stage set and equipment, referred to as loadout. The removal of the barricades was performed by Barclays Center workers. Live Nation did not and could not broadcast outside of the bowl, including over the Barclays Center house speaker system. Barclays Center hired the stagehands who performed the load-

out. Live Nation could not make announcements that could be heard outside the bowl. Live Nation responsibilities and obligations were governed by a licensing agreement between itself and BEC. No party disputed the authenticity of the license agreement.

The plaintiffs claimed, among other things, that they sustained injuries due to the negligence of Live Nation in their acts or omission at the Barclays Center. 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 (*see Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]; *Pulka v Edelman*, 40 NY2d 781, 782 [1976]). Here, the issue is whether any such duty ran from Live Nation to the plaintiffs, given that Live Nation's license agreement was with the owners or managers of the Barclays Center.

“Generally a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party” (*Kapoian-Trapani v City of New York*, 241 AD3d 895, 895 [2d Dept 2025], citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781 [2d Dept 2023]).

“However, a party that enters into a contract to render services may be said to have assumed a duty of care, and thus, be potentially liable in tort to third persons, where (1) the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely” (*Martinelli v Dublin Deck, Inc.*, 198 AD3d 635, 637 [2d Dept 2021]; *see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]; *Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781 [2d Dept 2023]).

“Where the pleadings do not allege facts which would establish the applicability of any of the *Espinal* exceptions, a defendant is not required to affirmatively demonstrate that the exceptions do not apply in order to establish its prima facie entitlement to judgment as a matter of law” (*Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781-782 [2d Dept 2023]; *Canciani v Stop & Shop Supermarket Co., LLC*, 203

AD3d 1011, 1013 [2d Dept 2022]; *Martinelli v Dublin Deck, Inc.*, 198 AD3d 635, 637 [2d Dept 2021]). “However, where any of the *Espinal* exceptions are pleaded in the complaint or the bill of particulars, a defendant contractor is required to demonstrate that those pleaded exceptions do not apply in order to establish its prima facie entitlement to judgment as a matter of law” (*Nesbitt v Advanced Serv. Solutions*, 224 AD3d 841, 843 [2d Dept 2024], citing *Conrad v Global Indus. Servs., Inc.*, 180 AD3d 868, 869 [2d Dept 2020], *Nachamie v County of Nassau*, 147 AD3d 770, 774 [2d Dept 2017], and *Perry-Renwick v Giovanni Macchia Landscaping & Gardening, Inc.*, 136 AD3d 772, 773 [2d Dept 2016]).

There is no dispute that not one of the plaintiffs was a party to the license agreement. Nor has any party claimed it was a third-party beneficiary of the license agreement. Live Nation has contended that no plaintiff claimed that Live Nation is liable to them under any one of the *Espinal* exceptions.

Assuming arguendo that an *Espinal* exception was pleaded by any plaintiff, Live Nation has made the following arguments. First, it did not launch a force or instrument of harm. Second, the plaintiffs did not detrimentally rely on Live Nation’s continued performance of its duties. Third, Live Nation’s duties did not entirely displace another party’s duties. Therefore, since Live Nation did not have any duty regarding crowd control or building security, bore no responsibility for monitoring, controlling, or stopping the escalator, and lacked the authority or capability to broadcast over the Barclay defendants’ house speaker system, no party can claim to have detrimentally relied upon the continuing performance of Live Nation’s duties.

Live Nation’s evidentiary submission establishes its second and third arguments. However, as set forth below, Live Nation did not make a prima facie showing that it did not launch an instrument of harm. Live Nation has argued that there is no clear evidence of the source of the loud noise which triggered the crowd surge and that multiple potential sources were identified. It further contends that, because of the uncertainty of the source, no party has or can submit admissible evidence that Live Nation caused, created, or contributed to the source of the sound.

Mockler’s deposition testimony showed that, although part of his responsibility on behalf of Live Nation was to ensure that the stage was properly removed, along with the sound and

lighting equipment, no one from Live Nation was present during the loadout at the time of the incident. Both Mr. Mockler and the only other Live Nation employee on site, Melissa Mack, had already left the premises. Additionally, prior to Mr. Mockler's departure on the date of the incident, he did not inform any Barclays Center personnel that he intended to leave early. Mockler, however, did not establish that no one from Live Nation was present when the loud noise occurred. In fact, there was some evidence that Live Nation may have had runners present at the time of the incident.

At this stage of the pretrial proceedings, it is not the plaintiff's burden to conclusively establish the cause of the loud noise that led to the crowd surge. "It is a defendant's burden, when it is the party moving for summary judgment, to demonstrate affirmatively the merits of a defense . . . , which cannot be sustained by pointing out gaps in the plaintiff's proof" (*J&M Indus., Inc. v Red Apple 180 Myrtle Ave. Dev., LLC*, 197 AD3d 1154, 1156 [2d Dept 2021], quoting *Quantum Corporate Funding, Ltd. v Ellis*, 126 AD3d 866, 871 [2d Dept 2015]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*J&M Indus., Inc. v Red Apple 180 Myrtle Ave. Dev., LLC*, 197 AD3d 1154, 1156 [2d Dept 2021], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], and *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In sum, Live Nation's evidentiary submission did not eliminate all material issues of fact as to whether it launched the instrument of harm. Accordingly, Live Nation's motion to dismiss the complaint and third-party complaint asserted against them is denied.

Live Nation's Motion for Dismissal of the Cross-Claims and Third-Party Claims under Motion Sequence Number 11

Live Nation also seeks an order pursuant to CPLR 3212 dismissing all cross-claims and third-party claims asserted against it. Live Nation focused solely on the cross-claims and third-party claims asserted by the Barclay defendants against it for contribution, indemnification based on breach of contract, breach of contract for failing to procure insurance, and contractual indemnification.

Live Nation seeks dismissal of the claims for common-law indemnity and contribution. This branch of their motion was premised on the assumption that it would have been found to be free of fault in connection with the branch of the motion

seeking summary judgment dismissing the plaintiffs' claims asserted against it. However, in light of the court's contrary ruling, this branch of Live Nation's motion for summary judgment is necessarily premature.

Live Nation seeks dismissal of the claims for indemnification based on breach of contract, breach of contract for failing to procure insurance, and contractual indemnification. Live Nation has argued that under articles 13 and 14 of the terms and conditions of the licensing agreement, the contractual obligation to indemnify, hold harmless, or procure insurance for the benefit of the Barclay defendants' indemnitees applies only as to liability assumed by Live Nation and/or damages arising out of Live Nation's acts, omissions, or negligence. Accepting this as true for the sake of argument, here, Live Nation's argument rests on the anticipated ruling that it would be found free of fault. In light of the court's contrary ruling, dismissal of these cross-claims and third-party claims is likewise premature. Furthermore, Live Nation has presented no evidence demonstrating that it procured the insurance required under the licensing agreement. Accordingly, the branch of Live Nation's motion seeking dismissal of all cross-claims and third-party claims asserted against it is denied.

#### Conclusion

The motion by defendants Brooklyn Events Center, LLC doing business as Barclays Center and incorrectly sued herein as Brooklyn Sports & Entertainment, Brooklyn Arena LLC, AEG Management Brooklyn LLC and Onexim Sports and Entertainment Holdings USA, Inc., under motion sequence number 8, for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and dismissing the complaint and all cross-claims asserted against them is denied.

The cross-motion by plaintiffs Sabrina Bencivenga and Michael Mulligan, under motion sequence number 9, for an order pursuant to the common-law doctrine of spoliation of evidence and CPLR article 31, granting sanctions against moving defendants Brooklyn Events Center, LLC doing business as Barclays Center and incorrectly sued herein as Brooklyn Sports & Entertainment, Brooklyn Arena LLC, AEG Management Brooklyn LLC, and Onexim Sports and Entertainment Holdings USA, Inc. is decided as follows. The branch of the motion seeking an order denying the Barclay defendants' motion for summary judgment as a sanction for spoliation of evidence is

moot. The branch of the motion seeking an adverse inference at trial as a sanction for spoliation of evidence is respectfully referred to the trial judge.

The cross-motion by plaintiffs Sabrina Bencivenga and Michael Mulligan, under motion sequence number 10, for an order pursuant to CPLR 305 (c), 2001, and 3025 (b) amending and correcting the name of a defendant in the caption from Live Nation Entertainment, Inc. to Live Nation Worldwide, Inc. is granted.

The motion by defendants/third-party defendants Live Nation Worldwide, Inc. and Live Nation Concerts, Inc., under motion sequence number 11, for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and dismissing the complaint of the plaintiffs, the cross-claims of codefendants, and the claims of third-party plaintiffs as against them, and entering judgment in their favor, is denied.

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[— NYS3d —]

UNG 3 REALTY, LLC, et al., Petitioners, v PASSERINE LLC, Respondent.

Civil Court of the City of New York, New York County, November 21, 2025

#### HEADNOTES

**Landlord and Tenant — Summary Proceedings — Service of Process — Limited Liability Company**

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#### RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Landlord and Tenant §§ 811, 819; AM JUR 2d Limited Liability Companies § 2; AM JUR 2d Process §§ 132, 241.

CARMODY-WAIT 2d Commencement of Actions; Summons and Service of Process §§ 24:160–24:162; CARMODY-WAIT 2d Summary Proceedings to Recover Possession of Real Property §§ 90:139, 90:142; CARMODY-WAIT 2d Actions and Proceedings by and Against Corporations, Their Officers, Directors, and Shareholders §§ 121:26–121:28.

DOLAN, RASCH'S NEW YORK LANDLORD AND TENANT, INCLUDING SUMMARY PROCEEDINGS (5th ed) §§ 42:5–42:6.

NY JUR 2d Business Relationships §§ 2147, 2155; NY JUR 2d Real Property—Possessory and Related Actions §§ 202, 205–207, 216, 218.

SIEGEL, NY PRAC (6th ed) §§ 69, 575.

#### ANNOTATION REFERENCE

See ALR Index under Civil Procedure Rules; Corporations; Jurisdiction; Landlord and Tenant; Limited Liability Companies; Process and Service of Process and Papers; Summary Proceedings.

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#### APPEARANCES OF COUNSEL

*Platte, Klarsfeld & Levine LLP*, New York City (*Jeffrey Klarsfeld* of counsel), for petitioners.

*O'Donoghue PLLC*, Brooklyn (*Kevin Sean O'Donoghue* of counsel), for respondent.

**OPINION OF THE COURT**

ALLISON R. GREENFIELD, J.

Petitioners' motion for summary judgment is denied, and the court grants summary judgment to respondent for the following reasons:

Petitioners commenced the instant commercial nonpayment proceeding on April 29, 2024, seeking to recover a judgment of possession and rental arrears with interest from September 1, 2023.

Petitioners are the landlords and owners of the building known as and located at 36 East 20th Street, New York, New York 10003 (ground floor and basement) (the premises). Pursuant to a lease agreement dated June 30, 2024,\* petitioners and nonparty, Eleven Belinda LLC, executed an agreement wherein Eleven Belinda LLC assigned its lease of the premises to respondent Passerine LLC. (*See* NY St Cts Elec Filing [NYSCEF] Doc No. 17.) Pursuant to paragraph two of the lease, the monthly base rent for the period between July 1, 2024, and September 30, 2025, was \$30,000.00 and set to increase per lease year. (*See id.*)

On April 2, 2025, petitioners served respondent with a 14-day notice, alleging rental arrears in the amount of \$80,918.14 to be paid on or before April 18, 2025, "or surrender up the possession of said premises to the Landlord." (NYSCEF Doc No. 1.) Respondent filed a verified answer on May 27, 2025, pleading 10 affirmative defenses, including failure to properly serve the Limited Liability Company (LLC) respondent.

Petitioners now move for: summary judgment against respondent for its failure to pay \$186,312.90 in rent and additional rent pursuant to the lease through August 31, 2025; dismissal of respondent's affirmative defenses and counterclaims; a judgment of possession; a money judgment; and a warrant of eviction. Respondent opposes the motion, asserting, *inter alia*, that the court does not have personal jurisdiction over it.

The crux of respondent's jurisdictional defense is that the service method permitted in landlord-tenant summary proceed-

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\* The court notes that the lease agreement has been amended three times. (*See* NYSCEF Doc Nos. 15-17.)

ings under Real Property Actions and Proceedings Law § 735 (1), the method by which petitioners served respondent, does not apply to respondent as an LLC. Rather, respondent argues, as an LLC, respondent can only be served pursuant to article III of the Limited Liability Company Law or CPLR 311-a. The court agrees.

Article III of the Limited Liability Company Law details the methods for service on an LLC either through the Secretary of State or upon an agent designated for receipt of service of process. Article III also specifies that “[n]othing in this section shall affect the right to serve process in any other manner permitted by law.” (Limited Liability Company Law § 301-A [e] [5].)

CPLR 311-a provides for personal service on an LLC and states as follows:

“(a) Service of process on any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law.

“(b) If service is impracticable under subdivision (a) of this section, it may be made in such manner as the court, upon motion without notice, directs.”

It is undisputed that in this case, respondent was served in accordance with RPAPL 735 (1), which allows for service on a person “of suitable age and discretion who resides or is employed at the property sought to be recovered.” However, RPAPL 735 provides for service upon a “natural person” or a “corporation, joint-stock or other unincorporated association.” The statute is silent as to LLCs. This is not a surprising discovery, as RPAPL 735 was enacted in 1962 and last amended in 1980, and LLCs were not created by the New York State Legislature until 1994.

Petitioners argue that, notwithstanding the fact that LLCs are not mentioned in RPAPL 735, service upon them is permissible under the general leave and mail provision of RPAPL 735 (1), which petitioners assert applies to all entities, including LLCs, even if LLCs were not expressly listed among the types of entities covered by the service provision.

Respondent argues that service on an LLC must be made according to a provision that specifically provides for service on an LLC, such as CPLR 311-a or article III of the Limited Liability Company Law.

There is a dearth of case law on the issue of whether an LLC may be properly served pursuant to RPAPL 735. This court was able to locate only one case directly on point, which is not binding upon this court, and to which petitioners cite: *2505 Victory Blvd., LLC v Victory Holding, LLC* (18 Misc 3d 279 [Civ Ct, Richmond County 2007, Straniere, J.]). In *Victory Blvd.*, the Honorable Philip S. Straniere, while noting that the issue was one of first impression, surmised that it was “likely” that “the legislature just failed to check all of the statutes which would be implicated by the creation of a new legal entity such as an LLC.” (*Id.* at 284.) Judge Straniere then opined that the legislature would not have intended to specifically eliminate LLCs from the service provision of RPAPL 735 and ultimately concluded that LLCs may be served pursuant to RPAPL 735. (*Id.* at 286.)

This court agrees with Judge Straniere that the failure to include LLCs in RPAPL 735 was most likely an oversight by the legislature. Indeed, it seems unlikely that the legislature purposely intended for corporations and unincorporated associations to be subject to the more relaxed service methods permitted in RPAPL 735 (1) for the commencement of summary proceedings, but that LLCs be afforded some greater procedural protections than these other legal forms.

However, this court is without power to remedy the oversights of the legislature, as “[a]bsent clear statutory or appellate authority, this court cannot read into the RPAPL a requirement” that is not there. (*JDM Washington St., LLC v 90 Washington Rest. Assoc., LLC*, 36 Misc 3d 769, 772-773 [Civ Ct, NY County 2012, Moulton, J.] [further holding “(w)here the RPAPL is silent on procedural issues, the court looks to the CPLR” (citation omitted)].) This is particularly true in a summary proceeding, as a “summary proceeding is a special proceeding governed entirely by statute . . . and it is well

established that there must be strict compliance with the statutory requirements to give the court jurisdiction.” (*MSG Pomp Corp. v Doe*, 185 AD2d 798, 799-800 [1st Dept 1992] [internal quotation marks and citations omitted].)

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature.’ The starting point is always to look to the language itself and ‘where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning.’” (*State of New York v Patricia II.*, 6 NY3d 160, 162 [2006] [citation and brackets omitted].) “Courts ‘cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the legislature did not see fit to enact.’” (*People v Corr*, 42 NY3d 668, 673 [2024] [citation and brackets omitted].)

An LLC is defined as “an unincorporated organization of one or more persons having limited liability for the contractual obligations and other liabilities of the business . . . other than a partnership or trust, formed and existing under this chapter and the laws of this state.” (Limited Liability Company Law § 102 [m].) This is distinctly unique from a “natural person” or “corporation, joint-stock or other unincorporated association” as provided for in RPAPL 735.

Moreover, the legislature clearly could not have intended to include LLCs in RPAPL 735 at the time it was enacted, or when it was last modified, as LLCs did not exist as an entity in New York State at those times. When the legislature created LLCs in 1994, it created specific provisions for service on such LLCs, but failed to amend or modify RPAPL 735 to allow for service of process on LLCs pursuant to that statute. “Regardless of whether the omission . . . was intentional . . . ‘we must read statutes as they are written.’” (*People v Page*, 35 NY3d 199, 207-208 [2020] [declining to construe statute as including more positions than those legislature has listed therein] [citations and brackets omitted], *cert denied* — US —, 141 S Ct 601 [2020]; *Matter of Makhani v Kiesel*, 211 AD3d 132, 142-143 [1st Dept 2022] [“We cannot expand the plain meaning of the text of (the statute) to force the law to say something that it does not. Similarly, we cannot expand the statute to cover something that the legislature could have easily expressed had it intended to do so” (citations omitted)].)

Accordingly, this court cannot modify the statute to provide for service upon an LLC. Absent appellate authority, this court

can only call upon the legislature to review the issue and, if it deems appropriate, make a suitable amendment. (*Lamie v United States Trustee*, 540 US 526, 542 [2004] [“If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. ‘It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result’” (citation omitted)].)

Moreover, the court notes that this ruling does not leave commercial landlords without a remedy. They may properly serve an LLC, pursuant to CPLR 311-a, by serving a member or manager, or they may serve the LLC through the Secretary of State, which creates a nearly irrebuttable presumption of proper service. (See e.g. *Hyman v 400 W. 152nd St. Hous. Dev. Fund Corp.*, 159 AD3d 606, 607 [1st Dept 2018] [“Defendant’s mere denial of service is insufficient to rebut the presumption of proper service created by the affidavit of service reflecting service through the Secretary of State” (citation omitted)]; *Fisher v Lewis Constr. NYC Inc.*, 179 AD3d 407, 408 [1st Dept 2020] [“Service of process was complete when plaintiff served the Secretary of State . . . and defendant’s excuse that its registered address . . . was not a reliable mail drop( ) is unavailing” (citations omitted)]; *Matter of Unsafe Bldg. & Structure No. 1184-1194 Riv. Ave.*, 268 AD2d 309, 310 [1st Dept 2000] [“jurisdiction over (defendant) was properly obtained by service upon the Secretary of State . . . which contains no diligent search requirement” (citation omitted)].)

As the court finds the service upon respondent was improper, the court has no personal jurisdiction over respondent. As this issue has been fully briefed by the parties, the court exercises its discretion, pursuant to CPLR 3212 (b), to search the record and grant summary judgment to respondent, the nonmoving party. (See e.g. *A.C. Transp. v Board of Educ. of City of N.Y.*, 253 AD2d 330, 338 [1st Dept 1999] [“It is well settled that, in deciding the propriety of a summary judgment motion, a court (even an appellate court) may search the record and grant summary judgment to the nonmoving party on any related claim” (citations omitted)], *lv denied* 93 NY2d 808 [1999]; *534 Flatbush Holdings, LLC v Solaris Props., LLC*, 234 AD3d 732, 734 [2d Dept 2025] [“although the plaintiffs did not move for summary judgment, the Supreme Court had the authority pursuant to CPLR 3212 (b) to search the record and award summary judgment to a nonmoving party with respect to an issue

that was the subject of the motion before the court” (citations omitted].)

Accordingly, it is hereby ordered that petitioners’ motion for summary judgment is denied; and it is further ordered that the court searches the record, pursuant to CPLR 3212 (b), and grants summary judgment to respondent, dismissing the petition for improper service upon respondent.

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[— NYS3d —]

JAMIE ALAM, Petitioner, v DAVID ZELMAN et al., Respondents.

Civil Court of the City of New York, Kings County, November 25, 2025

**HEADNOTES****Landlord and Tenant — Summary Proceedings — Illegal Lockout Proceeding — Intervening Event Preventing Restoration to Possession**

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**RESEARCH REFERENCES**

By the Publisher's Editorial Staff

AM JUR 2d Forcible Entry and Detainer § 55; AM JUR 2d Landlord and Tenant §§ 421, 431, 803, 811, 813, 853.  
CARMODY-WAIT 2d Summary Proceedings to Recover Possession of Real Property §§ 90:6, 90:64, 90:74.  
DOLAN, RASCH'S NEW YORK LANDLORD AND TENANT, INCLUDING SUMMARY PROCEEDINGS (5th ed) §§ 28:6, 28:15–28:16.  
NY JUR 2d Landlord and Tenant §§ 311, 321, 337–338; NY JUR 2d Real Property—Possessory and Related Actions §§ 3–4, 88, 324.  
SIEGEL, NY PRAC (6th ed) § 571.

**ANNOTATION REFERENCE**

See ALR Index under Ejectment, Eviction, and Ouster; Forcible Entry and Detainer; Landlord and Tenant.

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**APPEARANCES OF COUNSEL**

*Brooklyn Legal Services* (Catherine Patricia Barreda of counsel) for petitioner.

*Stern & Stern, Esqs.* (David Lyle Stern of counsel) for respondents.

**OPINION OF THE COURT**

KAREN MAY BACDAYAN, J.

### Background and Procedural History

Petitioner commenced this Real Property Actions and Proceedings Law § 713 (10) “illegal lockout” proceeding by order to show cause and verified petition seeking to be restored to possession of 509 Maple Street, Brooklyn, NY 11225. RPAPL 713 (10) provides that a special proceeding may be maintained where the person in possession has entered the property or remains in possession by force or unlawful means and he or his predecessor in interest was not in quiet possession for the years before the time of the forcible or unlawful entry or detainer and the petitioner was peaceably in actual possession at the time of the forcible or unlawful entry or in constructive possession at the time of the forcible or unlawful detainer.

The subject premises are a single-family dwelling. There is no dispute that petitioner is a tenant who was in possession pursuant to a lease which commenced July 2024. Petitioner’s tenancy was never terminated, and there is a pending nonpayment proceeding against petitioner in Kings County Housing Court, to wit *Zelman v Alam*, LT-322837-25/KI. Neither is there a dispute that David Zelman is the owner of the property.

Petitioner filed the instant petition on October 24, 2025, and had standing at the time to do so. On November 1, 2025, an intervening event occurred. It is not disputed that the premises were rendered uninhabitable by a massive fire. While the parties agree that, should petitioner prevail in this proceeding, petitioner will be unable to reoccupy the premises, petitioner’s position is that she was illegally locked out of the premises *prior to the fire*, and, thus, her claim is ripe for adjudication.

At the pretrial conference held on November 6, 2025, petitioner indicated a desire to obtain from the Housing Court a ruling that she was illegally locked out of the premises in order to utilize that holding to seek damages pursuant to RPAPL 853, discussed *infra*. Petitioner’s attorney described the premises as “no longer livable.” (FTR 10:16 a.m.) Petitioner herself described the premises as “burned out,” “boarded up,” and “pretty much destroyed.” (FTR 10:17 a.m.) Petitioner’s attorney suggested that someone had intentionally started the fire, and indicated that records from the Fire Department of the City of New York would be subpoenaed to establish same. The court denied petitioner’s oral application to amend the petition to include allegations of harassment, arson, and damages, noting that this court has no jurisdiction over an award of damages for unlawful eviction, that the court would not

consider a criminal allegation in the context of this proceeding, and that a finding of harassment can be sought in what is colloquially known as an “HP” proceeding. The court acknowledged that the illegal lockout petition was properly before this court *when signed* but cautioned that the court would not issue any advisory opinions regarding what should happen in the future. (FTR 10:38 a.m.)

At a conference held on November 21, 2025, the day of trial, which took place between 10:00 a.m. and 10:10 a.m. on the digital record, the court indicated its intention to dismiss the proceeding as moot without prejudice to a proceeding pursuant to RPAPL 853. Petitioner objected to the court’s inclination and their objection was heard. Petitioner’s attorney incorrectly advanced that a determination in Housing Court pursuant to RPAPL 713 (10) that an illegal lockout occurred is a preliminary requirement prior to filing a proceeding for damages under RPAPL 853. Petitioner’s counsel also advanced that recent case law, to wit *Rodriguez v HUB BK, LLC* (88 Misc 3d 5 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2025]), discussed *infra*, is controlling.

The court disagrees with petitioner that the court must maintain jurisdiction over this proceeding which was commenced by petitioner to be restored to possession should she prove that the ouster was illegal. While petitioner’s claims of unlawful eviction and damages therefor were not extinguished by the fire, petitioner’s claim to be restored to possession is untenable at best. Controlling authority does not constrain this court to order petitioner constructively restored to possession of the building until such time as physical reoccupation of the premises are feasible, in order to afford petitioner the opportunity to defend an end-of-lease holdover at some unknown time in the future. This is not a determination that restoration is futile; rather, the court issues this decision and order based upon the principles of judicial economy, justiciability, and the court’s “inherent power over the control of their calendars and the disposition of business before them.” (*Matter of Hochberg v Davis*, 171 AD2d 192, 194 [1st Dept 1991].) Petitioner can obtain complete relief—i.e., a finding of unlawful eviction, restoration to possession, and damages—in another forum, under a separate statute. (RPAPL 853 [“Action for forcible or unlawful entry or detainer; treble damages”].)

#### Analysis

The Housing Court lacks jurisdiction to award damages in a summary proceeding to restore possession of real property

brought pursuant to RPAPL 713 (10). (*Eze v Spring Cr. Gardens*, 85 AD3d 1102 [2d Dept 2011].)

RPAPL 853 provides for such a plenary action, and states in full:

“Action for forcible or unlawful entry or detainer;  
treble damages

“If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrongdoer.”

RPAPL 853 proceedings stand alone, and the court hearing such a proceeding may determine both whether an ouster was unlawful, and also the amount of damages incurred. (*See Orlitsky v 33 Greenwich Owners Corp.*, 2024 NY Slip Op 30364[U], \*6 [Sup Ct, NY County 2024].) No initial finding of an illegal lockout by the Housing Court is required. A petitioner in an RPAPL 853 proceeding may seek both damages *and* restoration to possession of the premises. (*Sol De Ibiza, LLC v Panjo Realty, Inc.*, 29 Misc 3d 72, 76 [App Term, 1st Dept 2010] [in a proceeding commenced pursuant to RPAPL 853, the Appellate Term reversed the trial court holding that “adjudication of tenant’s petition seeking restoration and treble damages for wrongful eviction was premature”].) A finding in favor of petitioner in an illegal lockout proceeding which merely positions petitioner to commence a proceeding for damages is in the nature of an impermissible advisory opinion.<sup>1</sup>

It is not disputed that, as a tenant in possession of this single-family home under an expired lease, petitioner has standing. What is disputed is whether the court can or should issue a judgment of possession in favor of petitioner such that she is constructively restored to possession of an undisputedly uninhabitable premises pending its hypothetical reconstruction. However, a court may not consider a question which, although once justiciable, has become moot by a change in circumstances or the passage of time. (*See Matter of Weinman v New York State Dept. of Motor Vehs. Traffic Violations Bur.*, 203

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1. “Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries.” (*See Portofino Realty Corp. v New York State Div. of Hous. & Community Renewal*, 193 AD3d 773, 775 [2d Dept 2021] [internal quotation marks and citations omitted].)

AD3d 1050, 1051 [2d Dept 2022]; *Ben-Benu v Kandhorov*, 75 Misc 3d 1211[A], 2022 NY Slip Op 50469[U], \*12 [Civ Ct, Kings County 2022].)<sup>2</sup>

Manifestly, the issuance of a judgment of possession and/or warrant of eviction to an individual who does not seek restoration to possession of a premises would have no immediate or practical effect. (See *Portofino Realty Corp. v New York State Div. of Hous. & Community Renewal*, 193 AD3d 773, 775 [2d Dept 2021].) By the same token, a petitioner in an illegal lockout proceeding who seeks restoration, but *who cannot be restored to the premises*—for example because a vacate order has been issued for the property,<sup>3</sup> or, as here, because the premises have been admittedly “destroyed” by a fire—presents the court with the same barriers to adjudication. As recently observed in *Barnes v Service* (85 Misc 3d 1281[A], 2025 NY Slip Op 50762[U] [Civ Ct, Queens County 2025]),

“[b]ecause the sole purpose of an unlawful detainer proceeding is to recover possession, a party seeking only monetary damages for illegal eviction or other incidental relief related to personal property is relegated to a plenary action (see *Tavares v Tavares*, 71 Misc 3d 134 [App Term, 1st Dept 2021]; *Rostant v Swersky*, 79 AD3d 456 [1st Dept 2010]).” (2025 NY Slip Op 50762[U], \*4 n 4.)

Here, while petitioner’s cause of action was ripe at the time she filed it, the relief she seeks from the Housing Court in this RPAPL 713 (10) is no longer plausible. (See e.g. *Kandhorov*, 2022 NY Slip Op 50469[U], \*12 [where during the illegal lockout proceeding respondent sold the premises, the court held that a “petitioner in a lockout proceeding cannot obtain a

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2. See n 1, *supra*.

3. RPAPL 768 (1) (a) provides that

“[i]t shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order.”

Administrative Code of the City of New York § 26-521 (a) provides that

“[i]t shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer . . . except to the extent permitted by law pursuant to a warrant of eviction or other order of a court of competent jurisdiction or a governmental vacate order.”

judgment of possession from a party who is no longer in a position to confer possession upon said petitioner”].)

#### Discussion of Instructive Case Law

Were the subject premises rent-stabilized, the Division of Housing and Community Renewal (DHCR) has the power to issue an order requiring a tenant who has been vacated by a fire to pay \$1.00 per month to remain in constructive possession of their apartment. This process entitles the tenant to reoccupy their apartment when the building is again made habitable. (See *Gregoretti v 92 Morningside Ave. LLC*, 166 AD3d 466 [1st Dept 2018].)

In *Gregoretti*, a fire rendered the building “uninhabitable . . . requiring all tenants to vacate the building.” (*Gregoretti v 92 Morningside Ave., LLC*, 2017 NY Slip Op 30655[U], \*1 [Sup Ct, NY County 2017].) *Gregoretti* remained in constructive possession for 10 years pursuant to a DHCR order until a second massive fire tore through the building. Thereafter, defendants performed a “gut renovation” and “rebuilt the interior of the building.” (*Id.*) The court noted that the law in the First Department is

“that where a rent-stabilized or rent-controlled building is effectively demolished by fire, which requires the building to be so damaged by fire, without being burned to the ground, that the owner is left with no real choice but to demolish it, the owner is not obligated to offer apartments in the new building to the former tenants of the rent-stabilized and rent-controlled apartments no longer in existence.” (*Id.* at \*2 [internal quotation marks omitted].)

The Appellate Division affirmed the Supreme Court’s holding. (*Gregoretti v 92 Morningside Ave. LLC*, 166 AD3d 466 [1st Dept 2018].)

*Gregoretti* is distinguishable from the case at bar. First, the subject premises are a single-family dwelling and not a rent-stabilized premises; DHCR does not oversee the occupancy of this building, and the same administrative procedures to maintain “constructive possession” do not apply. Second, no vacate order for the building has been issued. The common thread is that both parties agree that the building is uninhabitable.

In *Truglio v VNO 11 E. 68th St. LLC* (35 Misc 3d 1227[A], 2012 NY Slip Op 50908[U] [Civ Ct, NY County 2012]), the

court found that the petitioner, a rent-stabilized tenant, had established, prima facie, that she had been illegally evicted from a maid's room in violation of RPAPL 713 (10). The court found that respondent landlord forcibly broke the lock to the room, removed all of petitioner's belongings, and then demolished the room, preventing her reentry. (2012 NY Slip Op 50908[U], \*12.) In *Truglio*, while the court determined that it was not relevant whether the premises were rent regulated or not, petitioner therein "ask[ed] that the [c]ourt direct [r]espondent to rebuild the [s]ubject [p]remises." (*Id.* at \*11.) Here, there is no such request before the court. The salient distinction between *Truglio* and the case at bar is that the relief sought here does not comprise a request for an order to correct pursuant to New York City Civil Court Act § 110 (c). This relief is readily available to petitioner in an HP proceeding.

Neither does *Rodriguez v HUB BK, LLC* (88 Misc 3d 5 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2025]) require a different result. Reversing years of jurisprudence, the court in *HUB BK* held futility of restoration to a premises is no longer a factor after the passage of the Housing Stability and Tenant Protection Act of 2019 (HSTPA). The Appellate Term, Second Department held that under the HSTPA, "futility is no longer a consideration in proceedings commenced pursuant to RPAPL 713 (10) because a lawful occupant is now entitled to the protections afforded by a summary proceeding before being evicted, even if the occupant is ultimately not entitled to possession." (*Id.* at 7.) "The only type of occupant specifically excluded from the protections of RPAPL 711 is a squatter—an unlawful occupant." (*Id.*)<sup>4</sup>

Petitioner had standing at the moment in time when she asserted her claim to be restored to the premises. *HUB BK* would not alter the analysis. But the circumstances have rapidly changed, and petitioner seeks to be restored to an uninhabitable premises based on a speculative reconstruction of the building as the same single-family unit at some unknown time in the future. The court cannot enter a conditional possessory judgment. Moreover, as set forth above, petitioner may be afforded complete relief in a plenary proceeding.

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4. Shortly after *HUB BK* was published, the Appellate Term, First Department followed suit. (*Linder v Lafayette Morrison HDFC*, 87 Misc 3d 126[A], 2025 NY Slip Op 51469[U], \*1 [App Term, 1st Dept 2025].)

Conclusion

Accordingly, it is ordered that the proceeding is dismissed on the motion of the court without prejudice to a plenary proceeding.

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[246 NYS3d 910]

THE PEOPLE OF THE STATE OF NEW YORK v CHARLEY VELASQUEZ,  
Defendant.

Supreme Court, Queens County, December 2, 2025

**HEADNOTES**

**Crimes — Evidence — DNA Identification Tests — Admissibility of  
DNA Evidence Generated from Expunged Marijuana Conviction**

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**RESEARCH REFERENCES**

By the Publisher's Editorial Staff

AM JUR 2d Criminal Law § 1192; AM JUR 2d Evidence  
§§ 402, 570.

CARMODY-WAIT 2d Particular Types of Evidence § 194:64;

CARMODY-WAIT 2d Testimony of Witnesses § 195:144.

LAFAVE, ET AL., CRIMINAL PROCEDURE (4th ed) § 24.4.

NY JUR 2d Criminal Law: Procedure §§ 2225, 2411.

**ANNOTATION REFERENCES**

Admissibility of evidence of other offense where record  
has been expunged or erased. 82 ALR4th 913.

Admissibility of DNA identification evidence. 84 ALR4th  
313.

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**APPEARANCES OF COUNSEL**

*Melinda Katz*, District Attorney (*Marina Shew* of counsel),  
for the People.

*Sean McNicholas* for defendant.

**OPINION OF THE COURT**

DAVID J. KIRSCHNER, J.

By indictment filed May 31, 2024, defendant is charged with criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]), a class C violent felony, criminal possession of a weapon in the third degree (Penal Law § 265.02 [8]), a class D violent felony, assault in the second degree (Penal Law

§ 120.05 [2]), a class D violent felony, reckless endangerment in the first degree (Penal Law § 120.25), a class D felony, and other related charges.

These charges stem from events alleged to have occurred on February 24, 2024, at approximately 7:00 a.m., inside the second floor of 62-22 60th Avenue in Queens County, in that defendant allegedly slapped the complainant, his fiancée, resulting in a bloody nose, then struck the back of her head with a firearm. The firearm subsequently discharged, resulting in partial hearing loss in her left ear. Upon the complainant's consent, officers searched the premises, yielding the recovery of a Polymer 80 9 millimeter ghost gun from the bedroom closet containing seven rounds of live ammunition in a 17-round capacity magazine and a shell casing in the chamber. Officers also recovered 11 loose rounds of ammunition inside a Ziplock bag from the hamper.

On November 18, 2025, immediately before the commencement of jury selection, this court entertained several People's preliminary applications. Among them was to elicit testimony of defendant's DNA profile developed from an abandonment sample obtained and a buccal swab obtained by court order in connection with a 2019 case. Defendant was convicted in that case of criminal possession of marijuana in the fourth degree (Penal Law § 221.15), a class A misdemeanor, which was later expunged by operation of law pursuant to CPL 160.50 (5). Defendant opposes.

Consequently, this court is called upon to decide whether any evidence, material, or documents generated from defendant's now expunged 2019 marijuana conviction—most notably the abandonment sample, the court ordered buccal swab, and any laboratory profiles, reports, notes, or database entries derived from them—may be used as biological comparison materials in the present prosecution. For the reasons set forth below, the statutory scheme mandating the expungement of certain marijuana convictions under CPL 160.50 (5) compels the conclusion that such material is not admissible in any fashion.

According to CPL 1.20 (45), the New York Criminal Procedure Law provides that “expunge” means that an arrest

“is deemed a nullity and the accused is restored, in contemplation of the law, to the status such individual occupied before the arrest, prosecution and/or disposition; that records of such arrest, prosecution and/or disposition shall be marked as

expunged or shall be destroyed as set forth in section 160.50 of this chapter.”

But the analysis hardly ends here.

Although CPL 160.50 generally applies to the sealing of matters, subdivision (5) addresses the *expungement* of specified marijuana convictions. Specifically, CPL 160.50 (5) (a) mandates that such a conviction

“shall, on and after the effective date of this paragraph, in accordance with the provisions of this paragraph, be vacated and dismissed, and all records of such conviction or convictions and related to such conviction or convictions shall be expunged, as described in subdivision forty-five of section 1.20 of this chapter, and the matter shall be considered terminated in favor of the accused and deemed a nullity, having been rendered by this paragraph legally invalid. All such records for an offense described in this paragraph where the conviction was entered on or before the effective date of the chapter of the laws of 2019 that amended this paragraph shall be expunged promptly and, in any event, no later than one year after such effective date.”

But it hardly ends here.

CPL 160.50 (5) (b) (i) further obligates the Office of Court Administration and the Division of Criminal Justice Services (DCJS) to exclude references to expunged convictions from criminal history reports and to mark or destroy court records conspicuously. The statute also provides for the destruction of records upon written request. Further underscoring the Legislature’s intent that such records, marked as expunged, not be used in any capacity to the detriment of a criminal defendant, the statute specifically provides that “such records and papers shall not be made available to any person, except the individual whose case has been expunged or such person’s designated agent” (CPL 160.50 [5] [b] [i]).

Read together, these statutory provisions do more than create a privacy interest for an individual whose conviction has been expunged; they declare certain convictions a legal nullity, mandate vacatur and dismissal, and impose categorical, statutory limits on dissemination and use of all records “*related to*” the expunged conviction (emphasis supplied). The Legislature’s use of “nullity” along with the instruction that records “shall not be made available to any person” reflects a clear intention

to deny continuing legal effect to the conviction and to prevent downstream use of materials generated by the expunged proceeding.

The buccal swab and abandonment sample collected in 2019, and the DNA profile, laboratory reports, chain of custody entries, DCJS database entries, and any internal law enforcement or external Office of the Chief Medical Examiner forensic files produced from them plainly fall within the statutory category of “records . . . related to such conviction or convictions.” Admission of such material—or of any evidentiary product derived from them—would directly contravene the statute’s prohibition on making expunged records available and would render the statutory effect of expungement illusory.

Irrespective of the People’s claim that defendant had an affirmative duty to request the destruction of such material, the lawfulness of a sample’s original collection does not resolve the present question. The DNA profile suitable for comparison, created because of the now expunged 2019 matter, is the functional product of that proceeding. Admitting any such profile or admitting testimony or expert comparisons that rely on it would import into this case the very record the statute commands be treated as a nullity. And producing an ostensibly independent sample from the firearm recovered in this case, compared to a profile derived from expunged material, effectively reintroduces the expunged record. Thus, where, as here, a statutory regime expressly forbids disclosure and requires exclusion of records “related to” an expunged conviction, the use of derivative evidence should also naturally be precluded absent a showing of a genuinely independent DNA profile obtained from defendant suitable for comparison unconnected to the expunged matter.

Though the People correctly observe that CPL 160.50 (5) (b) (i) provides for record destruction “upon the written request of the individual whose case has been expunged or their designated agent,” this provision plainly contemplates that, as a practical matter, destruction shall follow a defendant’s affirmative request. That concession, however, does not assist the People in permitting current prosecutorial use of expunged materials. Two critical statutory commands that precede and accompany the destruction provision foreclose it.

First, even when destruction has not yet been effected, the statute requires that records “shall be marked as expunged”—i.e., court records must be conspicuously designated as expunged on their face and in digitized files. Second, and dis-

positively, the statute states in unqualified terms that unless and until destruction occurs, the records “shall not be made available to any person, *except the individual whose case has been expunged* or such person’s designated agent” (CPL 160.50 [5] [b] [i] [emphasis supplied]). Such plain language, therefore, creates an express interim prohibition: marking substitutes for immediate destruction, and that marked status carries a categorical bar on access by third parties, including non-law enforcement bodies such as the Office of the Chief Medical Examiner.

Moreover, the People’s reliance on the destruction upon request language overlooks that the statutory ban on availability is not contingent on the defendant’s request for destruction. The Legislature afforded a mechanism for destruction on request, but it simultaneously and affirmatively imposed a duty of nondisclosure in the interim. Permitting third-party entities to use or disseminate expunged files, samples, profiles, or derivative data before destruction would contravene that express prohibition and reduce the marking requirement to an empty formality. The statute’s structure therefore supports two independent protections: (1) marking to deny access immediately; and (2) destruction upon request to erase the record permanently if the defendant so chooses.

Practically, this means that any record marked as expunged by statute cannot lawfully be accessed by or provided to third parties (including prosecutors, law enforcement, forensic laboratories, etc.). Consequently, the use of such marked-but-not destroyed materials in this prosecution, even for comparative purposes, would violate the statutory command and frustrate the legislative intent of treating the conviction as a nullity. The People can no more rely on the absence of a destruction request to justify use of such materials than they could depend on a failure to purge a clerical entry to argue that the conviction remains a valid source of evidence.

Accordingly, this court rejects the People’s contention that failing to request destruction means the records are freely usable for comparison. Any conclusion to the contrary runs afoul of the statutory interim prohibition excluding the use of any materials marked as expunged or that have otherwise been identified as part of, related to, or stemming from the 2019 expunged matter.

For these reasons, then, any material produced or DNA reports derived by comparison with material obtained from de-

defendant's 2019 expunged marijuana matter are not properly usable in this prosecution. To be clear, the destruction upon request provision permits no predestruction dissemination: expunged records are required to be marked as expunged and, unless and until destroyed, "shall not be made available to any person" other than the defendant or the defendant's designated agent.

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[— NYS3d —]

COREY J. HOGAN, Plaintiff, v WALTER VAN BUREN et al., Defendants.

Supreme Court, Erie County, October 3, 2025

#### HEADNOTES

**Attorney and Client — Disciplinary Proceedings — Suspension — Pro Se Representation**

**Attorney and Client — Compensation — Services Resulting in Discipline**

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#### RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Attorneys at Law §§ 6, 29, 37, 225, 294–295;  
AM JUR 2d Equity §§ 19, 21, 25–27.

CARMODY-WAIT Officers of Court §§ 3:163–3:164, 3:334,  
3:483, 3:524; CARMODY-WAIT Right to Counsel § 184:76.

NY JUR 2d Attorneys at Law §§ 220, 273, 277; NY JUR 2d  
Equity §§ 94–96.

#### ANNOTATION REFERENCE

He who comes into equity must come with clean hands. 4  
ALR 44.

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#### APPEARANCES OF COUNSEL

*Webster Szanyi, LLP* (Andrew Miller of counsel) for defendants.

*Corey J. Hogan*, plaintiff pro se.

#### OPINION OF THE COURT

PETER ALLEN WEINMANN, J.

This court is presented with a novel issue of first impression.

Corey Hogan is a well-known Western New York attorney who is presently suspended from the practice of law. He now wishes to represent himself in order to sue his former clients to recover legal fees, advances and disbursements for the work which was the rationale for his suspension. He now claims \$1.177 million from his former clients.

The threshold issue for this court to determine is whether Mr. Hogan—as a suspended attorney—has the legal right to represent himself, and furthermore, if he does, whether he has the legal right to sue his former clients for work which was the rationale for his suspension.

The defendants are farmers who sought representation and legal counsel in 2015 from plaintiff, the managing attorney of the HoganWillig firm, a suburban law firm at the time with over 100 professionals including attorneys, paralegals, and administrative staff. Over the course of more than two years, plaintiff provided substantial legal services to defendants; assisted with refinancing efforts; defended against creditor claims; negotiated with creditors; and provided financial analysis to stabilize the business, including farm management services such as the collection of receivables from crop sales; payment of bills; marketing of farm products; coordinating digital mapping of farm fields; contact with customers regarding the sale of farm products; and bookkeeping and accounting services.

In addition, according to the Appellate Division, Fourth Department’s decision (*Matter of Hogan*, 212 AD3d 152 [4th Dept 2022], *lv denied* 39 NY3d 1117 [2023]), plaintiff provided his clients with financial assistance in the form of “advances” of funds, the majority of which were used to pay expenses associated with the operation of the farming business, including the purchase of supplies such as fuel, fertilizer, seed, and equipment parts, and the payment of other expenses such as trucking costs, wages for farm employees, insurance premiums, land lease payments, and owners’ draws paid to the clients.

Moreover, added the Court, some of the advances of funds were used to pay marketing costs, delinquent balances on debt owed to vendors and creditors, and disbursements associated with lawsuits in which HoganWillig was representing the clients. The sources of the advances were Hogan’s personal funds; HoganWillig’s credit card accounts; HoganWillig’s operating account; and an LLC that was created, solely owned, and funded by Hogan. Plaintiff provided no promissory notes or loan documentation; sale or purchase contracts; leases; or any other memorialization of the terms of repayment.

Furthermore, added the Court, plaintiff purchased 11 pieces of farming equipment, and filed a UCC financing statement listing the defendants as debtors to plaintiff’s LLC, and listing as collateral all crops, livestock, farming equipment and sup-

plies. Finally, plaintiff arranged for three mortgages in the amount of \$100,000, \$150,000, and \$250,000 listing HoganWilling as the mortgagee and defendants as the mortgagor. As if all that were not enough, the Court found that plaintiff did not disclose to his clients the terms of the transactions, nor did he advise his clients of the potential of any conflict of interest, or the advisability of seeking independent legal counsel.

But the straw that broke the camel's back was plaintiff's advice to his clients that they file for bankruptcy, after he had steered them into \$2.5 million in debt—which did not even include the \$1.177 million they allegedly owed to plaintiff for all the good work that he did for them.

In 2022, the Appellate Division, Fourth Department issued a seven page unanimous opinion listing the aforementioned transactions and much more, and holding that plaintiff violated five specific Rules of Professional Conduct. They noted that plaintiff failed to express contrition or remorse and failed to sufficiently acknowledge “his substantial disregard of his ethical obligations.” (*Matter of Hogan*, 212 AD3d at 161.) Accordingly, after due deliberation and consideration, the Court suspended Corey Hogan from the practice of law for a minimum of two years.

The Court issued a two page order finding the plaintiff guilty of professional misconduct, and notably held:

“It is further ORDERED that Corey J. Hogan is hereby commanded during the term of such suspension to *desist and refrain from the practice of law in any form* either as *principal* or agent, clerk or employee of another, and 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*” (emphasis added).

In a case of first impression, it is now up to this court to determine whether the order of the Appellate Division prohibits Mr. Hogan from representing himself in order to sue his former clients.

In the first layer of analysis, this court looks to the plain meaning of the language utilized by the Fourth Department. In its order, the Court specifically utilizes broad language: “desist and refrain from the practice of law in any form either as principal or agent.” At bar, clearly Mr. Hogan is acting for

himself—a principal party. He has filed papers and appears in court on his own behalf, thus violating the Court’s order that he is “forbidden to appear as an attorney . . . before any court, judge, justice.” There is no language permitting an exception of any kind—whether for pro se representation or otherwise.

The parties have submitted two cases, ostensibly involving the same suspended attorney acting pro se. The first case is at the trial level, and the second comes almost four years later from the Appellate Division, Second Department. In the first case, *Spinnell v Doris L. Sassower, P.C.* (155 Misc 2d 147 [Civ Ct, NY County 1992]), the suspended attorney was being sued by another attorney. The suspended attorney, Sassower, represented herself. The issues, primarily jurisdictional, were not directly on point, insofar as to whether the defendant could represent herself. However, Justice Michael D. Stallman of the Civil Court of the City of New York addressed the issue sua sponte in a footnote, noting: “While a suspended attorney may not represent another party during the period of her suspension, she may appear pro se in her individual capacity, and pro se as the president of the professional corporation.” (*Id.* at 148 n 1.)

Thus a court of inferior jurisdiction would seem to permit the suspended attorney to appear and represent himself or herself. However, the opinion is completely silent as to the exact, detailed and specific terms of the order of suspension—unlike at bar. At bar, it is clear that the Fourth Department specified: “refrain from the practice of law . . . and is hereby forbidden to appear as an attorney . . . before any court, judge, [and] justice.”

In the second case, *Blaustein v Sassower* (232 AD2d 516 [2d Dept 1996]), a different Court seemed to take a different tack. There, a client in a divorce matter sued his attorney, the same Sassower from the other case, for legal malpractice. There, the Appellate Division, Second Department, did not preclude the suspended attorney from defending herself pro se in her individual capacity, but in contradistinction to the earlier case, the Court did hold that she could not represent her professional corporation in the litigation. But again, as with the first case, the Court did not address the exact, specific and particular terms of the Appellate Division’s order of suspension.

Applying both Sassower decisions to the facts at bar, it is evident that there is a significant factual distinguishing circumstance. At bar, the Fourth Department specifically and

categorically issued an order of the Court prohibiting Mr. Hogan from “the practice of law in *any form* either as principal or agent” (emphasis added). The first Sassower case, from a level below State Supreme Court and in another county of the state, did not reference the specifics, particularities, or actual terms in the order of suspension pertaining to Ms. Sassower. Likewise, the Second Department’s opinion four years later also made no mention of the details, particularities, and terms of the order of suspension. But notably, the Court narrowed Sassower’s ability to self-represent. There the Court held she could self-represent as an individual, but not as president of her own P.C. (professional corporation). But again, there the facts are distinguishable from those at bar. There are no terms or particularities in the order referenced. And again, the Second Department is a Court of different, concurrent jurisdiction to the Fourth Department, thus that decision is not controlling. And finally, there the suspended attorney was *defending* two lawsuits—not seeking to proactively *file* a lawsuit. In sum, the two cases cited, while arguably distinguishable, simply do not support any argument that Mr. Hogan may self-represent, in view of the Fourth Department’s extremely limiting and qualifying language in its order of suspension.

Finally, Mr. Hogan cited at oral argument the 6th Amendment to the U.S. Constitution for the proposition that courts may not prohibit even non-attorneys from self-representation. Further, he argued that because he was suspended, and now acting as a non-attorney, he had the constitutional right to represent himself. However, even the U.S. Supreme Court has held that this constitutional right applies only in the realm of criminal law, where a defendant, made to respond to a criminal charge, has the right to self-representation (*Faretta v California*, 422 US 806 [1975]). At bar Mr. Hogan seeks the opposite—not to defend, but to affirmatively file a lawsuit—and in a civil—not a criminal court. Thus even the U.S. Constitution and U.S. Supreme Court cannot help Mr. Hogan here.

In view of the aforementioned, this court now holds that Corey J. Hogan, as an attorney suspended from the practice of law, may not represent himself in filing a lawsuit, whether against his former clients or otherwise.

This case analysis does not end here, however, because the farmers have filed a motion for summary judgment alleging that regardless of any self-representation issue, Mr. Hogan is legally prohibited from suing the very party tied to the representation that was the rationale for his suspension.

The law concerning summary judgment is found in CPLR 3212 (b), which permits the court to grant the moving party victory if the claim can be established as a matter of law. The motion must be denied if any party can show facts sufficient to require a trial of any issue of fact.

At bar, the defendants allege there is no question of fact requiring a trial, and that the determination may be made as a strict application of law. Defendants cite chapter and verse of the Appellate Division, Fourth Department's seven page opinion relying on a litany of behaviors committed by plaintiff that would make a card shark blush: providing business consulting under the guise of legal services; advancing personal funds to pay marketing costs and pay debts to vendors; taking security interests in the client's property to secure and collateralize the client's debts to plaintiff; filing a UCC statement listing the clients as debtors to the plaintiff; arranging three mortgages to the clients with plaintiff as mortgagee; and becoming a secured creditor and mortgagee to clients while legally representing them in refinancing transactions and defense of creditor claims. For all this, note the farmers, the appellate court found plaintiff in violation of the following Rules of Professional Conduct (22 NYCRR 1200.0):

Rule 1.5 (b)—failing to appropriately communicate with a client;

Rule 1.7 (a) (2)—representing a client where there is a significant risk that the lawyer's professional judgment will be adversely affected by his or her personal interests;

Rule 1.8 (a)—entering into a business transaction with a client;

Rule 8.4 (h)—engaging in conduct that adversely reflects on his or her fitness as a lawyer; and

22 NYCRR 1215.1—failing to provide a letter of engagement explaining scope, fees, and services to be provided.

In short, defendants have presented a smorgasbord of violations encompassing conflicts of interest; predatory behavior; exploitation; self-dealing; and abuse of trust. It is self-evident, they contend, that there is absolutely no issue of fact.

Plaintiff, on the other hand, contends that the entire scenario is rife with genuine issues of material fact. The farmers, plaintiff alleges, retained the benefits of extensive legal representation, including negotiating with creditors, assisting with refinancing efforts, and preserving the farming operation, yet

they have failed to pay for those services. Plaintiff's efforts were integral to the survival of the defendants' business, contends plaintiff. The Court did not criticize the quality of the legal work provided, nor did they allege that Hogan's services were incompetent, substandard, or ineffective. On the contrary, the defendants benefitted from Hogan's work: they avoided foreclosure, maintained their farm, and created a pathway for financial stability. None of these assertions, however, raise even a hint of an issue of fact. They are partisan subjective opinions that may be subject to debate, but they certainly are not "facts," let alone issues of fact. As United States Senator Daniel Patrick Moynihan once said, everyone is entitled to their own opinion, but no one is entitled to their own facts.

The bumper crop of cases, and thus the applicable case law, comes primarily from the Second Department, which apparently has its share of suspended attorneys. The leading case is *Matter of Winston* (214 AD2d 677 [2d Dept 1995]), where the Court held in no uncertain terms: "[A]n attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered" (*id.* at 677 [emphasis added and citation omitted]). Citing *Winston*, another Supreme Court held:

"[A] disbarred attorney forfeits his entire fee if his misconduct relates to his representation in the matter for which the fees are sought. It is well settled that [a]n attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered (*Pessoni v Rabkin*, 220 AD2d 732 [2d Dept 1995] . . . , citing *Matter of Winston* . . . )" (*Nawaz v Boryczka*, 34 Misc 3d 1234[A], 2012 NY Slip Op 50367[U], \*2 [Sup Ct, Kings County 2012] [internal quotation marks and citation omitted]).

Three other cases from the Second Department cite *Winston*, and denied legal fees to attorneys who had engaged in misconduct and then sought to bill for the services which were the grounds for the misconduct (*Saint Annes Dev. Co. v Battista*, 165 AD3d 997 [2d Dept 2018]; *Quinn v Walsh*, 18 AD3d 638 [2d Dept 2005]; *Jay Deitz & Assoc. of Nassau County, Ltd. v Breslow & Walker, LLP*, 153 AD3d 503 [2d Dept 2017]).

In what appears to be a recurring pattern, the Second Department has developed a whole body of case law denying legal fees to suspended attorneys who wish to bill for the very

deeds which led to their suspension or disbarment (*Matter of Satin*, 265 AD2d 330 [2d Dept 1999]; *Pessoni v Rabkin*, 220 AD2d 732 [2d Dept 1995]; *Brill v Friends World Coll.*, 133 AD2d 729 [2d Dept 1987]; *Baughner v Cullen & Dykman, LLP*, 173 AD3d 959 [2d Dept 2019]; *Biagioni v Narrows MRI & Diagnostic Radiology, P.C.*, 127 AD3d 800 [2d Dept 2015]; *Filler v Motta*, 45 Misc 3d 41 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]).

As a consequence, this court holds that there are no issues of fact precluding a grant of summary judgment in favor of the farmers, and that the overwhelming body of accumulated case law prohibits Mr. Hogan as a suspended attorney from collecting fees, advances and disbursements from his former clients for the representation which was the very ground for his suspension from the practice of law.

Next, courts have held that “[t]he doctrine of ‘clean hands’ is a fundamental principle of equity as well as of public policy.” (*Levy v Braverman*, 24 AD2d 430, 430 [1st Dept 1965].) The doctrine comes into play here because Corey Hogan alleges an equitable claim to be paid for services rendered. “Where a litigant has himself been guilty of inequitable conduct with reference to the subject matter of the transaction in suit, a court of equity will refuse him affirmative aid. Therefore, as a matter of law,” held the Appellate Division, First Department, such plaintiff “should [be] denied relief . . . and his complaint should [be] dismissed” (*id.*). As the Court of Appeals has held,

“No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes” (*McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 469 [1960] [citation omitted]; *accord Hytko v Hennessey*, 62 AD3d 1081 [3d Dept 2009] [Equitable remedies are barred by the doctrine of unclean hands where the party seeking to assert the equitable remedy has committed some unconscionable act that is directly related to the subject matter in litigation and has injured the party attempting to invoke the doctrine]).

Applying the doctrine of unclean hands and *Levy* and *McConnell*, and *Hytko*, plaintiff at bar shall not be “permitted to

profit by his own fraud, or to take advantage of his own wrong.” Both equity and public policy, as described by the Appellate Division First and Third Departments and the Court of Appeals, therefore would prohibit Mr. Hogan from receiving compensation for his work for the farmers. Hogan’s representation clearly harmed the farmers to the tune of a more than \$2 million debt, to say nothing of the ethical morass they could never have anticipated when they sought out assistance and counsel for their foundering farm.

Finally, counsel for the farmers asks this court to sanction Mr. Hogan by awarding costs and legal fees for his allegedly frivolous conduct in launching this litigation (22 NYCRR 130-1.1). “Frivolous” is defined by the statute as conduct that “is completely without merit in law and cannot be supported by a reasonable argument [or] is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another.” (*Id.* subd [c] [1], [2].) At bar, applying extreme logic to the entire saga of events, it cannot be said that Mr. Hogan’s request to be paid for his representation of his clients is “completely without merit,” however unethical the services may have been. After all, there is an old adage that no one works for free. Most would agree that lawyers should be paid for their work. Thus it might be said that while Mr. Hogan’s attempt to get paid could arguably be better characterized as: audacious; ballsy; disingenuous; nervy; brazen; shameless; or greedy, it is not entirely accurate to characterize it as “frivolous,” as defined by the statute. Really the most functional characterization for Mr. Hogan’s conduct is arguably best described by a term that is not even considered part of the English language but comes from what has been described as one of God’s gifts to humanity, Yiddish. The term most appropriate to characterize Mr. Hogan’s conduct at bar is “*chutzpah*.” The great author Leo Rosten has described *chutzpah* as the criminal defendant standing in court after being convicted of killing his parents, begging for mercy because he is an orphan. That is *chutzpah*. This court therefore holds that while Mr. Hogan’s plea in seeking payment for decidedly unethical conduct which caused his suspension from the practice of law is not frivolous; it is unarguably a stunning and breathtaking example of *chutzpah*. The defendants’ application for sanctions is therefore denied.

For the above-stated reasons, it is therefore ordered that the defendants’ motion granting summary judgment in favor of the

defendants and dismissing plaintiff's complaint in its entirety, on the merits, and with prejudice, is *granted*; it is further ordered that the remainder of defendants' relief is *denied*.

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[249 NYS3d 746]

THE PEOPLE OF THE STATE OF NEW YORK v A.P., Defendant.

Supreme Court, Bronx County, December 23, 2025

**HEADNOTES****Crimes — Sentence — Domestic Violence Survivors Justice Act — Juvenile Offender**

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**RESEARCH REFERENCES**

By the Publisher's Editorial Staff

AM JUR 2d Criminal Law §§ 709, 734; AM JUR 2d Domestic Abuse and Violence § 61.

CARMODY-WAIT 2d Sentencing Procedures §§ 203:3, 203:9, 203:16–203:17; CARMODY-WAIT 2d Juvenile, Adolescent, and Youthful Offenders §§ 206:34, 206:67.

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

NY JUR 2d Criminal Law: Procedure §§ 2969–2970, 2979, 3106, 3292, 3307.

**ANNOTATION REFERENCE**

See ALR Index under Abuse of Persons; Children and Minors; Family, Relatives, and Household; Sentence and Punishment.

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**APPEARANCES OF COUNSEL***The Legal Aid Society (Paris DeYoung of counsel) for defendant.**Darcel D. Clark, District Attorney (Mary McGarvey-DePuy of counsel), for the People.***OPINION OF THE COURT**

E. DERONN BOWEN, J.

SummaryThe defense application for vacatur of the judgment of conviction and resentencing consideration under the Domestic Violence Survivors Justice Act is *denied*.

### I. Background

On the evening of December 9, 2017, 61-year-old Calixto Palacio López (decedent) was fatally stabbed inside of his Bronx County home. Subsequent investigation led the police to Shamika Mosley, the codefendant and mother of defendant, A.P. The codefendant gave a statement that her then-14-year-old son “stabbed someone up.” NYPD homicide detectives interviewed defendant on February 2, 2018. In a recorded statement, defendant admitted that he and his codefendant mother went to the decedent’s apartment that evening with the intent to rob him. According to defendant, after the codefendant knocked on the apartment door and the decedent opened it, defendant forced his way into the apartment. The decedent began to scream, and the codefendant told defendant to “shut him up.” In compliance with his mother’s command, defendant stabbed the decedent three or four times in the lower body with a knife that he had brought with him. The codefendant also stabbed the decedent another three or four times in the chest area using a knife that she retrieved from the decedent’s kitchen. Defendant and his mother then left the apartment. Defendant returned alone the next day to retrieve both knives, wrap them in black plastic bags and bury them in a park.

On February 4, 2020, defendant was convicted, upon a guilty plea, of manslaughter in the first degree (Penal Law § 125.20 [1]). On March 4, 2020, pursuant to the plea agreement and the juvenile offender sentencing statute, a negotiated sentence of  $3\frac{1}{3}$  to 10 years’ incarceration was imposed (Denis Boyle, J.) (*see* Penal Law §§ 10.00 [18] [2]; 70.05).

### II. The 440.20 Motion

By motion dated June 26, 2025, made pursuant to CPL 440.20, defendant protests that at the time of sentencing he was not considered for alternative sentencing under the Domestic Violence Survivors Justice Act (DVSJA) (*see* Penal Law § 60.12). Defendant notes correctly that, had he been found to qualify for DVSJA alternative sentencing, he “could be sentenced to (1) a determinate sentence between 1 and 5 years’ imprisonment followed by  $2\frac{1}{2}$  to 5 years’ post-release supervision, (2) an alternative definite sentence of up to 1 year, or (3) a probationary term of 3, 4, or 5 years” (*see* Penal Law §§ 60.12 [2] [a]; 65.00 [3] [a] [i]; 70.45 [2] [f]). Defendant complains, first, that the DVSJA is age discriminatory against juvenile offenders, like himself, because, by its express terms, access to

the alternative sentencing scheme is limited to defendants who would otherwise be sentenced under select adult felony sentencing statutes (*see* Penal Law §§ 60.12 [1]; 70.00, 70.02, 70.06, 70.71 [2], [3]). This, defendant asserts, is a state equal protection violation (*see* NY Const, art I, § 6).

Alternatively, defendant argues that legislative history reveals the Legislature’s intent that DVSJA alternative sentencing be available to qualifying juveniles despite express statutory language that commands otherwise. Defendant contends that, in enacting the DVSJA, the Legislature recognized that

“New York State has a responsibility to preserve the human right to live free from violence and provide support for domestic violence survivors, a responsibility that does not end when a survivor becomes involved in the criminal justice system because of the abuse . . . he suffers. In seeking to protect this right and remedy New York’s long-held and unjust practice of imposing long and unfair prison sentences on survivors of domestic violence whose crimes are linked to their histories of abuse, the Legislature passed the DVSJA, a groundbreaking statute that empowers judges to consider those histories in fashioning appropriate sentences” (internal quotation marks and brackets omitted).

Defendant submits that the express statutory limitation of DVSJA alternative sentencing to adult defendants was an unintended “drafting oversight.”

“As the result of a drafting oversight, the DVSJA excludes juvenile offenders, sentenced pursuant to P.L. § 70.05, from seeking sentencing relief under P.L. § 60.12. Because this exclusion was both unintentional and runs afoul of the Legislature’s stated aims in passing the statute, and because [defendant] was otherwise plainly eligible for DVSJA consideration, the statute violates [defendant’s] equal protection rights under both the United States and New York State Constitutions.”

The People oppose the 440.20 motion in responsive papers dated October 6, 2025.

### III. Analysis

“At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant,

set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law” (CPL 440.20 [1]). Consequently, “by its plain language, CPL . . . 440.20 is a statute that only involves the legality of a sentence at the time it was pronounced” (*People v White*, 69 Misc 3d 425, 434 [Sup Ct, NY County 2020]; see *People v Catalanotte*, 72 NY2d 641, 645 [1988] [“the validity of the conviction shall be determined as of the time it was entered”]; *People v Shilman*, 85 Misc 3d 408, 410 [Sup Ct, Bronx County 2024] [“CPL 440.20 is a vehicle post-conviction to set aside a sentence. This provision does not provide a basis to vacate a conviction, reduce a plea, and order a new sentence”]). CPL 440.20 is not a catch-all mechanism for constitutional collateral challenges to sentencing statutes. Nor may CPL 440.20 be used to move for a more lenient sentence based upon later policy, legal or other changes, e.g., if, as defendant claims here, “the statute employs a suspect classification under the newly-amended New York State Constitution” (see *People v Smith*, 28 NY3d 191, 203 [2016] [“a conviction does not become unconstitutional merely because the law has changed subsequent to the defendant’s direct appeal of that conviction”] [internal quotation marks omitted]).

Defendant rightly does not contest that, as he was 14 years of age at the time of the criminal act, the juvenile offender sentencing statute was the legislatively designed and designated framework for determining his sentence upon conviction. Defendant also rightly does not claim that the sentence handed down was outside of the permissible bounds of that statutory framework. In other words, defendant concedes that it is not the case here that his “sentence . . . was unauthorized, illegally imposed or otherwise invalid as a matter of law” (CPL 440.20 [1]). Defendant cannot cloak under CPL 440.20 a constitutional equal protection claim due to his exclusion from alternative sentencing consideration under a different statute. Such argument is simply beyond the scope of statutorily permissible legal argument under CPL 440.20. Accordingly, the equal protection prong of defendant’s CPL 440.20 motion is *denied* for this procedural reason.

Defendant’s alternative averment—that the availability of DVSJA sentencing to adult offenders, but not to juveniles, was an “inadvertent omission” and that the State Legislature’s actual intent was to permit DVSJA consideration for juveniles—is unavailing. There is a legal “presumption that the

legislature has investigated for and found facts necessary to support the legislation. While courts may look to the record relied on by the legislature, even in the absence of such a record, factual support for the legislation would be assumed by the courts to exist” (*White v Cuomo*, 38 NY3d 209, 217 [2022] [internal quotation marks, brackets, and citation omitted]). Consequently, the court declines to blindly presume that the DVSJA-qualifying language was the result of legislative drafting incompetence.

It is well established that, “with any question of statutory interpretation, our task is to ascertain and give effect to the intention of the Legislature” (*People ex rel. Ellis v Imperati*, 45 NY3d 67, 73 [2025] [internal quotation marks omitted]). Respecting juvenile sentencing, “most saliently, the legislature must have recognized that an individual’s youthfulness should be considered for purposes of sentencing, otherwise it would not have specifically created a ‘juvenile offender’ designation” (*People v Aponte*, 42 Misc 3d 868, 871 [Sup Ct, Bronx County 2013]). From the enactment of the Juvenile Offender Act of 1978 (JOA) through the recent Raise the Age reforms of 2017, the State Legislature has demonstrated a clear and consistent intent that the sentencing schemes for juvenile and adult offenders be kept distinct, as reflected in the Penal Law sentencing scheme. Even during the JOA’s infancy nearly half a century ago, juvenile offender sentencing was already judicially recognized as granting a host of benefits intended specifically and only for juvenile offenders. The legislative intent behind the creation of the juvenile sentencing scheme justified then, as now, the sometimes harsher, outlier outcomes that may result than had the juvenile been sentenced under a separate statute outside of the JOA.

“The Legislature has not acted arbitrarily or capriciously in establishing the juvenile offender category [for 13, 14, and 15 year olds]. While the potential punishment may, in some instances, be more severe than that imposed upon 16-, 17-, or 18-year-old defendants in that youthful offender status is unavailable, there are also ameliorative provisions in this legislation which are designed to protect the juvenile. There are provisions in the challenged legislation which provide for removal of the case to the Family Court under certain conditions. In addition, the Legislature has provided that juvenile offenders are to be confined in separate facilities.

“It is clear, therefore, that the Legislature enacted a body of law specifically tailored to juvenile offenders. Certain aspects of the legislation provide benefits to the juvenile offender which are not available to other groups. Furthermore, the juvenile offender possesses all of the basic rights available to the adult offender such as preliminary proceedings, bail and counsel” (*People v Mason*, 99 Misc 2d 583, 587-588 [Sup Ct, Richmond County 1979] [citations omitted]; see *People v Hudson*, 232 AD3d 200, 205 [2d Dept 2024] [“nothing in the plain language of Penal Law § 60.12, or the purpose and policy goals of the Legislature in enacting the statute, leads this Court to conclude that a DVSJA hearing is in the category of rights which may not be waived”]; *People v B.N.*, 79 Misc 3d 740, 756 [Sup Ct, Cayuga County 2023] [“the legislature intended that the DVSJA would only apply to a very small pool of eligible applicants”]; cf. *People v Thomas*, 33 NY3d 1, 5 [2019] [“We reject this strained interpretation of the predicate felony statutes, because it defies the express language, and would defeat the purpose, of those statutes”]).

The court accords with the reasoning of the *Mason* court and declines the defense invitation to deem juvenile offenders eligible for DVSJA sentencing consideration in the absence of any indication that the Legislature intended that result. To grant defendant’s application would be to judicially mandate the commingling of the adult and juvenile sentencing statutes, in contravention of that clear, long-standing legislative intent.

In conclusion, the CPL 440.20 application for sentence vacatur and consideration for resentencing under the DVSJA is *denied in its entirety*. The equal protection argument is rejected on procedural grounds. The legislative intent argument is rejected as unavailing on the merits.

The court does wish to register its sympathy to defendant’s position, as presented in the motion papers. Where, purportedly, a 14 year old (1) assisted his mother with a planned robbery, (2) carried a weapon, (3) stabbed an elderly man alongside his mother upon her order, and (4) returned alone to an apartment with a deceased body inside to retrieve and hide the weapons, the court would not be surprised to learn that abuse and trauma of the DVSJA variety were attendant with the

mother/son relationship. The court's denial of the CPL 440.20 motion is in no way meant to diminish the importance of defendant's experiences or the policy debate he raises. It simply reflects the procedural constraints placed upon the court's consideration of a CPL 440.20 application. The constraints make clear that a "trial-level court has no authority under CPL 440.20 to reduce a valid sentence in the interest of justice" (*People v Jogie*, 118 AD3d 1025, 1026 [2d Dept 2014]). Whether alternative sentencing guidelines should be developed for juvenile survivors of domestic abuse is a call to be made by the appropriate elected representatives of the New York State legislative and executive branches, not the court (*cf.* Hurubie Meko, *Top Judge Favors a Second Chance for Those Languishing in Prison*, NY Times, Feb. 10, 2025 ["The chief judge of New York State's highest court urged the State Legislature on Monday to pass a bill that would allow prisoners who have been locked up for years to apply for reduced sentences"], available at <https://www.nytimes.com/2025/02/10/nyregion/second-look-prison-ny-judge-wilson.html> [last accessed Dec. 22, 2025]).

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[248 NYS3d 916]

THE PEOPLE OF THE STATE OF NEW YORK v GENESIS DUGAL, Defendant.

Criminal Court of the City of New York, Bronx County, December 24, 2025

#### HEADNOTES

**Crimes — Disclosure — Automatic Discovery — Medical Records of Complainant — Records Predating Incident**

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#### RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d Criminal Law §§ 930, 937; AM JUR 2d Depositions and Discovery §§ 258, 261, 266, 273, 277.

CARMODY-WAIT 2d Discovery §§ 187:19, 187:21, 187:25, 187:34, 187:57.

LAFAVE, ET AL., CRIMINAL PROCEDURE (4th ed) § 20.3.

NY JUR 2d Criminal Law: Procedure §§ 1685, 1685.50, 1701, 1707, 1924.

#### ANNOTATION REFERENCE

See ALR Index under Assault and Battery; Criminal Law; Disclosures; Discovery; Victims.

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#### APPEARANCES OF COUNSEL

*The Law Office of Joshua Hadas*, Bronx (*Joshua Hadas* of counsel), for defendant.

*Darcel D. Clark*, District Attorney, Bronx (*Nefertiri J. Lashley* of counsel), for the People.

#### OPINION OF THE COURT

ANNA MIKHALEVA, J.

Defendant's motion to invalidate the People's certificate of compliance pursuant to CPL 245.20 (1) and to dismiss the accusatory instrument pursuant to CPL 170.30 (1) (e) and 30.30, or, in the alternative, for an *Allard* hearing is denied for the reasons set forth below.

Relevant Facts and Procedural History

On June 16, 2025, defendant was arrested and charged with (i) assault in the third degree (Penal Law § 120.00 [1]) and (ii) harassment in the second degree (Penal Law § 240.26 [1]), stemming from a June 16, 2025 incident in which defendant allegedly “struck [complainant] about the stomach with [her] foot,” causing the complainant, who was pregnant at the time, to suffer “substantial pain about the stomach” and to seek “treatment at a local Bronx hospital” (complaint at 1; Lashley affirmation at 2-3). On June 17, 2025, defendant was arraigned and released on her own recognizance. On July 30, 2025, the People filed and served a supporting deposition, and the complaint was subsequently deemed an information. On September 8, 2025, the People filed and served a certificate of compliance (COC) and statement of readiness (SOR) off-calendar.\*

The central issue raised by defendant on this motion concerns the medical records produced by the People as part of their discovery compliance. Specifically, defendant takes issue with the fact that the People turned over only seven pages of medical records as related to this incident, when, in fact, hundreds of pages were purportedly produced by the hospital in response to the People’s subpoena dated July 29, 2025. The subpoena, however, lists dates of treatment for the complainant as January 18, 2025, to July 22, 2025—i.e., the subpoena includes a period of treatment *predating* the incident by approximately six months.

On September 29, 2025, defense counsel emailed the assigned Assistant District Attorney (ADA) to request the complainant’s full medical records. The ADA responded that same day that these records were not provided because the People received “voluminous . . . medical records that were not related to the incident” that “were highly sensitive and [included] confidential information related to the complainant” (People’s mem, exhibit 2). By email dated October 7, 2025, defense counsel again requested all medical records in the People’s possession. The next day, October 8, 2025, without awaiting a response, defendant filed this motion challenging the validity of the COC.

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\* The People’s opposition states the COC was filed on September 9, 2025, but a review of the court file and COC shows that it was filed on September 8, 2025.

Defendant argues that the People's COC and SOR are invalid under CPL 245.20 (1) because the People did not provide all the medical records in their possession (Hadas affirmation ¶¶ 8, 19-20). Defendant maintains the People were required to provide the entirety of the complainant's medical records that were in their possession or to seek a protective order, and that the failure to do either invalidates the COC (Hadas reply affirmation ¶¶ 5, 13). As a result, defense counsel maintains they could not "meaningfully assess causation, the extent of the alleged injury, or potential impeachment material" (Hadas reply affirmation ¶ 12).

The People counter that they made reasonable and diligent efforts by providing a "robust discovery package to the defense," that defendant was not prejudiced by the alleged disclosure violations, and that the totality of the People's efforts demonstrate the COC should not be invalidated (People's mem at 15-16, 19-21). In addition, the People maintain they have disclosed all required discovery pursuant to CPL article 245 as they provided the medical records relevant to the date of the alleged incident, and that the remaining medical records predate the alleged incident and contain sensitive medical information about the complainant and/or her children (People's mem at 17-18, 21).

#### Discussion

In a misdemeanor case, the People must be ready for trial within 90 days of the time a criminal court action is commenced, less any excludable time (CPL 30.30 [1] [b]; *People v Brown*, 28 NY3d 392, 403 [2016]). To that end, the People must "make a diligent, good faith effort to ascertain the existence of" any discoverable material and to "cause such material or information to be made available for discovery" (CPL 245.20 [2]). The filing of a valid COC, along with a statement of readiness, will toll the statutory speedy trial period (*see* CPL 30.30 [5]).

On a motion challenging the validity of a COC, the court must determine whether the People exercised due diligence or improperly filed a COC. The burden is on the People to establish that they made reasonable inquiries to ascertain the existence of, and to obtain any, material and information subject to discovery, and that they have disclosed and made available all such known material and information (CPL 245.50 [1]; *People v Bay*, 41 NY3d 200, 211 [2023]; *see also* CPL 245.20 [2]).

This year, the legislature amended article 245 of the Criminal Procedure Law to enact certain changes and provide clarity

as to the scope of discovery obligations by the parties. Critically, to facilitate discovery compliance, the recently amended discovery statute now requires that, absent a good cause extension, any challenge to a COC must be timely made within 35 days of service of the COC and that any such challenge “*shall* be accompanied” by an affirmation of counsel attesting that counsel “timely conferred in good faith or timely made good faith efforts to confer with the opposing party regarding the specific and particularized matters forming the basis for [any] challenge, that efforts to obtain the missing discovery from the opposing party or otherwise resolve the issues raised were unsuccessful, and that no accommodation could be reached” (CPL 245.50 [4] [c] [emphasis added]). This new requirement contemplates that “the parties may confer informally, including but not limited to communication by email, telephone, or any other reasonable means”; however, the affirmation must demonstrate that, at a minimum, the parties did, in fact, confer and that “no accommodation could be reached” (*id.*).

On this motion, a threshold question exists as to whether defense counsel satisfied this new affirmation requirement (*see* CPL 245.50 [4] [c]). Defense counsel’s affirmation, which is submitted in lieu of any memorandum of law, only states that counsel raised the issue as to the medical records with the assigned ADA, received a prompt response the same day, reiterated his request a week later and filed this motion the day after his second email, before receiving any reply thereto. The court can only try to infer from this summary that “no accommodation could be reached” as defense counsel never actually affirms as much (CPL 245.50 [4] [c]).

Given that this is a recent requirement, whether the courts will strictly construe this threshold obligation remains to be seen. Case law concerning how much specificity is required in the affirmation, or what is even required of the “meet and confer process” in criminal cases, is admittedly limited. In *People v Whitney*, a recent Bronx County Criminal Court decision, the court (David, J.) concluded that, “by requiring an attestation similar to that mandated in the civil context, the Legislature plainly intended that counsel do more than simply parrot the statutory language in the affirmation” (88 Misc 3d 905, 909 [Crim Ct, Bronx County, Nov. 21, 2025]). The court in *Whitney* concluded that defense counsel failed to satisfy the procedural requirements of section 245.50 (4) (c) where counsel did not make a “timely effort to confer with the People” when

they raised an issue with respect to “over 31 varied items of discovery a week before the COC challenge [motion] deadline” and failed to demonstrate that the “conferral was undertaken with the ‘good faith’ the statute contemplates” (*Whitney*, 88 Misc 3d at 911).

In *People v Calvin Y.*, however, a New York County Criminal Court decision from September of this year, a different court (Coleman, J.) noted in dicta that “[t]he statute only requires conferral sufficient to elicit the parties’ respective positions in the dispute and to establish that a resolution could not be reached” (86 Misc 3d 1270[A], 2025 NY Slip Op 51383[U], \*2 [Crim Ct, NY County, Sept. 2, 2025]). The court further observed that, “where the defense believes that they are entitled to dismissal and the prosecution offers only explanations for any discovery lapses and belated disclosure, the parties need not confer any more than what is needed to clarify the points of disagreement” (2025 NY Slip Op 51383[U], \*3).

To be sure, the new requirement cannot be read to “require either party to accept a ‘resolution’ or ‘accommodation’ that they consider unsatisfactory” (*id.* at \*3). However, plainly, the new statutory requirement was intended to encourage the parties to resolve their disputes without motion practice, as well as to avoid the inevitable delay caused by such motions, whenever possible. As such, the affirmation requirement, including the moving party’s attestation that “no accommodation could be reached,” cannot be read out of the statute or simply inferred from the mere fact that counsel raised an issue with the other side at some point before their motion was filed (*see* CPL 245.50 [4] [c]). Here, it is unclear from the affirmation submitted whether there was any meaningful effort to actually resolve the dispute before defense counsel filed this motion. All that the court can surmise is that the parties had a disagreement as to whether additional records were required to be turned over.

For purposes of this motion, however, whether the procedural requirements have been met is not dispositive as the remaining medical records are plainly not required to be disclosed because, as noted above, they predate the date of the alleged incident and are, therefore, not “relat[ed] to the criminal action or proceeding” (CPL 245.20 [1] [j]). As such, the failure to produce these records is simply not a basis to invalidate the People’s COC in this case (*see People v Garcia*, 72 Misc 3d 1217[A], 2021 NY Slip Op 50791[U], \*12-13 [Sup Ct, Kings County 2021]).

Specifically, CPL 245.20 (1) (j) directs the People to disclose to defendant “the following material and information in the possession, custody or control of the prosecution or persons under the prosecution’s direction or control,” which, in part, includes all reports, documents and other writings concerning, among other things, physical or mental examinations relating to the criminal action or proceeding when the documents: (i) “were made by or at the request or direction of a public servant engaged in law enforcement activity”; (ii) “were made by a person whom the prosecutor intends to call as a witness at trial or a pre-trial hearing”; or (iii) “which the prosecution intends to introduce at trial or a pre-trial hearing.” Here, while the People are in possession of the complainant’s medical records, the unproduced portion of the medical records does not fall within any of the categories listed in CPL 245.20 (1) (j) that would require disclosure (*see People v Siame*, 84 Misc 3d 971 [Crim Ct, Bronx County 2024]). As the People explain, the unproduced medical records predate the alleged incident and contain information about the health of the complainant and her children; as such, these are not records “relating to the criminal action or proceeding” as outlined in CPL 245.20 (1) (j), and the People are not required to provide these records (*see People v Garcia*, 2021 NY Slip Op 50791[U], \*12-13; *see generally People v Kennedy*, 79 Misc 3d 973 [Crim Ct, Kings County 2023]).

To the extent that defendant argues—for the first time on reply—that without the remaining medical records, defense cannot meaningfully assess causation or the extent of the alleged injury, it is unclear how the medical records *predating* the alleged incident, including information relating to complainant’s children, are necessary or relevant in that regard. Notably, the records provided by the People include the complainant’s aftercare visits (People’s mem, exhibit 1). Defendant is not entitled to the entirety of the complainant’s medical file on the mere speculation that it might contain something relevant without at least articulating what that something might be.

Given that the medical records are not discoverable, defendant’s position that the People’s failure to seek a protective order for the unproduced medical records renders the COC invalid is likewise without merit (*People v Garcia*, 2021 NY Slip Op 50791[U], \*12-13 [CPL article 245 does not require People to seek protective order to redact information from the

complainant's medical records as it is not discoverable]). Defendant's argument that the People were "required to turn over all relevant materials in their possession" or to seek a protective order ignores the statutory language (Hadas reply affirmation ¶ 5). Notably, defense counsel then states that "the language of CPL § 245.20 (1) (j) is explicit in including medical records among the materials subject to automatic disclosure, provided they were generated by or at the request of law enforcement, or are intended for use at trial or a pre-trial hearing" (*id.* ¶ 6). As set forth above, defense fails to explain how the unproduced medical records fall under the information specified in CPL 245.20 (1) (j) that would require disclosure.

However, inasmuch as the produced medical records were redacted without the People first seeking a protective order, the People are directed to provide defense counsel with a new copy of said records containing only redactions specifically authorized by statute (*see* CPL 245.20 [6] [permitting redactions without protective order of social security numbers, tax numbers, physical addresses or other forms of contact information for certain witnesses provided that one form of adequate contact information is provided, and material or information not otherwise required to be disclosed under CPL 245.20 (1) so long as underlying reason for redactions provided]; *see also* CPL 245.70). For the avoidance of doubt, this is not a basis to invalidate the COC as the court finds that the People otherwise met their due diligence obligations in this case (*see* CPL 245.50 [5]).

As to defendant's claim that the remaining medical records "may be relevant to the credibility of the complainant," and may be "potential impeachment material" (Hadas affirmation ¶ 8; Hadas reply affirmation ¶ 12), CPL 245.20 (1) (k) requires that the People provide "[a]ll evidence and information that relate to the subject matter of the case" that tends to "impeach the credibility of a testifying prosecution witness." Defendant has not demonstrated how the remaining medical records would impeach the complainant's credibility in any way. Without more, defense counsel's mere conjecture that the remaining medical records *could* include substance abuse and/or mental health information does not require those records to be disclosed (*see People v Diez*, 73 Misc 3d 143[A], 2021 NY Slip Op 51233[U] [App Term, 2d Dept, 9th & 10th Jud Dists 2021]; *see generally People v Miller*, 86 Misc 3d 1210[A], 2025 NY Slip Op 50907[U] [Sup Ct, Kings County 2025]). By

that logic, medical records for any testifying prosecution witness would need to be produced for every criminal case whenever they happen to be in the People's possession. To the extent anything exculpatory is contained in said medical records, the People are already under the obligation to turn over those documents pursuant to *Brady* and its progeny (*see generally Brady v Maryland*, 373 US 83 [1963]).

Speedy Trial Calculation

The time from defendant's arraignment on June 17, 2025, to September 8, 2025, the date the People filed their COC and SOR, is 83 days. Accordingly, 83 days are chargeable to the People.

Allard Motion

Inasmuch as defendant seeks a hearing pursuant to *People v Allard* (28 NY3d 41 [2016]), with respect to any disputed issues of material facts so that said issues may be resolved, there are no disputed issues of material fact requiring a hearing to resolve on this motion.

Accordingly, it is hereby ordered that defendant's motion to dismiss pursuant to CPL 170.30 (1) (e) and 30.30 is denied; and it is further ordered that the People's certificate of compliance filed on September 8, 2025, is deemed valid; and it is further ordered that the People are directed to provide unredacted copies of the already produced medical records in accordance with this decision and order on or before January 7, 2026; and it is further ordered that defendant's request for an *Allard* hearing is denied.

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- 620** Santos-Alcantara v Gramercy Sq. LLC, 2025 NY Slip Op 52217(U). Labor—Safe Place to Work—Industrial Code—Slip on Piece of Pipe. (Sup Ct, Bronx County, Dec. 16, 2025, Crawford, J.)
- 621** Vargas v Port Auth. of N.Y. & N.J., 2025 NY Slip Op 52218(U). Labor—Safe Place to Work—Industrial Code Violations. Labor—Safe Place to Work—Creation of Condition. (Sup Ct, Bronx County, Dec. 17, 2025, Crawford, J.)
- 622** Rand, Matter of, v Sheridan, 2026 NY Slip Op 50616(U). Elections—Judicial Proceedings—Timeliness of Service. (Sup Ct, Rockland County, Apr. 27, 2026, Collins, Jr., J.)
- 623** People v Rawl (Ross), 2026 NY Slip Op 50617(U). Crimes—Assault—Dismissal in Interest of Justice. (Crim Ct, NY County, May 1, 2026, Shamahs, J.)
- 624** People v Paulino (John), 2026 NY Slip Op 50618(U). Crimes—Disclosure—Timeliness of Challenge to Certificate of Compliance. Crimes—Disclosure—Challenge to Certificate of Compliance—Requirement to Confer. (Crim Ct, NY County, Apr. 30, 2026, Shamahs, J.)
- 625** People v Derczo (Michael), 2026 NY Slip Op 50619(U). Crimes—Information—Simplified Traffic Information—Entitlement to Supporting Deposition upon Request. (Utica City Ct, Oneida County, Mar. 23, 2026, Saba, J.)
- 626** KN Acupuncture, PC v MVAIC, 2026 NY Slip Op 50620(U). Evidence—Hearsay Evidence—Business Records Exception—Uncertified Police Report. (Civ Ct, Kings County, Apr. 30, 2026, Roper, J.)
- 627** Riccardi, Matter of, v Phillips-Staley, 2026 NY Slip Op 50621(U). Elections—Designating Petitions—Fraud Permeation. (Sup Ct, Rockland County, Apr. 28, 2026, Fried, J.)
- 628** Riccardi, Matter of, v Phillips-Staley, 2026 NY Slip Op 50622(U). Trial—Place of Trial—Election Law Special Proceeding Involving Inter-County Race—Dismissal for Improper Venue—County within Relevant Congressional District. (Sup Ct, Rockland County, Apr. 21, 2026, Fried, J.)
- 629** Hernandez v 303 W. 42nd St. Realty, LLC, 2025 NY Slip Op 52219(U). Labor—Safe Place to Work—Industrial Code Violation—Eye Protection. (Sup Ct, Bronx County, Dec. 18, 2025, Crawford, J.)
- 630** Sanchez v 1435 Tenants Corp., 2025 NY Slip Op 52220(U). Labor—Safe Place to Work—Tripping Accident at Construction Site. Indemnity—Contractual Indemnification. (Sup Ct, Bronx County, Dec. 19, 2025, Crawford, J.)

- 631** Cuddihy v Bronx Pro Group LLC, 2025 NY Slip Op 52221(U). Labor—Safe Place to Work—Elevation-Related Hazard—Falling Interior Wall Panel. Labor—Safe Place to Work—Industrial Code Violation—Tripping Hazard. (Sup Ct, Bronx County, Dec. 22, 2025, Crawford, J.)
- 632** People v Hallman (Breyon), 2025 NY Slip Op 52222(U). Crimes—Information—Sufficiency. (Crim Ct, NY County, May 1, 2026, Coleman, J.)
- 633** Peru Leasing L.P. v Sanchez, 2026 NY Slip Op 50623(U). Landlord and Tenant—Rent Regulation—Notice of Termination—Nuisance. (Civ Ct, Queens County, Apr. 27, 2026, Dressler, J.)
- 634** People v Ford (P.), 2026 NY Slip Op 50624(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, Bronx County, Apr. 24, 2026, Goodwin, J.)
- 635** Joseph v 3604 Church LLC, 2026 NY Slip Op 50625(U). Motions and Orders—Motion Papers—Previously Electronically-Filed Documents. (Sup Ct, Kings County, May 1, 2026, Maslow, J.)
- 636** Sloan v 216 Bedford Kings Corp., 2026 NY Slip Op 50626(U). Trial—Adjournment—Witness Availability. Negligence—Comparative Negligence—Apportionment of Liability. (Sup Ct, Kings County, Apr. 21, 2026, Maslow, J.)
- 637** S.W.M., Matter of, 2026 NY Slip Op 50627(U). Licenses—Firearms—Good Moral Character. Licenses—Firearms—Private Permit. (Sup Ct, Rensselaer County, May 4, 2026, Mendez, J.)
- 638** 1378 Bedford v Watson, 2026 NY Slip Op 50628(U). Landlord and Tenant—Rent—Change in Building Ownership. Landlord and Tenant—Warranty of Habitability—Proof of Violations. (Civ Ct, Kings County, May 1, 2026, D’Souza, J.)
- 639** Hernandez v Helzen Assoc. LLC, 2025 NY Slip Op 52223(U). Labor—Safe Place to Work—Fall in Hole—Industrial Code Violations. (Sup Ct, Bronx County, Dec. 22, 2025, Crawford, J.)
- 640** Lopez v Salm Props., LLC, 2025 NY Slip Op 52224(U). Labor—Safe Place to Work—Falling Object—Summary Judgment. (Sup Ct, Bronx County, Dec. 22, 2025, Crawford, J.)
- 641** New York State Police v N.C., 2026 NY Slip Op 50629(U). Constitutional Law—Right to Bear Arms—Extreme Risk Protection Order (CPLR Art 63-A)—Minor Respondent. (Sup Ct, Albany County, Mar. 31, 2026, O’Connor, J.)

- 642** Riator v 534 Graham Ave. Hous. Dev. Fund Corp., 2026 NY Slip Op 50630(U). Judgments—Default Judgment—Reasonable Excuse. (Sup Ct, Kings County, May 1, 2026, Maslow, J.)
- 643** Marcinkiewicz v Flushing Hosp. Med. Ctr., 2026 NY Slip Op 50631(U). Physicians and Surgeons—Malpractice—Bowel Perforation. Hospitals—Malpractice—Private Attending Physician. (Sup Ct, Kings County, Feb. 26, 2026, Frias-Colón, J.)
- 644** Minsky v John Hancock Life Ins. Co. of N.Y., 2026 NY Slip Op 50632(U). Parties—Standing—Action to Recover Proceeds of Life Insurance Policy. Limitation of Actions—Two-Year Statute of Limitations—Action to Recover on Lapsed Life Insurance Policy. (Civ Ct, Kings County, Apr. 26, 2026, Berman, J.)
- 645** Gigante v Veniopoulos, 2026 NY Slip Op 50633(U). Judgments—Vacatur of Judgment—Lack of Personal Jurisdiction. (Sup Ct, NY County, May 4, 2026, Reed, J.)
- 646** KRE Bklyner23 Menahan LLC v Fortune, 2026 NY Slip Op 50634(U). Landlord and Tenant—Rent—Recovery of Rent Arrears from Former Co-Tenants—Consumer Credit Transaction. Equity—Laches—Prejudice. (Civ Ct, Kings County, Apr. 21, 2026, Eze, J.)
- 647** Manculich v Five Riverside Towers Owners, Inc., 2026 NY Slip Op 50635(U). Civil Rights—Discrimination Based on Disability—Discrimination in Housing—Denial of Tenancy—Emotional Support Animal. (Sup Ct, Broome County, Apr. 27, 2026, Faughnan, J.)
- 648** Rodriguez v Lendlease (US) Constr., Inc., 2025 NY Slip Op 52225(U). Labor—Safe Place to Work—Slip and Fall on Ramp—Elevation Differential. Labor—Safe Place to Work—Slip and Fall on Ramp—Industrial Code. (Sup Ct, Bronx County, Dec. 22, 2025, Crawford, J.)
- 649** Salas v Joy Constr. Corp., 2025 NY Slip Op 52226(U). Labor—Safe Place to Work—Violations of Industrial Code. Indemnity—Contractual Indemnification—Summary Judgment. (Sup Ct, Bronx County, Dec. 19, 2025, Crawford, J.)
- 650** C.G., Matter of (L.J.), 2026 NY Slip Op 50636(U). Social Services—Foster Care—Qualified Residential Treatment Program Hearing—Suitability of Placement with Family Member. (Fam Ct, Bronx County, May 4, 2026, Cruz, J.)
- 651** Jimenez v Grannum, 2026 NY Slip Op 50637(U). Physicians and Surgeons—Dentists—Malpractice—Summary Judgment. (Sup Ct, Kings County, May 2, 2026, Frias-Colón, J.)

- 652** Doiban v Shellpoint Mtge. Servicing, 2026 NY Slip Op 50638(U). Process—Service by Mail—Compliance with Statutory Requirements. Fraud—What Constitutes—Alleged Fraud in Connection with Foreclosure Proceedings and Loan Servicing—Dismissal Motion. (Sup Ct, Richmond County, Mar. 31, 2026, Castorina, Jr., J.)
- 653** Sloan v 216 Bedford Kings Corp., 2026 NY Slip Op 50639(U). Witnesses—Expert Witness—Physician Life Care Planner—Motion in Limine. (Sup Ct, Kings County, May 4, 2026, Maslow, J.)
- 654** Dynamite Props., Inc., Matter of, v Town of Somers Zoning Bd. of Appeals, 2026 NY Slip Op 50640(U). Municipal Corporations—Zoning—Variance. (Sup Ct, Westchester County, May 5, 2026, Pulver, J.)
- 655** Lubrano, Matter of, 2026 NY Slip Op 50641(U). Wills—Probate—Objections Filed by Spouse Who was Not Mentioned in Will. (Sur Ct, Suffolk County, Mar. 24, 2026, Messina, Jr., S.)
- 656** People v Campbell (O.), 2026 NY Slip Op 50642(U). Crimes—Accusatory Instrument—Conversion. (Crim Ct, Bronx County, May 4, 2026, Goodwin, J.)
- 657** Perrone v Thor 180 Livingston LLC, 2025 NY Slip Op 52227(U). Labor—Safe Place to Work—Fall through Floor while Jackhammering. (Sup Ct, Bronx County, Dec. 29, 2025, Crawford, J.)
- 658** Rodriguez v Condominiums Bd. of the Bd. of the One Lincoln Plaza Condominium, 2025 NY Slip Op 52228(U). Labor—Safe Place to Work—Fall from Scaffold. Indemnity—Contractual Indemnification—Construction Site Accident. (Sup Ct, Bronx County, Dec. 29, 2025, Crawford, J.)
- 659** People v Lawry (Raymond), 2026 NY Slip Op 50644(U). Crimes—Right to Speedy Trial—Excludable Time—Absence or Unavailability of Defendant. (Nassau Dist Ct, 1st Dist, May 6, 2026, Agazarian, J.)
- 660** Sloan v 216 Bedford Kings Corp., 2026 NY Slip Op 50645(U). Trial—Fair Trial—Reference to Opposing Party's Attorneys or Financial Status. (Sup Ct, Kings County, May 5, 2026, Maslow, J.)
- 661** People v Martinez (Audrey), 2026 NY Slip Op 50646(U). Crimes—Disclosure—Automatic Discovery—Good Faith and Due Diligence. (Crim Ct, NY County, May 6, 2026, Coleman, J.)
- 662** ST v MT, 2026 NY Slip Op 50647(U). Attorney and Client—Frivolous Conduct—Divorce Action—Allegation of Prior Foreign Marriage. Husband and Wife and Other Domestic Relationships—Counsel Fees. (Sup Ct, Richmond County, May 4, 2026, Castorina, Jr., J.)

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**663** Jones v State of New York, 2026 NY Slip Op 50648(U). Labor—  
Safe Place to Work—Road Construction Accident. (Ct Cl, Apr.  
14, 2026, Chaudhry, J.)

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